

House Resolution 106

By: Representatives Brockway of the 102nd, Barr of the 103rd, Allison of the 8th, Teasley of the 37th, Clark of the 98th, and others

A RESOLUTION

1 Encouraging Congress to Convey Title and Jurisdiction of Federal Public Lands to the States;
2 and for other purposes.

3 WHEREAS, in 1780, the United States Congress resolved that "the unappropriated lands that
4 may be ceded or relinquished to the United States, by any particular states, pursuant to the
5 recommendation of Congress of the 6th day of September last, shall be granted and disposed
6 of for the common benefit of all the United States that shall be members of the federal union,
7 and be settled and formed into distinct republican states, which shall become members of the
8 federal union, and have the same rights of sovereignty, freedom and independence, as the
9 other states: ... and that upon such cession being made by any State and approved and
10 accepted by Congress, the United States shall guaranty the remaining territory of the said
11 States respectively (Resolution of Congress, October 10, 1780)"; and

12 WHEREAS, under the United States Constitution, the American states reorganized to form
13 a more perfect union, yielding up certain portions of their sovereign powers to the elected
14 officers of the government of their union, yet retaining the residuum of sovereignty for the
15 purpose of independent internal self-governance; and

16 WHEREAS, the territorial and public lands of the United States are addressed in Article IV,
17 Section 3, Clause 2 of the United States Constitution, referred to as the Property Clause,
18 which states, "The Congress shall have Power to dispose of and make all needful Rules and
19 Regulations respecting the Territory or other Property belonging to the United States."; and

20 WHEREAS, with this clause, the Constitutional Convention agreed that the Constitution
21 would maintain the "status quo" that had been established with respect to the federal
22 territorial lands being disposed only to create new states with the same rights of sovereignty,
23 freedom, and independence as the original states; and

24 WHEREAS, with respect to the disposition of the federal territorial lands, the Northwest
25 Ordinance of July 13, 1787, provides, "The legislatures of those districts or new States, shall
26 never interfere with the primary disposal of the soil by the United States in Congress
27 assembled, nor with any regulations Congress may find necessary for securing the title in
28 such soil to the bona fide purchasers"; and

29 WHEREAS, by resolution, the United States Congress declared "That the proceeds of sales
30 which shall be made of lands in the Western territory, now belonging or that may hereafter
31 belong to the United States, shall be, and are hereby appropriated towards sinking or
32 discharging the debts for the payment whereof the United States now are, or by virtue of this
33 act may be holden, and shall be applied solely to that use, until the said debt shall be fully
34 satisfied"; and

35 WHEREAS, under these express terms of trust, the land claiming states, over time, ceded
36 their western land to their confederated union and retained their claims that the confederated
37 government dispose of such lands only to create new states "and for no other use or purpose
38 whatsoever" and apply the net proceeds of any sales of such lands only for the purpose of
39 paying down the public debt; and

40 WHEREAS, by compact between the original states, territorial lands were divided into
41 "suitable extents of territory" and upon attaining a certain population were to be admitted into
42 the union upon "an equal footing" as members possessing "the same rights of sovereignty,
43 freedom and independence" as the original states; and

44 WHEREAS, in 1828, United States Supreme Court Chief Justice John Marshall, in *American*
45 *Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828), confirmed that no provision in the
46 Constitution authorized the federal government to indefinitely exercise control over western
47 public lands beyond the duty to manage these lands pending the disposal of the lands to
48 create new states when he said, "At the time the Constitution was formed, the limits of the
49 territory over which it was to operate were generally defined and recognized (sic). These
50 limits consisted in part, of organized states, and in part of territories, the absolute property
51 and dependencies of the United States. These states, this territory, and future states to be
52 admitted into the Union, are the sole objects of the Constitution; there is no express provision
53 whatever made in the Constitution for the acquisition or government of territories beyond
54 those Limits."; and

55 WHEREAS, in 1833, referring to the land cession compacts which arose from the original
56 1780 congressional resolution, President Andrew Jackson stated, "These solemn compacts,
57 invited by Congress in a resolution declaring the purposes to which the proceeds of these
58 lands should be applied, originating before the constitution, and forming the basis on which
59 it was made, bound the United States to a particular course of policy in relation to them by
60 ties as strong as can be invented to secure the faith of nations" (Land bill veto, December 5,
61 1833); and

62 WHEREAS, the intent of the founding fathers to eventually extinguish title to all public
63 lands was reaffirmed by President Andrew Jackson in his land bill veto message to the
64 United States Senate on December 4, 1833, where he explained: "I do not doubt that it is the
65 real interest of each and all the States in the Union, and particularly of the new States, that
66 the price of these lands shall be reduced and graduated, and that after they have been offered
67 for a certain number of years the refuse remaining unsold shall be abandoned to the States
68 and the machinery of our land system entirely withdrawn. It can not be supposed the
69 compacts intended that the United States should retain forever a title to lands within the
70 States which are of no value, and no doubt is entertained that the general interest would be
71 best promoted by surrendering such lands to the States"; and

72 WHEREAS, the United States Supreme Court, in *State of Texas v. White*, 74 U.S. 700
73 (1868), clarified that a state, by definition, includes a defined sovereign territory, stating that
74 "State," in the constitutional context, is "a political community of free citizens, occupying
75 a territory of defined boundaries, and organized under a government sanctioned and limited
76 by a written constitution, and established by the consent of the governed," and added, "This
77 is undoubtedly the fundamental idea upon which the republican institutions of our own
78 country are established"; and

79 WHEREAS, in *Shively v. Bowlby*, 152 U.S. 1 (1894), the United States Supreme Court
80 confirmed that all federal territories, regardless of how acquired, are held in trust to create
81 new states on an equal footing with the original states when it stated, "Upon the acquisition
82 of a Territory by the United States, whether by cession from one of the States, or by treaty
83 with a foreign country, or by discovery and settlement, the same title and dominion passed
84 to the United States, for the benefit of the whole people, and in trust for the several States to
85 be ultimately created out of the Territory."; and

86 WHEREAS, the United States Supreme Court has affirmed that the federal government must
87 honor its trust obligation to extinguish title to the public lands for the sovereignty of the new

88 state to be complete, stating once "the United States shall have fully executed these trusts,
89 the municipal sovereignty of the new states will be complete, throughout their respective
90 borders, and they, and the original states, will be upon an equal footing, in all respects."
91 (*Pollard v. Hagan*, 44 U.S. 212 (1845)); and

92 WHEREAS, the enabling acts of the new states west of the original colonies established the
93 terms upon which all such states were admitted into the union, and contained the same
94 promise to all new states that the federal government would extinguish title to all public
95 lands lying within their respective borders; and

96 WHEREAS, the United States Supreme Court looks upon the enabling acts which create new
97 states as "solemn compacts" and "bilateral (two-way) agreements" to be performed "in a
98 timely fashion"; and

99 WHEREAS, the federal government confirmed its trust obligation to timely extinguish title
100 to all public lands lying within the boundaries of states by and through the 1934 Taylor
101 Grazing Act, which declared that the act was established "In order to promote the highest use
102 of the public lands pending its final disposal"; and

103 WHEREAS, in 1976, after nearly 200 years of trust history regarding the obligation of
104 Congress to extinguish title of western lands to create new states and use the proceeds to
105 discharge its public debts, the United States Congress purported to unilaterally change this
106 solemn promise by and through the Federal Land Policy Management Act (FLPMA), which
107 provides, in part, "The Congress declares that it is the policy of the United States that the
108 public lands be retained in Federal ownership, unless ... it is determined that disposal of a
109 particular parcel will serve the federal interest"; and

110 WHEREAS, the course and practice of the United States Congress with all states admitted
111 to the union prior to FLPMA had been to fully extinguish title, within a reasonable time, to
112 all lands within the boundaries of such states except lands otherwise expressly reserved to
113 the exclusive jurisdiction of the United States; and

114 WHEREAS, the states admitted to the Union prior to FLPMA did not, and could not have,
115 contemplated or bargained for the United States failing or refusing to abide by its solemn
116 promise to extinguish title to all lands within its defined boundaries within a reasonable time
117 such that the states could never realize the bargained-for benefit of the deployment, taxation,
118 or economic benefit of all the lands within its defined boundaries; and

119 WHEREAS, from 1780 forward the federal government only held bare legal title to the
120 western public lands in the nature of a trustee in trust with the solemn obligation to timely
121 extinguish title to such lands to create new states and to use the proceeds to pay the public
122 debt; and

123 WHEREAS, Congress, by and through FLPMA, unilaterally altered its duty in 1976 to
124 extinguish title to all public lands by committing to a policy of retention and a process of
125 comprehensive land management; and

126 WHEREAS, despite the fact that the federal government had not divested all public lands by
127 1976, this did not alleviate the federal government from its duty to extinguish title and divest
128 itself of federal ownership of remaining public land by ceding such land directly to the
129 western states as it did with other states; and

130 WHEREAS, since the passage of FLPMA, the federal government has engaged in a
131 persistent pattern and course of conduct in direct violation of the letter and spirit of FLPMA
132 through disregard of local resource management plans, failure and refusal to coordinate and
133 cooperate with the state and local governments, unilateral and oppressive land control edicts
134 to the severe and extreme detriment of the western states and their ability to adequately fund
135 education, provide essential government services, secure economic opportunities for wage
136 earners and ensure a stable prosperous future; and

137 WHEREAS, federal land-management actions, even when applied exclusively to federal
138 lands, directly impact the ability of western states to manage private lands, manage their
139 state-owned lands and manage their school trust lands to meet their obligations to the
140 beneficiaries of the trusts; and

141 WHEREAS, the vision and promise of agricultural production on the forest lands is the
142 reason that the United States Forest Service was made part of the United States Department
143 of Agriculture as opposed to the Department of the Interior; and

144 WHEREAS, the promise of preservation for agricultural use has been broken by the current
145 and recent administrations; and

146 WHEREAS, logging, timber, and wood products operations on National Forests have been
147 significantly suppressed, resulting in forests that are choked with old growth monocultures,

148 loss of aspen diversity, loss of habitat, and a threat to community watersheds due to insect
149 infestation and catastrophic fire; and

150 WHEREAS, these conditions are the result of the federal government's failure to properly
151 manage the forest lands for their intended use, which is responsible and sustained timber
152 production, watershed protection, and grazing; and

153 WHEREAS, under Article I, Section 8, Clause 17 of the United States Constitution, the
154 federal government is only constitutionally authorized to exercise jurisdiction over and above
155 bare right and title over lands that are "purchased by the Consent of the Legislature of the
156 State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards,
157 and other needful Buildings"; and

158 WHEREAS, the United States Supreme Court affirmed that the federal government only
159 holds lands as a mere "ordinary proprietor" and cannot exert jurisdictional dominion and
160 control over public lands without the consent of the state Legislature, stating "Where lands
161 are acquired without such consent, the possession of the United States, unless political
162 jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor.
163 The property in that case, unless used as a means to carry out the purposes of the
164 government, is subject to the legislative authority and control of the states equally with the
165 property of private individuals." (*Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525 (1885)); and

166 WHEREAS, in a unanimous 2009 decision, the United States Supreme Court, in *Hawaii v.*
167 *Office of Hawaiian Affairs*, 556 U.S. 163 (2009), affirmed that Congress has no right to
168 change the promises it made to a state's Enabling Act, stating, " ... [a subsequent act of
169 Congress] would raise grave constitutional concerns if it purported to 'cloud' Hawaii's title
170 to its sovereign lands more than three decades after the State's admission to the Union ...
171 '[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign
172 character of that event ... to suggest that subsequent events somehow can diminish what has
173 already been bestowed'. And that proposition applies a fortiori [with even greater force]
174 where virtually all of the State's public lands ... are at stake" (emphasis added, citation
175 omitted); and

176 WHEREAS, the only remedy for the federal government breaches of Western States'
177 Enabling Act Compacts and breaches to the spirit and letter of the promises of FLPMA is for
178 the States to take back title and management responsibility of federally-managed public
179 lands, which would restore the promises in the solemn compacts made at their statehood; and

180 WHEREAS, citizens of western states have a love of the land and have demonstrated
181 responsible stewardship of lands within state jurisdiction; and

182 WHEREAS, the western states are willing to sponsor, evaluate, and advance locally driven
183 efforts in a more efficient manner than the federal government, to the benefit of all users,
184 including recreation, conservation and the responsible and sustainable management of natural
185 resources; and

186 WHEREAS, because of the entanglements and rights arising over the years that the federal
187 government has failed to honor its promise to timely extinguish title to public lands and
188 because of the federal government's breach of western states' enabling acts and breach of
189 FLPMA, among other promises made, and the damages resulting from such breaches, the
190 United States Congress should imminently convey title to all public lands lying within the
191 western states, excluding national parks, designated wilderness and national heritage sites,
192 directly to those States that are willing to accept ownership and management responsibilities
193 of those federal lands.

194 NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that
195 in order to provide a fair, justified, and equitable remedy for the federal government's past
196 and continuing breaches of its solemn promises to extinguish title of public lands, the States
197 in making up the union of the United States encourage the federal government to imminently
198 extinguish both its title and government jurisdiction on the public lands that are held in trust
199 by the United States and convey title and jurisdiction to willing States in which the federal
200 public lands are located.

201 BE IT FURTHER RESOLVED that the States encourage the United States Congress in the
202 most strenuous terms to engage in good faith communication, cooperation, coordination, and
203 consultation with each willing state regarding the conveyance of federal public lands directly
204 to the States.