

## 12. WESTERN LANDS AND THE CONSTITUTION

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### **Former Senator Schmitt Reviews Background of the Federal Government's Continued Western Land Grab**

A review of the history of the Western lands of the United States stands in order. Why? The Obama Administration is moving toward removing another 14 areas and over 13 million acres of federally controlled land from potential economic and national security applications. All in the name of conservation, energy production and other job, income, and revenue creating lands and their resources would be withdrawn in order to strictly limit legitimate private, public, and State use.

Conservatives believe in all aspects of conservation, as the name implies. Conservatives want to protect individual liberty, our federal concept of government, as well as nature's wonders. Conservatives believe that the Founders' Declaration of Independence, Constitution of the United States, and Bill of Rights give Americans the best guidance conceivable in meeting conservation objectives. To conservatives, it stands as lasting tribute to the Founders' inspired intellect and dedication to liberty that the specifics of their guidance relates directly to issues of modern times, in spite of cultural and technological changes that could not have been anticipated 230 years ago. When adhered to specifically as intended, these scriptures have stood the test of time. Questions now arise in the Conservative mind as to whether the Federal Government at present intends

that the Founders' guidance should be followed in the future.

Specifically, with respect to the conservation of public lands in the West, conservatives inherently balance actions to achieve that broad aim against their fundamental beliefs. This balance requires consideration of the liberties of individual citizens, the economic wellbeing of local communities and States, requirements for the "common defence", and the advance of conservation technologies. Many conservatives might not recognize the term, but instinctively they practice the Art of "systems engineering"; that is, consideration of all variables that might bear on meeting a challenge as well as evaluation of the impacts of intended and possible unintended consequences. Modern liberal activists do not appear to have this highly rational instinct.

The early stage for land issues in the West was set by Thomas Jefferson's consummation of the Louisiana Purchase in 1803. In addition to beginning the territorial growth necessary to guarantee the security, strength, and economic vitality of a truly continental United States, the Purchase also began the separation of the economic interests of the West from those in the East. Subsequently, the Anglo-American Convention of 1818 set the western northern border with

Canada along the 49<sup>th</sup> parallel, with the final settlement of the Oregon Territory boundaries occurring under President Polk in 1846. Polk's 1848 Treaty of Guadalupe Hildalgo added large territories in the Southwest formerly ruled by Spain or Mexico, including all of what would become California, Nevada, and Utah; most of Arizona; and western New Mexico and Colorado. Western land augmentation largely was complete with the Gadsden Purchase of 1853, adding land in southern Arizona and New Mexico, and then President Lincoln's remarkably farsighted purchase of Alaska from Russia in 1867.

In various ways, State, county, municipal, and private holdings replaced some federal control of the lands of the West. The treaties that added former Mexican territories initially preserved the original property rights and maintained old municipal boundaries. The Pre-Exemption Act of 1841, followed by the Homestead Act of 1862 and the latter Act's expansions in 1909 and 1919, permitted individual Americans and immigrants to take ownership of 160 acres (ultimately raised to 640 acres) of U.S. territory. In 1862 and 1864, to partially finance the construction of the Transcontinental Railroad, the Pacific Railroad Acts granted the Union Pacific and Central Pacific Railroads alternating sections of land within 20 miles of every mile of track lain. Other railroads across federally controlled Western land later received similar grants. Also, in 1862, a legislative process began so that States received land, proceeds from which would fund "Land Grant Colleges." The "patenting" of mining claims on federally managed land under the General Mining Act of 1872 created additional private holdings. Finally, the progressive admission of the States into the Union included various agreements as to what would be federal and what would be State managed lands.

Had modern extreme conservation beliefs been in ascendancy during the 18<sup>th</sup> and 19<sup>th</sup> Centuries, there would have been no transfer of Western Lands into private or State hands. The negative consequences of such a different history to the wellbeing of Americans and the world would have been enormous. The mineral, energy, and agricultural resources necessary to fuel our economic growth would not have been available. That economic growth could not have supported the worldwide defense of liberty through two World Wars, a Cold War, and now a war against Islamic Terrorism. The need for that internally supported economic growth has not changed. In fact, the urgency for it has increased as foreign sources of energy and other resources become increasingly unreliable.

The Founders gave Congress significant power in dealing with federally controlled land. First of all, Article IV, Section 3, Clause 1 of the Constitution asserts, "New States may be admitted by the Congress into this Union..." from territories controlled by the Federal Government. Clause 2 follows and gives Congress the further "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..." Having these clear powers, however, does not permit otherwise unconstitutional overreaching by either the Congress or the Executive. In particular, with the Antiquities Act of 1906, Congress unconstitutionally gave dictatorial land withdrawal power to the President. Clearly, only Congress has this power of disposition as enumerated in Clause 2. Presidents, in turn, have further violated constitutional equal protection guarantees by using Executive Orders to create extremely large area "National Monuments" with the sole purpose of withdrawing Western land from resource exploration and development. These actions go

well beyond the clear intent of the Antiquities Act relative to size of withdrawals and their allowed purpose.

In addition to the limitations of powers in Article IV, “equal protection of the law” provided by the 5<sup>th</sup> and 14<sup>th</sup> Amendments constitutes the primary constitutional constraint on the Congress and the President in actions relative to federally controlled land and property. The Government violates constitutional equal protection most generally by restricting the land-related economic and recreational activities of residents of Western States when no comparable restrictions are possible in most Eastern States. Wilderness and Monument designation for various western lands, establishment of private land buffer zones for endangered species, and regulatory and federal lawsuit roadblocks in the name of conservation also trample equal protection, as well as 5<sup>th</sup> Amendment’s guarantee of due process in many cases.

Additionally, Federal Government continues to alienate much of the West through its abuse of the 1906 American Antiquities Act through vindictive Presidential designation of certain public lands as “National Monuments”. Increasingly, arbitrary Monument designations under the false umbrella of conservation negatively impacts local economic potential as well as adding to national dependence on foreign sources of energy and minerals. The Antiquities Act states its purpose and intent protection of “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interests,” most especially “antiquities.” The Act also states that Monuments should be “the *smallest* area compatible with proper care and management of *objects* to be protected.” The purpose and intent of the Act clearly has been honored far more in the breach than in the word. Most Presidents

ignore these explicit constraints and the Congress cynically lets it happen.

The purpose and intent of the Antiquities Act has been used to avoid the normal, intentionally cumbersome process envisioned by the Founders for all major legislation. In this case, Congress avoids contentious debate on bills to create National Parks or Wilderness Areas. The purpose and intent of the Act itself have been violated from the beginning as President Theodore Roosevelt and at least 12 of his successors have used the arbitrary power given to them to withdraw large areas of western lands from broad public and economic use. Although some of the nearly 100 withdrawn areas have obvious antiquities and other scientific values, such as New Mexico’s Chaco Canyon National Monument (1906), or have little defined economic resource potential, such as the Grand Canyon National Monument (1906), others would need extensive study to confirm that their withdrawn esthetic value exceeds that of other pressing commercial, State, or national requirements. In the latter instance, obvious questions exist about President William J. Clinton’s designation of the Utah’s resource-rich Grand Staircase-Escalante National Monument (1.9 million acres) without legislative and public debate.

Congress made a few state specific amendments to the Antiquities Act in response to perceived Presidential abuse of power. This happened in 1950 after President Franklin D. Roosevelt’s designation of the Jackson Hole National Monument (later added to the Grand Teton National Park) and again in 1980 after President Jimmy Carter’s egregious and extremely controversial withdrawal of 56 million acres in Alaska. Otherwise, Congress has unconstitutionally acquiesced to Presidential acts of hubris and authoritarianism far in excess of

the Act's original intent to protect antiquities. Congress' first mistake, after not eliminating the Act's basic unconstitutionality under Article IV, was to not set a specific size limit on a monument that, if exceeded, Congress must approve.

The socialists currently in control of the Government, for the narrow political purpose of gaining more power over private and State initiatives, do not and cannot admit that both the States and the people have strong direct interests in conserving natural environments. Federal oversight is one thing— heavy-handed restrictions that ignore broad State and national wellbeing is quite another. The advance of technology to explore for and extract resources without significant environmental impact threatens these opponents of progress in their attempts to destroy the livelihoods of the citizens of the West.

The new Congress elected in 2010 must restore constitutionality to federal management of Western lands and to federal activities in general. In addition, cooperative public, industry, State, and Federal Government

assessment of the resource, recreational, and overall economic potential of federally controlled land areas would allow fair evaluation of the benefit-cost relationships related to any constitutionally proper, land management decisions. New technologies and techniques, including non-invasive geophysical, geochemical, and geological evaluation methods, when combined with minimally invasive and helicopter-enabled scientific drilling tests, would give all parties an objective foundation for evaluation of particular land management proposals.

The Great Western Land Grab will continue until elections change the perspective of Congress and the President on the value of a true federal system of government supported by liberty and human initiative.

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