

IN THE HOUSE OF REPRESENTATIVES
HOUSE CONCURRENT RESOLUTION NO. 22

BY STATE AFFAIRS COMMITTEE

A CONCURRENT RESOLUTION
STATING LEGISLATIVE FINDINGS AND DEMANDING THAT THE FEDERAL GOVERNMENT EX-
TINGUISH TITLE TO IDAHO'S PUBLIC LANDS AND TRANSFER TITLE TO THOSE LANDS
TO THE STATE OF IDAHO.

Be It Resolved by the Legislature of the State of Idaho:

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

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

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

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

WHEREAS, with respect to the disposition of the federal territorial
lands, the Northwest Ordinance of July 13, 1787, provides, "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"; and

WHEREAS, by resolution in 1790, the United States Congress declared
"That the proceeds of sales which shall be made of lands in the Western terri-
tory, now belonging or that may hereafter belong to the United States, shall
be, and are hereby appropriated towards sinking or discharging the debts for
the payment whereof the United States now are, or by virtue of this act may be

1 holden, and shall be applied solely to that use, until the said debt shall be
2 fully satisfied"; and

3 WHEREAS, the intent of the founding fathers to eventually extinguish
4 title to all public lands was reaffirmed by President Andrew Jackson in a
5 message to the United States Senate on December 4, 1833, where he explained
6 the reasons he vetoed a bill entitled "An act to appropriate for a limited
7 time the proceeds of the sales of the public lands of the United States and
8 for granting lands to certain States": "I do not doubt that it is the real
9 interest of each and all the States in the Union, and particularly of the new
10 States, that the price of these lands shall be reduced and graduated, and
11 that after they have been offered for a certain number of years the refuse re-
12 maining unsold shall be abandoned to the States and the machinery of our land
13 system entirely withdrawn. It can not be supposed the compacts intended that
14 the United States should retain forever a title to lands within the States
15 which are of no value, and no doubt is entertained that the general interest
16 would be best promoted by surrendering such lands to the States"; and

17 WHEREAS, in 1828, United States Supreme Court Chief Justice John Mar-
18 shall, in *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828),
19 confirmed that no provision in the Constitution authorized the federal gov-
20 ernment to indefinitely exercise control over western public lands beyond
21 the duty to manage these lands pending the disposal of the lands to create
22 new states when he said, "At the time the Constitution was formed, the lim-
23 its of the territory over which it was to operate were generally defined and
24 recognised [sic]. These limits consisted in part, of organized states, and
25 in part of territories, the absolute property and dependencies of the United
26 States. These states, this territory, and future states to be admitted into
27 the Union, are the sole objects of the Constitution; there is no express pro-
28 vision whatever made in the Constitution for the acquisition or government
29 of territories beyond those Limits."; and

30 WHEREAS, in 1833, referring to these land cession compacts which arose
31 from the original 1780 congressional resolution, President Andrew Jackson
32 stated, "These solemn compacts, invited by Congress in a resolution declar-
33 ing the purposes to which the proceeds of these lands should be applied,
34 originating before the constitution, and forming the basis on which it was
35 made, bound the United States to a particular course of policy in relation
36 to them by ties as strong as can be invented to secure the faith of nations"
37 (*Land bill veto*, December 5, 1833); and

38 WHEREAS, the United States Supreme Court, in *State of Texas v. White*,
39 74 U.S. 700 (1868), clarified that a state, by definition, includes a de-
40 fined sovereign territory, stating that "State," in the constitutional con-
41 text, is "a political community of free citizens, occupying a territory of
42 defined boundaries, and organized under a government sanctioned and limited
43 by a written constitution, and established by the consent of the governed,"
44 and added, "This is undoubtedly the fundamental idea upon which the republi-
45 can institutions of our own country are established"; and

46 WHEREAS, in *Shively v. Bowlby*, 152 U.S. 1 (1894), the United States
47 Supreme Court confirmed that all federal territories, regardless of how
48 acquired, are held in trust to create new states on an equal footing with the
49 original states when it stated, "Upon the acquisition of a Territory by the
50 United States, whether by cession from one of the States, or by treaty with a

1 foreign country, or by discovery and settlement, the same title and dominion
2 passed to the United States, for the benefit of the whole people, and in trust
3 for the several States to be ultimately created out of the Territory."; and

4 WHEREAS, the United States Supreme Court has affirmed that the federal
5 government must honor its trust obligation to extinguish title to the public
6 lands for the sovereignty of the new state to be complete, stating once, "the
7 United States shall have fully executed these trusts, the municipal sover-
8 eignty of the new states will be complete, throughout their respective bor-
9 ders, and they, and the original states, will be upon an equal footing, in all
10 respects ... "(Pollard v. Hagan, 44 U.S. 212 (1845)); and

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

16 WHEREAS, the United States Supreme Court looks upon the enabling acts
17 which create new states as "solemn compacts" and "bilateral (two-way) agree-
18 ments" to be performed "in a timely fashion"; and

19 WHEREAS, Section 19, Article XXI, of the Constitution of the State of
20 Idaho provides "... And the people of the State of Idaho do agree and de-
21 clare that we forever disclaim all right and title to the unappropriated pub-
22 lic lands lying within the boundaries thereof, and to all lands lying within
23 said limits owned or held by any Indians or Indian tribes; and until the title
24 thereto shall have been extinguished by the United States, the same shall be
25 subject to the disposition of the United States"; and

26 WHEREAS, the trust obligation of the federal government to timely ex-
27 tinguish title of all public lands lying within the boundaries of the State
28 of Idaho is made even more clear in Section 7 of Idaho's Admissions Act, "Five
29 percent of the proceeds of the sales of public lands lying within said state
30 which shall be sold by the United States subsequent to the admission of said
31 state into the union after deducting all the expenses incident to the same
32 shall be paid to the said state, to be used as a permanent fund, the interest
33 of which only shall be expended for the support of the common schools within
34 said state"; and

35 WHEREAS, the federal government confirmed its trust obligation to
36 timely extinguish title to all public lands lying within the boundaries of
37 the State of Idaho by and through the 1934 Taylor Grazing Act, which declared
38 that the act was established "In order to promote the highest use of the pub-
39 lic lands pending its final disposal"; and

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

48 WHEREAS, at the time of the Idaho Admissions Act, the course and prac-
49 tice of the United States Congress with all prior states admitted to the
50 union had been to fully extinguish title, within a reasonable time, to all

1 lands within the boundaries of such states, except for those Indian lands,
2 or lands otherwise expressly reserved to the exclusive jurisdiction of the
3 United States; and

4 WHEREAS, the State of Idaho did not, and could not have, contemplated or
5 bargained for the United States failing or refusing to abide by its solemn
6 promise to extinguish title to all lands within its defined boundaries
7 within a reasonable time such that the State of Idaho and its permanent fund
8 for its common schools could never realize the bargained-for benefit of the
9 deployment, taxation or economic benefit of all the lands within its defined
10 boundaries; and

11 WHEREAS, from 1780 forward, the federal government only held bare le-
12 gal title to the western public lands in the nature of a trustee in trust with
13 the solemn obligation to timely extinguish title to such lands to create new
14 states and to use the proceeds to pay the public debt; and

15 WHEREAS, the federal government complied with its promise and solemn
16 obligation to imminently transfer title of public lands lying within the
17 boundaries of all states to the eastern edge of the State of Colorado and also
18 with the State of Hawaii; and

19 WHEREAS, by the terms of Idaho's Admissions Act and State Constitu-
20 tion, Idaho suspended its sovereign right to eventually tax the public lands
21 within its borders, pending final disposition of the public lands; and

22 WHEREAS, the federal government has repeatedly and persistently failed
23 to honor its promises and has refused to abide by the terms of its preexisting
24 solemn obligations to imminently extinguish title to all public lands; and

25 WHEREAS, had Congress honored its promise to Idaho to timely extinguish
26 title to all public lands within Idaho's boundaries, Idaho would have had
27 sovereign control over lands within its borders; and

28 WHEREAS, Congress, by and through FLPMA, unilaterally altered its duty
29 in 1976 to extinguish title to all public lands within Idaho's borders by
30 committing to a policy of retention and a process of comprehensive land man-
31 agement and planning coordinated between the federal government, the states
32 and local governing bodies for access, multiple use and sustained yield of
33 the public lands; and

34 WHEREAS, despite the fact that the federal government had not divested
35 all public lands within Idaho's borders by 1976, this did not alleviate the
36 federal government from its duty to extinguish title and divest itself of
37 federal ownership of remaining public land in Idaho by ceding such land di-
38 rectly to the state as it did with other states; and

39 WHEREAS, since the passage of FLPMA, the federal government has engaged
40 in a persistent pattern and course of conduct in direct violation of the let-
41 ter and spirit of FLPMA through an abject disregard of local resource manage-
42 ment plans, failure and refusal to coordinate and cooperate with the state
43 and local governments, unilateral and oppressive land control edicts to the
44 severe and extreme detriment of the state and its ability to adequately fund
45 education, provide essential government services, secure economic opportu-
46 nities for wage earners and Idaho business, and ensure a stable, prosperous
47 future; and

48 WHEREAS, under the United States Constitution, the American states re-
49 organized to form a more perfect union, yielding up certain portions of their
50 sovereign powers to the elected officers of the government of their union,

1 yet retaining the residuum of sovereignty for the purpose of independent in-
2 ternal self-governance; and

3 WHEREAS, by compact between the original states, territorial lands were
4 divided into "suitable extents of territory" and upon attaining a certain
5 population, were to be admitted into the union upon "an equal footing" as
6 members possessing "the same rights of sovereignty, freedom and indepen-
7 dence" as the original states; and

8 WHEREAS, the federal trust respecting public lands obligates the United
9 States, through their agent, Congress, to extinguish both their government
10 jurisdiction and their title on the public lands that are held in trust by the
11 United States for the states in which they are located; and

12 WHEREAS, the state and federal partnership of public lands management
13 has been eroded by an oppressive and overreaching federal management agenda
14 that has adversely impacted the sovereignty and the economies of the State of
15 Idaho and local governments; and

16 WHEREAS, federal land management actions, even when applied exclu-
17 sively to federal lands, directly impact the ability of the State of Idaho
18 to manage its school trust lands in accordance with the mandate of the Idaho
19 Admissions Act and to meet its obligation to the beneficiaries of the trust;
20 and

21 WHEREAS, Idaho has been substantially damaged in its ability to provide
22 funding for education and the common good of the state and to serve a sustain-
23 able, vibrant economy into the future because the federal government has un-
24 duly retained control of nearly two-thirds of the lands lying within Idaho's
25 borders; and

26 WHEREAS, Idaho consistently ranks high among all the states in class
27 size and low in the nation in per pupil spending for education; and

28 WHEREAS, had the federal government disposed of the land in or about
29 1890, Idaho would have, from that point forward, generated substantial tax
30 revenues and revenues from the sustainable managed use of its natural re-
31 sources to the benefit of its public schools and to the common good of the
32 state and nation; and

33 WHEREAS, the federal government gives Idaho less than one-half of the
34 net proceeds of mineral lease revenues and severance taxes generated from
35 the lands within Idaho's borders; and

36 WHEREAS, Idaho has been substantially damaged in mineral lease revenues
37 and severance taxes in that, had the federal government extinguished title
38 to all public lands, Idaho would realize one hundred percent of the mineral
39 lease revenues and severance taxes from the lands; and

40 WHEREAS, the Bureau of Land Management's (BLM) failure to act affirma-
41 tively on definitive allocation decisions of multiple use activities in re-
42 source management plans has created uncertainty in the future of public land
43 use in Idaho and has caused capital to flee the state; and

44 WHEREAS, the United States Army Corps of Engineers is proposing to ex-
45 tend its jurisdiction to regulate the waters of the United States to areas
46 traditionally dry, except during severe weather events, in violation of the
47 common definition of jurisdictional water; and

48 WHEREAS, the United States Fish and Wildlife Service is making deci-
49 sions concerning various species on BLM lands under the provisions of the
50 Endangered Species Act without serious consideration of state wildlife

1 management activities and protection designed to prevent the need for a
2 listing, or recognizing the ability to delist a species, thereby affecting
3 the economic vitality of the state and local region; and

4 WHEREAS, the BLM has not authorized all necessary rangeland improvement
5 projects involving the removal of pinyon-juniper and other climax vegeta-
6 tion, thereby reducing the biological diversity of the range, reducing ri-
7 parian viability and water quality and reducing the availability of forage
8 for both livestock and wildlife; and

9 WHEREAS, Idaho initially supported placing into reserve the various
10 national forests in the state, because Idaho was promised this action would
11 preserve the forest lands as watersheds and for agricultural use, namely
12 timber and other wood products, and grazing; and

13 WHEREAS, this vision and promise of agricultural production on the for-
14 est lands is the reason that the United States Forest Service was made part of
15 the United States Department of Agriculture as opposed to the Department of
16 the Interior; and

17 WHEREAS, the promise of preservation for agricultural use has been bro-
18 ken by recent administrations; and

19 WHEREAS, logging, timber and wood products operations on Idaho's na-
20 tional forests have come to a virtual standstill, resulting in forests that
21 are choked with old growth monocultures, loss of aspen diversity, loss of
22 habitat and a threat to community watersheds due to insect infestation and
23 catastrophic fire; and

24 WHEREAS, these conditions are the result of a failure to properly manage
25 the forest lands for their intended use, which is responsible and sustained
26 timber production, watersheds and grazing; and

27 WHEREAS, the only remedy for federal government breaches of Idaho's Ad-
28 missions Act and breaches to the spirit and letter of the promises of FLPMA
29 is for the State of Idaho to take back title and management responsibility
30 of federally managed public lands, which would restore the promises in the
31 solemn compact made at statehood; and

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

38 WHEREAS, the United States Supreme Court affirmed that the federal gov-
39 ernment only holds lands as a mere "ordinary proprietor" and cannot exert ju-
40 risdictional dominion and control over public lands without the consent of
41 the state Legislature, stating, "Where lands are acquired without such con-
42 sent, the possession of the United States, unless political jurisdiction be
43 ceded to them in some other way, is simply that of an ordinary proprietor (em-
44 phasis added). The property in that case, unless used as a means to carry
45 out the purposes of the government, is subject to the legislative authority
46 and control of the states equally with the property of private individuals."
47 (Ft. Leavenworth R. Co. v. Lowe, 114 U.S. 525 (1885)); and

48 WHEREAS, citizens of the State of Idaho have a love of the land and have
49 demonstrated responsible stewardship of lands within state jurisdiction;
50 and

1 WHEREAS, the State of Idaho is willing to sponsor, evaluate and advance
2 the locally driven efforts in a more efficient manner than the federal gov-
3 ernment, to the benefit of all users, including recreation, conservation and
4 the responsible and sustainable management of Idaho's natural resources;
5 and

6 WHEREAS, the State of Idaho has a proven regulatory structure to manage
7 public lands for multiple use and sustainable yield; and

8 WHEREAS, the United States Congress disposed of lands within the bound-
9 aries of the states of Tennessee and Hawaii directly to those states; and

10 WHEREAS, because of the entanglements and rights arising over the 122
11 years that the federal government has failed to honor its promise to timely
12 extinguish title to public lands and because of the federal government's
13 breach of Idaho's Admissions Act and breach of FLPMA, among other promises
14 made, and the damages resulting from such breaches, the United States Con-
15 gress should imminently transfer title to all public lands lying within the
16 State of Idaho directly to the State of Idaho, as it did with Hawaii and Ten-
17 nessee; and

18 WHEREAS, the Legislature of the State of Idaho, upon transfer of title
19 by the federal government of the public lands directly to the state, intends
20 to cede the national park land to the federal government on condition that
21 the lands permanently remain national park lands, that they not be sold,
22 transferred, left in disrepair, or conveyed to any party other than the State
23 of Idaho; and

24 WHEREAS, the Legislature of the State of Idaho, upon transfer of title
25 by the federal government of the public lands directly to the state, intends
26 to cede to the federal government all lands currently designated as part of
27 the National Wilderness Preservation System pursuant to the Wilderness Act
28 of 1964, National Monuments, Department of Defense lands and Department of
29 Energy reservations on the condition that they not be sold, transferred,
30 left in disrepair or conveyed to any party other than the State of Idaho; and

31 WHEREAS, in order to effectively address the accumulated entanglements
32 and expectations over Idaho's public lands, including open space, access,
33 multiple use and the management of sustainable yields of Idaho's natural re-
34 sources, an Interim Public Lands Study Committee should be formed to review
35 how to manage multiple use of the public lands and to determine, through a
36 public process, the extent to which public land may be sold, if any; and

37 WHEREAS, to the extent that the Interim Public Lands Study Committee de-
38 termines through a public process that any such land should be sold to pri-
39 vate owners, five percent of the net proceeds should be paid to the Public
40 School Endowment Fund and ninety-five percent of the net proceeds should be
41 paid to the federal government to pay down the federal debt; and

42 WHEREAS, Section 19, Article XXI, of the Constitution of the State of
43 Idaho provides that Indian lands shall remain under the absolute jurisdic-
44 tion and control of the Congress of the United States, Idaho disclaims any
45 title to such land and will observe all treaty rights.

46 NOW, THEREFORE, BE IT RESOLVED by the members of the First Regular Ses-
47 sion of the Sixty-second Idaho Legislature, the House of Representatives and
48 the Senate concurring therein, that in order to provide a fair, justified and
49 equitable remedy for the federal government's past and continuing breaches
50 of its solemn promises to the State of Idaho as set forth in this resolution

1 and to provide for the sufficient and necessary funding of Idaho's public ed-
2 ucation system, the Legislature of the State of Idaho demands that the fed-
3 eral government imminently transfer title to all of the public lands within
4 Idaho's borders directly to the State of Idaho.

5 BE IT FURTHER RESOLVED that the Legislature of the State of Idaho urges
6 the United States Congress in the most strenuous terms to engage in good
7 faith communication, cooperation, coordination and consultation with the
8 State of Idaho regarding the transfer of public lands directly to the State
9 of Idaho.

10 BE IT FURTHER RESOLVED that, upon transfer of the public lands directly
11 to the State of Idaho, the Legislature intends to affirmatively cede the
12 national park lands to the federal government, under Clause 17, Section 8,
13 Article I, of the United States Constitution, on condition that the lands
14 permanently remain national park lands, that they not be sold, transferred,
15 left in substantial disrepair or conveyed to any party other than the State
16 of Idaho.

17 BE IT FURTHER RESOLVED that, upon transfer of the public lands directly
18 to the State of Idaho, the Legislature intends to affirmatively cede to the
19 federal government all lands currently designated as part of the National
20 Wilderness Preservation System pursuant to the Wilderness Act of 1964,
21 National Monuments, Department of Defense lands and Department of Energy
22 reservations on condition that they not be sold, transferred, left in sub-
23 stantial disrepair or conveyed to any party other than the State of Idaho.

24 BE IT FURTHER RESOLVED that the Legislature calls for the creation of an
25 Interim Public Lands Study Committee to review how to manage access, open
26 space, sustainable yields and the multiple use of the public lands and to
27 determine, through a public process, the extent to which public land may be
28 sold.

29 BE IT FURTHER RESOLVED that, to the extent that the Interim Public
30 Lands Study Committee determines through a public process that any such land
31 should be sold to private owners, five percent of the net proceeds should be
32 paid to the Public School Endowment Fund and ninety-five percent should be
33 paid to the Bureau of the Public Debt to pay down the federal debt.

34 BE IT FURTHER RESOLVED that copies of this resolution be sent to the
35 United States Department of the Interior, the United States Department of
36 Agriculture, the Majority Leader of the United States Senate, the Speaker of
37 the United States House of Representatives, the members of Idaho's congres-
38 sional delegation, and the Governors, Senate Presidents and Speakers of the
39 House of the forty-nine other states.