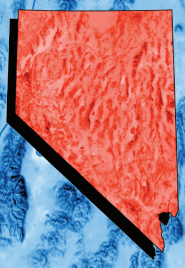
BROKEN COMPACT



The Hollowing-Out of Nevada Statehood

an npri special report

Executive Summary

Before Nevada joined the Union in 1864, the U.S. Congress explicitly promised more than two dozen times that the new state would be on an equal footing with the original states.

That promise, however, was not kept.

Today, as this report's cover illustrates, only 13 percent of Nevada's land is available for private ownership to provide the state with a tax base for the funding of services. In some counties — examples are Mineral, Nye and White Pine — private land and the tax base it provides is virtually nonexistent, at 4 percent or less.

Behind this problem is congressional bad faith — the breaking of a commitment to new states, a commitment even older than the U.S. Constitution: that the federal government would facilitate the settling of new states by selling or giving away unappropriated land and not keeping it. Indeed, it was on the basis of this commitment that the original 13 states agreed to the Constitution.

Nevada's enabling act, with its famous disclaimer clause, is widely misunderstood. It states:

> That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States …

Contrary to the impression still present with many Nevadans, however, Congress did not require this provision in order to forever lock the Silver State's unappropriated public lands away from its citizens and into permanent federal ownership.

Virtually all American states' enabling acts have such disclaimer clauses, going all the way back to the 1787 Northwest Ordinance.

The clauses were necessary to clear title to the lands so that they could be sold. Thus, disclaiming was not an obstacle to disposal, it was the necessary preliminary step — the *vehicle* by which disposal was going to be accomplished.

Nevada and the other modern Western states are not the first to be faced with a faith-breaking U.S. Congress.

In the late 1820s and into the 1850s, states in the "West" of that day — Missouri, Illinois and others — experienced the same kind of congressional recalcitrance.

Nevertheless, focused pressure by citizens of those states and their representatives eventually forced Congress to honor its commitments and dispose of those public lands.

BROKEN COMPACT

The Hollowing-Out of Nevada Statehood

By Steven Miller

Before Nevada joined the Union in 1864, the U.S. Congress explicitly promised *more than two dozen times* that the new state would be on an equal footing with the original states.

That promise was not kept.

Take, for example, language on merely one page from the *Congressional Globe* — predecessor of the modern *Congressional Record* — for March 3, 1864:

> The motion [to take up the bill for the admis sion of Nevada into the Union] was agreed to; and the bill (S. No. 524) to enable the people of Nevada to form a constitution and State government, and for the admission of such State into the Union on an **equal footing with the original States**, was considered as in Committee of the Whole.
>
> The inhabitants of that portion of the Territory of Nevada included in the boundaries designated are by the bill authorized to form for themselves a State government, which State, when formed, is to be admitted into the union upon an **equal footing with the original States in all respects whatsoever**…
>
> In case a constitution and State government shall be formed for the people of the Territory of Nevada … it shall be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an **equal footing with the original States**….

Yet today — almost 150 years later — the Silver State still limps along with its effective sovereignty significantly crippled by a federal government that, even by its own count, controls over 85 percent of the state's surface.

Only 13 percent privately owned

One result is that only 13 percent of Nevada's surface is available to provide the state with a tax base for the funding of services. In some counties — such as Mineral, Nye and White Pine — the tax base is virtually nonexistent, at 4 percent or less.

However, "taxing the soil" — as a committee of the U.S. House stated as far back as 1828 — is a power "incident to all sovereign states."

Moreover, as the committee report noted,

> If these lands are to be withheld from sale, which is the effect of the present system, in vain may the People of these States expect the advantages of well settled neighborhoods, so essential to the education of youth, and to the pleasures of social intercourse, and the advantages of religious instruction. *Those States will for many*

> *generations, without some change, be retarded in endeavors to increase their comfort and wealth, by means of works of internal improvements, because they have not the power, incident to all sovereign States, of taxing the soil, to pay for the benefits conferred upon its owner by roads and canals*. (Emphasis added.)

Beyond the issue of merely bad policy, however, is the question of whether the federal government has seriously breached the law — not only vis-à-vis Nevada, but vis-à-vis virtually all the Western states.

The U.S. Supreme Court has never directly addressed that question, noted the State of Utah last year. But for the federal government to never follow through after 1864 and sell the unappropriated Nevada lands — or if unsellable, simply give them to the new state — was a clear violation of the terms under which the Silver State had agreed to enter the union.

The covenant that Congress broke

As the 1828 House committee report noted, those terms were part of an implicit contract between the states and the federal government:

> When these States stipulated not to tax the lands of the United States until they were sold, they rested upon the implied engagement of Congress to cause them to be sold, within a reasonable time. *No just equivalent has been given those States for a surrender of an attribute of sovereignty so important to their welfare, and to an equal standing with the original States*. (Emphasis added.)

President Andrew Jackson, five years later, would make a similar point. In a veto message to the Congress, he reviewed the history of America's enabling acts and wrote, "It can not be supposed the compacts intended that the United States should retain forever a title to lands within the States…."

Thus, at the time of Nevada's entry into the Union, the enabling acts were recognized as, in essence, *terms* being offered by Congress to the people of the territories: If they would organize themselves into representatively republican assemblies and meet other conditions Congress set forth in the enabling acts, the federal government would sell or otherwise dispose of the unappropriated lands within the new states' borders, opening those lands up to settlement and commerce. Additionally, to get the new states up and running, the federal government would share with them some of those land-sale revenues.

Of course, for the federal government to be able to sell those lands, *title on them had to be clear. No market existed for encumbered properties with clouded titles*.

This gets to the reason why one of the conditions set by Nevada's Enabling Act was a requirement that the territorial constitutional convention include in its draft constitution the now-infamous disclaimer clause.

That clause — which has long confused readers unaware of its full historical context — states:

> That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said

> territory, and that the same shall be and remain at the sole and entire disposition of the United States …

Counter to the impression that many Nevadans still have, Congress did *not* require this provision in order to forever lock the Silver State's unappropriated public lands away from its citizens and into permanent federal ownership.

Every state had a disclaimer clause

Proof of this is the fact that virtually *all* American enabling acts have such disclaimer clauses, going all the way back to the Northwest Ordinance of 1787.

Consider Section 14, Article 4 of that watershed document:

> ... The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for *securing the title in such soil to the bona fide purchasers*. No tax shall be imposed on lands the property of the United States; and, in no case, shall nonresident proprietors be taxed higher than residents. (Emphasis added.)

Or, consider Alabama's enabling act, passed in 1819, a full generation before Nevada's:

> … And… that the said convention shall provide, by an ordinance irrevocable without the consent of the United States, that the people inhabiting the said territory, do agree and declare that *they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States …*

The State of Nebraska's enabling act is also revealing, because its disclaimer language is *identical* to Nevada's. However, only 1 percent of the surface of that state — according to the American Lands Council — is today in the hands of the federal government.

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How Nebraska's federal land entered the private domain

Just one month apart, in 1864, Congress passed the acts enabling the residents of the Nevada and Nebraska territories to apply for statehood.

Each act had exactly the same disclaimer clause. Under that clause, each territory's residents "agree[d] and declare[d] that they forever disclaim all right and title to the unappropriated public lands lying within said territory…"

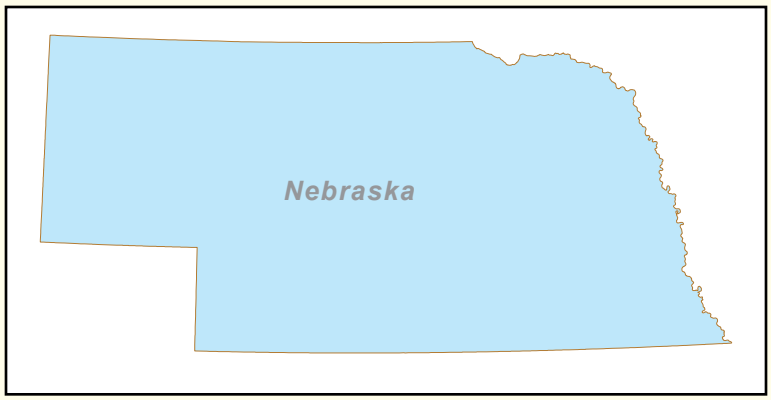
That disclaimer clause, clearing title to the unappropriated land in each territory, opened the door for Congress to sell or otherwise dispose of that land — and thus to open great expanses of the soil to settlement, commerce, the building of communities and, eventually, to state and local taxation.

In Nebraska, Congress allowed that entire process to occur.

In Nevada, it did not.

Thus, in the Silver State today, the federal government still occupies approximately 87-plus percent of the land — while in Nebraska, the Cornhusker State, it is virtually none.

Which naturally raises questions: Why was Nebraska so much more successful in getting Congress to follow through and dispose of those lands? Where did Nebraska get the leadership, the intelligence and understanding and/or the political clout to accomplish that?



Those questions were put by *Nevada Journal* to the Nebraska State Historical Society, and John Carter, a senior historian with the society, responded.

"There's a real difference — and I've done a lot of work on this — there's a real difference between Nebraska and the states west of it, including Nevada," he said.

"What we're looking at is the result of two different visions of how land works."

Going all the way back to 1570, under Spanish Mexico, ranching in what would become Nevada and the Western states consisted of, said Carter, a cluster of buildings inside a large extent of free-range land.

"Ranchers would put their cattle out on the range and let them run around, and then periodically go round them up and bring them in.

"So there the expectation was that there was going to be free government land. And if you're going to raise cattle, you did not have the overhead of land ownership and land management. That was the government's problem. And that was the expectation of everybody in the cattle industry."

Nebraska, on the other hand, notes Carter, was settled by "a whole bunch of these Jeffersonian yeoman farmers who pushed from the East to the West. And they first settled the eastern half of the state, which is great farm land, just tremendous farmland."

Soon, the cattle people, in the western part of the state, "were in a distinct minority. They were just outvoted."

Then, "around 1905, a United States Congressman from eastern Nebraska, by the name of Moses Kincaid, got a bill pushed through Congress that created a new version of the Homestead Act."

Under the original Homestead Act of 1862, any head of household who lived for five years on public-domain land where the federal government was obligated to extinguish title received 160 acres.

Under the Kinkaid Act, however — and only applying to settlers in the western part of Nebraska — the gift would be 640 acres.

"Even though that was still too small for effective ranching," said Carter, "people poured out there, and through the Kinkaid Act, brought all of that land into the private domain.

"And over time, every scrap of property got brought into the private domain. I don't think we've got 10 acres of BLM land in Nebraska. That's probably an exaggeration, but most of the federal land we have is in the form of things like the wildlife refuge up at Fort Niobrara. They're all park lands or wildlife preserves or things like that."

Kinkaid himself understood something that the U.S. Congress — whether in the 18th, 19th or 20th centuries — has virtually never been able to collectively grasp.

It is that livestock in the arid American West, and thus the ranching businesses that run them, need extended land upon which the livestock can range — far more than the original Homestead Act allowed.

Thus, the initial form of his legislation, as Kinkaid introduced it, allowed homesteaders in Western Nebraska to receive, for their efforts, even *more* than 640 acres after five years.

"Kinkaid," notes the NebraskaStudies.org website, "originally tried to get more land into the act, but Congress representatives from the crowded eastern states couldn't fathom why anyone would need so much space."

Thus, in the clash of visions — using land for farming or for extended-range ranching — the U.S. Congress, in its local, Eastern-based myopia, could only understand, and so allow, the former.

Ironically, that very myopia of Eastern politicians was what allowed Nebraska's Western ranches to grow to the expanse necessary for profitable operation.

Since even 640 acres was too little to sustain the Kinkaid-Act allotments, most of the "Kinkaiders," as they were known, soon went bust — allowing the ranchers of Nebraska's Sandhills grasslands to purchase those allotments inexpensively.

Continued from page 4

So the actual purpose of the Nevada Enabling Act's condition that territorial residents disclaim "all right and title to the unappropriated public lands lying within said territory" was simply to *clear title*, so the lands could be sold.

"That concept of disclaiming title to Western lands," says Utah's Assistant Attorney General Anthony Rampton, a Western-lands specialist, "goes way back to the Articles of Confederation. Because without that occurring, the federal government couldn't convey clear title to the land."

Disclaiming, he says, "was the vehicle by which disposal was going to be accomplished. It's not an *obstacle* to disposal, *it's the vehicle* by which disposal was going to be accomplished."

What also is frequently not understood today is that would-be states such as Nevada were *eager* to disclaim title because they had a significant *financial interest* in the federal government selling the unappropriated lands.

While most of the revenues from those land sales were to be kept by the federal government — originally, to pay off the public debt left from the Revolutionary War — all the enabling acts also specified that significant revenues from those sales were to go to the new states for education, roads and a multitude of other public improvements.

Thus Nevada's enabling act — which, like many others, said that the land "*shall* be sold" — promised the new state 5 percent of the income produced by those federal sales:

> **Sec. 10. Five percent of subsequent sales of public lands by United States to be paid to state for public roads and irrigation.** *And be it further enacted*, That five percentum of the proceeds of the sales of all public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state for the purpose of making and improving public roads, constructing ditches or canals, to effect a general system of irrigation of the agricultural land in the state, as the legislature shall direct.

As "new states were brought on board," continues Rampton, "every single one of them had to say, 'Okay. We disclaim title to all of the public lands within our territorial boundaries.' That was the deal."

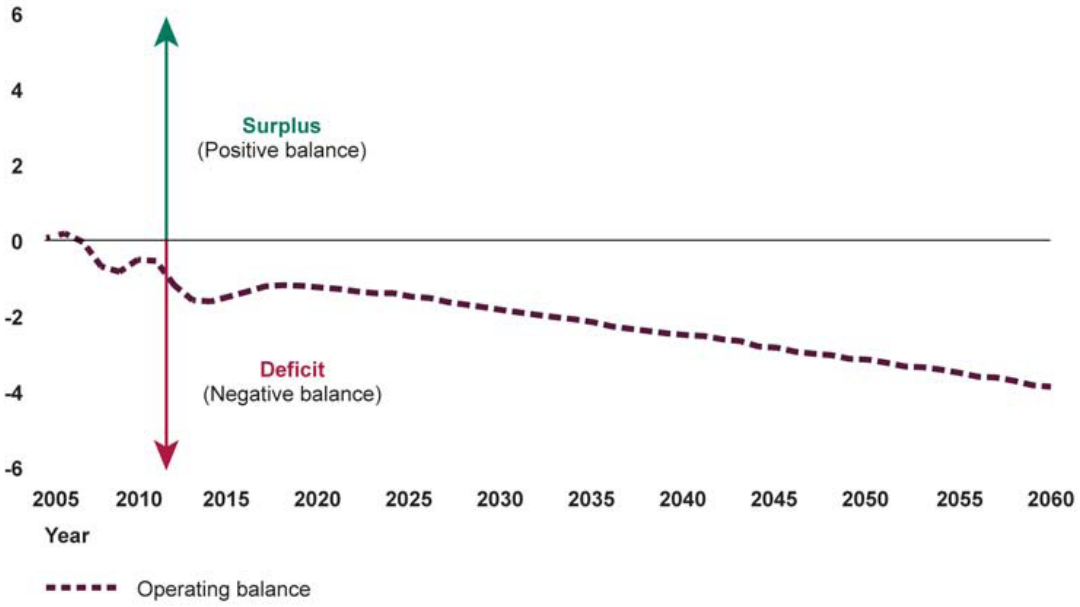
To which, he says, the federal government would respond, "'Okay, and until we extinguish the U.S. title to these lands, you can't mess with them, you can't tax them, for, over a reasonable period of time we're going to dispose of them, and then you can bring them within your revenue base.'"

All parties in the West recognized that until that disposal occurred, the states in the West would be in trouble financially, says Rampton, since "they couldn't tax these federal lands. It was a revenue problem, and it was a recognized revenue problem."

Talk to virtually any state legislator in Nevada or Utah today and they'll tell you: That

revenue problem still exists today. Moreover, the Government Accounting Office foresees ever-worsening fiscal outlooks for America's state and local governments, all the way through 2060, with increasing gaps between receipts and expenditures.

Figure 1: State and Local Operating Balance Measure, as a Percentage of Gross Domestic Product (GDP)



Source: GAO simulations, updated April 2013.

The thinking behind AB 227

Yet were the U.S. Congress — newly alive to the Western public, its politicians, state lawsuits and the nation's $16-to-$70 trillion federal debt — to begin honoring its enabling-act commitments, the financial results for Nevada, the other Western states and the nation itself could be huge.

Take Nevada alone, as an example.

Today, according to the federal Bureau of Land Management, just three federal agencies — the BLM, the U.S. Forest Service and the Fish & Wildlife Service — occupy some 77.5 percent, or 55 million acres, of Silver State land.

At a mere $5,000 an acre — reportedly the lowest price paid for Southern Nevada BLM land during the depths of the recent recession — that figures out to $13.75 billion for the State of Nevada and $275 billion for the federal treasury.

Of course, Southern Nevada land usually goes for well *above* $5,000, and the market value of much of the rest of the federally occupied land within the state remains unknown. And, given the absence under the federal regime of not only access but also genuine market pricing, that is unlikely to change soon.

Moreover, so interwoven are different interests with the federal government's current occupation of Nevada lands, and so deficient are state and federal inventories of those lands' resources, that the actual values at issue are currently unknown.

Indeed, that was a primary reason why the Nevada Legislature, earlier this year, passed Assembly Bill 227, which established the Nevada Land Management Task Force. Made up of county-commission representatives from all 17 Nevada counties, it has until Sept. 1, 2014, to research and report the consequences and responsibilities for the state and its citizens, were Congress to turn over the management and control of those public lands to the State of Nevada.

The 'only remedy that makes sense'

Across the border in Utah, where the issue of the federal government's breach of its covenant with that state has been front and center in recent years, Assistant Attorney General Rampton says the actual resources involved are currently impossible to calculate.

"If you tried to come up with a dollar amount, it would be impossible," he says. "If you try to find other remedies, it's a mess."

That's why, says Rampton, Utah chose to pass legislation — House Bill 148 — demanding that the federal government follow through and transfer BLM and Forest Service lands to that state.

"Frankly, this is the best way to do it — and it's in everybody's interest. What we have done, in making [this] demand, is provide an adequate remedy to a problem."

According to Rampton, transfer of the public lands from the federal government to the state governments is the only remedy that makes sense.

"Because if all we were saying is that the federal government has to dispose of these lands, that would be unpalatable at every level, frankly," he says.

"It wouldn't work for anyone, to take all of these public lands and put [them] into private holdings," he argues. "You'd lose control, totally. And I don't think anybody wants that. So it's not the objective, and in my discussions over the last two years I have heard no one say that that's what we're trying to do — except the opponents. They say that's what this is all about."

Earlier states injured by Congress

Utah, Nevada and the other modern Western states are not the first to confront a faith-breaking U.S. Congress. In the late 1820s and into the 1850s, states in the "West" of that day — Missouri, Illinois and others — experienced the same kind of congressional recalcitrance. And yet, eventually, Congress was brought to honor its commitments.

Repeatedly those states complained to Congress that they could not educate their children, provide economic opportunities for their citizens, and conduct their affairs as sovereign states because the federal government, for decades, had failed to dispose of the public lands, as promised.

"[T]he system of disposing of the public lands of the United States now pursued," wrote Missouri's legislature to the U.S. Congress in December 1828, "is highly injurious … to the States in which those lands lie, and to none, perhaps, more so than to the State of Missouri."

The letter noted that "several objections to the present system … have heretofore been urged to the consideration of Congress," and that those objections "have not been answered satisfactorily."

"A perseverance in the present system manifestly appears," said the state general assembly, "to be equivalent to a declaration on the part of Congress that it will not sell or dispose of nine-tenths of the public lands in this State…

> [T]his general assembly cannot refrain from declaring that it views such refusal as an infringement of the compact between the United States and this State; and that the State of Missouri never could have been brought to consent not to tax the lands of the United States whilst unsold; and not to tax the lands sold until five years thereafter, if it had been understood by the contracting parties that a system was to be pursued which would prevent nine-tenths of those lands from ever becoming the property of persons in whose hands they might be taxed.

Illinois, too, recognized Congress's bad faith in pricing land so high that it necessarily remained in federal hands:

> [T]he State of Illinois alone contains about forty millions of acres of land, and … an amount very little exceeding one and a half million of acres have as yet been disposed of at the public sales. If the present price at which it is required by law to be sold shall not be reduced, it will be hundreds of years before the soil will have passed out of the control of the general government, and be subject to the laws and jurisdiction of this State…
>
> If, as would seem to be most clearly inferable, the high price at which those lands are required to be disposed of should prevent their sale, it may be a subject of serious inquiry whether it does not operate as a virtual infraction of the compact in relation to the not taxing those lands before they are sold, and for a certain term of time afterwards.
>
> From the terms of that compact, and upon the supposition that the same is obligatory upon the parties to it, any act on the part of the government to delay the sales of the land in a reasonable period, whether accomplished by a positive refusal to sell, or by demanding for it a sum greatly beyond its value, by which the sales would be defeated, in a great measure, if not wholly so, would doubtless be an infraction of the compact itself.

Eventually, however, the "Western States" of that earlier era banded together and succeeded. The federal government was compelled to follow through and dispose of the public lands it still held in those states.

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