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The Transfer of Public Lands Movement: Taking “Back” Lands that were Never Theirs and other Examples of Legal Falsehoods and Revisionist History

John C. Ruple

S.J. Quinney College of Law, University of Utah, john.ruple@law.utah.edu

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The Transfer of Public Lands Movement: Taking “Back” Lands that were Never Theirs and other Examples of Legal Falsehoods and Revisionist History

John C. Ruple*

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Long a hotbed of discontent over federal public land management, Utah rekindled the smoldering “sagebrush rebellion” in 2012 when it passed the Transfer of Public Lands Act (TPLA),¹ demanding that the federal government turn millions of acres of public land² over to the state. Backed by a multi-million-dollar litigation budget, Utah’s efforts became a model for legislation that sprang up across much of the West, and transfer theories were adopted as part of the Republican National Committee Platform. A growing minority are also seizing on Utah’s legal theories to justify wresting public lands from the federal government, too often in violent ways.

While unlikely to succeed in the courts, the transfer movement taps into a long history of Western antagonism towards what some characterize as an overbearing federal absentee landlord. This broad discontent, when combined with the threat of litigation, could lead to federal legislation devolving the public domain to the states — and that could forever reshape our nation.

Part I summarizes the TPLA and the movement that the Act has spawned. Part II puts current demands into historical context, summarizing the acquisition and disposal of the public domain, federal authority over the public domain, and evolution of public land management policies. Part III explains and critiques the legal and policy arguments favoring compulsory public land disposal. Part IV summarizes the policy arguments behind, and the unintended consequences that would flow from, a public land transfer. Part V proceeds from the premise that it is not enough to simply critique the transfer movement by identifying the frustrations driving transfer efforts and

* John C. Ruple is an Associate Professor of Law (Research), and Wallace Stegner Center Fellow at the University of Utah’s S.J. Quinney College of Law. This paper was made possible by the generous support provided by the AHE/CI Trust and the ESSR Endowment Fund. The author would also like to thank Professors Myrl Duncan, Robert Fischman, Hillary Hoffman, and Robert Keiter for their comments on drafts of this article.

¹ H.B. 148, 2012 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-6-101 through 104 (2014)).

² As used herein, “public domain” refers to lands acquired by the United States from other sovereigns, including Indian tribes, that remain federally owned. It is used interchangeably with the term “public lands.”

offering constructive alternatives to transfer that address the underlying frustrations.

I. Sagebrush Rebellion Revisited — The Public Lands Transfer Movement

Millions of acres of highly-coveted lands and minerals remain in federal ownership.

Dissatisfied with management that does not reflect the wishes of many in the state legislature, Utah, in 2012, enacted legislation demanding title to millions of acres of federally managed lands. Enticed by the prospect of quick riches, legislators across the West took up the issue. Interest from other states was understandable because of common frustrations and shared histories. As federal legislation authorizing statehood is generally consistent state-to-state, Utah's arguments, if successful, would likely apply West-wide, and permanently remake the West.

Transfer demands reflect frustrations that are as old as the nation itself and that re-emerge every generation or so.³ Much has been written about the sagebrush rebellion;⁴ this article intersperses bits and pieces of that history throughout to illuminate the narrative of today.

A. Utah's Transfer of Public Lands Act

Signed into law on March 23, 2012, the TPLA demands that by December 31, 2014, the

³ See e.g., Richard M. Mollison & Richard W. Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problem of Federal Land Management*, 19 HARV. J. ON LEGIS. 97, 100, n. 14 (1982) (cataloguing demands to cede federal lands to the states from Alabama, Illinois, Indiana, Louisiana, and Missouri). See also, John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

⁴ For a thorough discussion of the sagebrush rebellion, see, Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123 (2011); George Cameron Coggins, 'Devolution' in Federal Land Law: Abdicating by any Other Name. . . , 14 HASTINGS WEST-NORTHWEST J. OF ENVTL. L. & POLICY 485 (2008); Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KANSAS L. REV. 647 (1997); Scott Reed, *The County Supremacy Movement: Mendacious Myth Making*, 30 IDAHO L. REV. 525 (1994); Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands*, *supra* note 3; Paul W. Gates, *The Intermountain West Against Itself*, 27 J. OF THE SOUTHWEST 205 (1985); and Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847 (1982).

United States transfer title to public lands within Utah to the state.⁵ Under the TPLA, “public lands” include all federal lands except national parks, national monuments (other than the Grand Staircase-Escalante National Monument, which would be conveyed to the state), congressionally-designated Wilderness Areas, Department of Defense areas, and tribal lands.⁶ The lands at issue are administered primarily by the Bureau of Land Management (BLM) and the United States Forest Service (USFS), and also include the Glen Canyon National Recreation Area that is administered by the National Park Service. Together, these lands cover approximately 31.2 million acres of Utah,⁷ or an area roughly the size of the entire state of Mississippi.⁸

If public lands are transferred into state ownership, Utah may, under the TPLA, either retain or sell the land.⁹ If Utah sells the land, the state would retain five-percent of net sale proceeds and pay ninety-five-percent of the proceeds to the federal government. Utah’s share of sale proceeds would be used to support public education.¹⁰ Utah may also retain the newly acquired lands, and statements by legislators signal this intent,¹¹ though fiscal realities may make that difficult.

⁵ UTAH CODE ANN. § 63L-6-103(1) (2014).

⁶ UTAH CODE ANN. § 63L-6-102(3) (2014).

⁷ UNIV. OF UTAH, UTAH STATE UNIV. & WEBER STATE UNIV., AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH xxv (2014) (hereinafter ECONOMIC ANALYSIS), *available at* <http://publiclands.utah.gov/wp-content/uploads/2014/11/1.%20Land%20Transfer%20Analysis%20Final%20Report.pdf>.

⁸ Mississippi has a total area (land and water) of 48,432 square-miles, or 31 million acres. U.S. CENSUS BUREAU, DEP’T OF COM., 2012 STATISTICAL ABSTRACT OF THE UNITED STATES, Table 358 *at* <http://www.census.gov/compendia/statab/>.

⁹ UTAH CODE ANN. § 63L-6-103(2) (2014).

¹⁰ UTAH CODE ANN. § 63L-6-103(3) (2014).

¹¹ *See e.g.*, Amy Joi O’Donoghue, *House GOP Reiterates Stance on Public Lands*, DESERET NEWS (March 6, 2015) 2015 WLNR 6794754 (quoting Rep. Stratton as saying that “it makes little sense to ‘sell off’ those lands.”); Brian Maffly, *Officials Say Economic Outlook Good for Public Land Transfer, but Keep Study Under Wraps*, SALT LAKE TRIBUNE (Nov. 19, 2014) (quoting Rep. Stratton that “Over my dead body do we transfer these public lands

Exactly how Utah would manage acquired public lands, however, remains unclear. During the 2014 legislative session Utah took steps towards clarifying management of the targeted lands by enacting the Utah Wilderness Act.¹² Utah, however, has yet to propose protecting any land under this act. Furthermore, the Act contains exemptions to resource protections that could make designations illusory.¹³ Allusions to wilderness protection aside, comments by key state officials reveal a clear goal of increasing commodity production.¹⁴

The following year, the legislature enacted the Utah Public Land Management Act (UPLMA),¹⁵ setting forth general management direction for the targeted lands. While modeled after the Federal Land Policy and Management Act (FLPMA)¹⁶ and touting multiple-use, sustained-yield management, the UPLMA deletes key directions from FLPMA’s definition of “multiple use.” While FLPMA directs the BLM to consider the “relative values of the resources and not necessarily [] the combination of uses that will give the greatest economic return or the greatest unit output,”¹⁷ no such direction is contained in the UPLMA. Rather, the UPLMA directs the state to manage each

to the private sector. We will remain a public lands state.”) at: <http://www.sltrib.com/news/1847306-155/state-public-lands-utah-transfer-federal?>

¹² UTAH CODE ANN. §§ 63L-7-1-1 through -109 (2014).

¹³ See e.g., UTAH CODE ANN. § 63L-7-106(12) (2014) (“The governor may, within protected wilderness areas, authorize: . . . (b) the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in developing water resources, including road construction and essential maintenance.”).

¹⁴ According to Kathleen Clarke, Director of Utah’s Public Land Policy Coordination Office, there is the “potential for variation in management scenario[s] that would invite significantly more revenue” if federal public lands are transferred to the state. *Trib Talk: Transferring federal lands to Utah*, SALT LAKE TRIBUNE May 22, 2014 available at <http://publiclands.utah.gov/kathleen-clarke-interviewed-for-trib-talk/>.

¹⁵ H.B. 276, 2016 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-8-101—602, and 79-6-101—105).

¹⁶ 43 U.S.C. §§ 1701—1784 (2012).

¹⁷ 43 U.S.C. § 1702(c) (2012).

parcel of land to promote “principal or major uses of the land.”¹⁸ The UPLMA also omits the requirement to “take any action necessary to prevent unnecessary or undue degradation of the lands,” which is contained in FLPMA.¹⁹

B. Why the Transfer of Public Lands Act Matters

While the TPLA’s deadline for a public land handover passed without federal acquiescence and Utah has not yet sued to force a transfer, Utah has spent millions preparing for such a fight, other states are following Utah’s lead, and federal bills to affect transfer to states are emerging.²⁰ Transfer rhetoric is also inspiring fringe groups to take up arms against the federal government.²¹

1. The Proliferation of Bad Ideas

Inspired by the prospect of local control, increased commodity production, and the promise of a revenue windfall that many assume a state takeover would bring, ten of the eleven contiguous Western states had, by late 2015, entertained some form of transfer legislation. Idaho joined Utah in calling for a takeover of federal public lands.²² Nevada²³ and Wyoming²⁴ enacted legislation calling for transfer option studies. Nevada then enacted a joint resolution urging Congress to transfer public lands to the state.²⁵ In Montana, the legislature passed a joint resolution directing the

¹⁸ H.B. 276, 2016 Gen. Sess. (Utah) (to be codified at UTAH CODE ANN. § 63L-8-103).

¹⁹ 43 U.S.C. § 1732(b) (2012).

²⁰ *See e.g.*, H.R. 1484, 114th Cong. (2015) (to convey no less than 7.2 million acres of public land to Nevada), and H.R. 3650, 114th Cong. (2015) (to transfer National Forest System lands to states).

²¹ *See e.g.*, Criminal Indictment, U.S. v. Bundy, No. 2:16-CR-46 (D. Nev. Feb. 17, 2016), and Criminal Complaint, U.S. v. Bundy et al., No. 3:16-mj-004-1 –8 (D. Or. Jan. 16, 2016).

²² H.R. Con. Res. 22, 62nd Leg., 1st Reg. Sess. (Idaho 2013) (demanding the federal government to “imminently transfer title to all of the public lands within Idaho’s borders directly to the State of Idaho.”).

²³ A.B. 227, 77th Reg. Sess. (Nev. 2013) (creating a commission to study the public lands takeover).

²⁴ H.R. 228, 62nd Leg., Gen. Sess. (Wyo. 2013) (creating a commission to study the takeover of federal public lands).

²⁵ S.J.R. 1, 78th Leg (Nevada 2015).

Legislative Council to investigate “ownership and jurisdictional responsibilities” pertaining to the public lands.²⁶ The Arizona legislature passed a bill demanding that the United States extinguish title to all public lands in Arizona and transfer them to the state, only to see the bill vetoed by the Governor.²⁷ Unable to override the Governor’s veto, transfer movement supporters then tried to amend the Arizona Constitution to assert Arizona’s claim of title to federal public lands. While the ballot measure was defeated soundly,²⁸ the Arizona legislature refused to give in, eventually enacting a bill to “to examine processes to transfer, manage and dispose of federal lands within this state.”²⁹

The Colorado Legislature defeated at least one joint resolution and three transfer bills.³⁰ The New Mexico Legislature fought off at least nine similar efforts.³¹ Oregon thwarted four transfer bills,³² and Washington blocked three transfer bills.³³ Of the eleven contiguous Western states, only California has not taken up the fight.

²⁶ S.J.R. 15, 63rd Reg. Sess. (Mont. 2013).

²⁷ S.B. 1332, 50th Leg., 2d Reg. Sess. (Ariz. 2013); Governor Jan K. Brewer, Veto Statement for S.B. 1332 (May 14, 2013).

²⁸ Arizona Proposition 120 (2012). Arizona Secretary of State, State of Arizona Official Canvas, 2012 General Election, November 7, 2012 *available at* <http://www.azsos.gov/election/2012/general/electioninformation.htm>.

²⁹ H.B. 2658, 52d Leg., 1st Reg. Sess. (Ariz. 2015).

³⁰ S.J.R. 13-031, 69th Gen. Sess. (Colo. 2013), and S.B. 13-142, 2013 Reg. Sess. (Colo. 2013); S.B. 15-039, 70th Gen. Sess. (Colo. 2015), and S.B. 15-232, 70th Gen. Sess. (Colo. 2015).

³¹ H.B. 292, 2013 Leg. Sess. (N.M. 2013); S.B. 404, 2013 Leg. Sess. (N.M. 2013); S.J.M. 53, 2013 Leg. Sess. (N.M. 2013); S.J.M. 56, 2013 Leg. Sess. (N.M. 2013); and S.M. 93, 2013 Leg. Sess. (N.M. 2013); S.M. 6, 52nd Gen. Sess. (N.M. 2015); H.B. 291, 52nd Gen. Sess. (N.M. 2015); S.B. 483, 52nd Gen. Sess. (N.M. 2015); and H.B. 102, 51st Gen. Sess. (N.M. 2014).

³² H.J.M. 13, 78th Gen. Sess. (Or. 2015); S.J.M. 5, 78th Gen. Sess. (Or. 2015); H.B. 3444, 78th Gen. Sess. (Or. 2015); and H.B. 3240, 78th Gen. Sess. (Or. 2015).

³³ S.B. 5405, 64th Gen. Sess. (Wash. 2015); H.B. 1262, 64th Gen. Sess. (Wash. 2015); H.B. 1192, 64th Gen. Sess. (Wash. 2015); H.B. 2268, 63rd Leg. 1st Reg. Sess. (Wash. 2014).

Even distant states are joining the act. Georgia “encourage[s] the federal government to imminently extinguish both its title and government jurisdiction on the public lands that are held in trust by the United States and convey title and jurisdiction to willing States in which the federal public lands are located.”³⁴ Similarly, South Carolina encourages the U.S. Congress to “coordinate the transfer of title to the western states.”³⁵

The idea of transferring public lands to the states has also infused national politics, with the Republican National Committee lending its support,³⁶ and takeover advocates introducing multiple bills during the 114th Congress that would transfer to the states title to or jurisdiction over public lands.³⁷ On the budgetary front, Senator Murkowski succeeded in amending the Senate’s 2016 budget proposal to authorize funding of “initiatives to sell or transfer to, or exchange with, a State

³⁴ H.R. 106, 53d Genn. Sess. (Ga. 2015).

³⁵ H.R. 3552, 120th Leg. Sess. (S.C. 2013-14).

³⁶ See Republican Platform 2016 21 (“Congress shall immediately pass universal legislation providing for a timely and orderly mechanism requiring the federal government to convey certain federally controlled public lands to states. We call upon all national and state leaders and representatives to exert their utmost power and influence to urge the transfer of those lands, identified in the review process, to all willing states for the benefit of the states and the nation as a whole.”) <https://prod-static-ngop-pbl.s3.amazonaws.com/docs/2012GOPPlatform.pdf>. See also, Republican National Committee, Resolution in Support of Western States Taking Back Public Lands, adopted Jan. 24, 2014 *available at* <http://www.gop.com/wp-content/uploads/2014/01/RESOLUTION-IN-SUPPORT-OF-WESTERN-STATES-TAKING-BACK-PUBLIC-LANDS.pdf>.

³⁷ See *e.g.*, S. 361, 114th Cong. (2015) (directing the Secretary of the Interior to sell specified federal public lands), H.R. 435, 114th Cong. (2015) (same), H.R. 3650, 114th Cong. (2015) (requiring the Secretary of Agriculture, upon a request from a state, to sell that state up to 2 million acres of National Forest System land), H.R. 925, 114th Cong. (2015) (directing grants of public land to the state of Nevada and its counties, and requiring public land auctions), S. 472, 114th Cong. (2015) (same), H.R. 1484, 114th Cong. (2015) (directing the secretaries of Agriculture and the Interior to convey without consideration to the state of Nevada all interest in Forest Service and BLM lands), and H.R. 3650, 114th Cong. (2015) (authorizing states to select and acquire National Forest System lands).

or local government any [enumerated] Federal land.”³⁸ In April 2015, Reps. Rob Bishop and Chris Stewart launched “a congressional team that will develop a legislative framework for transferring public lands to local ownership and control.”³⁹ As Congressman Bishop explains:

This group will explore legal and historical background in order to determine the best congressional action needed to return these lands to the rightful owners. We have assembled a strong team of lawmakers, and I look forward to formulating a plan that reminds the federal government it should leave the job of land management to those who know best.⁴⁰

While federal legislative efforts have thus far foundered, they represent an evolution in approach that may avoid many of the legal pitfalls discussed in section III. With Republicans now in control of both houses of Congress and the White House, the prospect of passing such legislation has improved considerably.

2. Transfer Rhetoric Fuels Revolt

The potential for land transfer rhetoric to embolden fringe groups and spur violent action is a growing concern. As federal attorneys warned almost two decades ago:

The danger inherent in [ordinances exerting local control over federal land] is not that they are being enforced by the counties that pass them — indeed, most are not. The danger is that they encourage citizens to unlawful defiance of lawful federal land management directives. These acts of defiance threaten federal land managers as they carry out their statutorily mandated duties and may have serious ramifications, such as the imposition of fines and the loss of grazing permits for citizens who act on the legal theories touted by the movement.⁴¹

Cliven Bundy relied on transfer arguments in justifying armed resistance to federal land management. Mr. Bundy had, since 1993, refused to pay federal grazing fees.⁴² Following years of

³⁸ S. Amend. 838 to S. Con. Res. 11, 114th Cong. (2015), 161 Cong. Rec. S 1937 (March 25, 2015).

³⁹ <http://stewart.house.gov/flag>.

⁴⁰ *Id.*

⁴¹ Peter D. Coppelman, *The Federal Government's Response to the County Supremacy Movement*, 12 NAT. RES. & ENV'T 30 (1997).

⁴² *United States v. Bundy*, 1998 U.S. Dist. LEXIS 23835, *1 (D. Nev. 1988).

failed efforts to resolve the conflict and multiple court orders directing him to remove his cattle,⁴³ all of which were ignored, the District Court authorized the federal government to seize Bundy's trespassing cattle.⁴⁴ The federal government began to roundup and auction off the trespass cattle, with the proceeds set against Mr. Bundy's more than \$1 million in accumulated fees and fines.⁴⁵ Mr. Bundy resisted, seeking support from militia groups groups,⁴⁶ and hundreds of armed supporters flocked to the Bundy compound.⁴⁷ The Department of the Interior backed down,⁴⁸ avoiding violence but emboldening anti-government sentiments: Senator Harry Reid (who criticized Mr. Bundy), BLM employees, and environmentalist all found themselves the recipients of death threats.⁴⁹

Mr. Bundy's justification for his actions is eerily similar to the arguments proffered by transfer movement supporters. In 1998 Mr. Bundy contended that the federal government lacked authority over lands "inside an admitted state."⁵⁰ He therefore disputed the BLM's "constitutional authority over public lands,"⁵¹ and dismissed federal efforts to regulate grazing on federal public

⁴³ *See id.*, and U.S. v. Bundy, 1999 WL 33654616 (9th Cir. 1999).

⁴⁴ United States v. Bundy, 2013 WL 3463610, *3 (D. Nevada 2013).

⁴⁵ Statement from Director of the BLM Neil Kornze on the Cattle Gather in Nevada (April 25, 2014) http://www.blm.gov/nv/st/en/info/newsroom/2014/april/national_office__statement.html.

⁴⁶ RYAN LENZ & MARK POTOK, S. POVERTY LAW CTR., WAR IN THE WEST, THE BUNDY RANCH STANDOFF AND THE AMERICAN RADICAL RIGHT (2014).

⁴⁷ Criminal Indictment, United States v. Bundy, 2:16-CR-46 (D. Nev. Feb. 17, 2016).

⁴⁸ Statement from Director of the BLM Neil Kornze, *supra* note 45.

⁴⁹ *Capitol Police Investigate Threats to Reid Amid Bundy Battle*, GREENWIRE, April 29, 2014 <http://www.eenews.net/greenwire/stories/1059998621>; Phil Taylor, *With Death Threats, Nev. Conflict Highlights Dangerous Side of Public Land Management*, GREENWIRE, April 17, 2014 <http://www.eenews.net/greenwire/stories/1059998078>; *Federal Worker Harassed at Gunpoint on Utah Highway*, GREENWIRE, May 8, 2014, <http://www.eenews.net/greenwire/stories/1059999230>.

⁵⁰ United States v Bundy, 1998 U.S. Dist. LEXIS 23835, *12-13 (D. Nev. 1988).

⁵¹ *Id.* at *7-8.

lands as a “land grab,”⁵² claiming that he possess a “vested right” to graze cattle on the public domain.⁵³ These arguments evolved over the following fifteen years and by 2014 could be summarized as: the Nevada Constitution’s disclaimer of title to federal public lands carries no legal force; the Property Clause of the United States Constitution applies only to federal lands outside the state borders; the United States’ exercise of ownership over federal lands violates the Equal Footing Doctrine; and Nevada state law excuses his trespass.⁵⁴

The Bundy debacle demonstrates the danger of allowing misconceptions regarding ownership of public lands to continue. As the Department of Homeland Security explained:

[T]he belief among militia extremists that their threats and show of force against the BLM during the April Bunkerville standoff was a defining victory over government oppression is galvanizing some individuals — particularly militia extremists and violent lone offenders — to actively confront law enforcement officials, increasing the likelihood of violence. Additionally, this perceived success likely will embolden other militia extremists and like-minded lone offenders to attempt to replicate these confrontational tactics and force future armed standoffs with law enforcement and government officials during 2014.⁵⁵

On the heels of the Bunkerville fiasco, Phil Lyman, a County Commissioner from San Juan County, Utah organized an ATV ride up Recapture Canyon. Recapture Canyon, which includes public lands managed by the BLM, contains an unusually dense collection of Anasazi and Pueblo Indian sites dating back more than 2,000 years,⁵⁶ and was closed to vehicle access in 2007 because of

⁵² See Ted McDermott, *Freedom Fighter*, MISSOULA INDEPENDENT, June 12, 2014, available at <http://missoulanews.bigskypress.com/missoula/freedom-fighter/Content?oid=2054145>.

⁵³ *United States v Bundy*, 1998 U.S. Dist. LEXIS 23835, *2 (D. Nev. 1988).

⁵⁴ *United States v. Bundy*, 2013 WL 3463610, *2 (D. Nev. 2013).

⁵⁵ Dep’t of Homeland Sec., Intelligence Assessment, Domestic Violent Extremists Pose Increased Threat to Government Officials and Law Enforcement 1, July 22, 2014 (on file with author).

⁵⁶ Phil Taylor, *Utah Official Plans Illegal ATV Ride Through BLM Canyon*, GREENWIRE, April 15, 2014, <http://www.eenews.net/greenwire/stories/1059997933>.

damage to archaeological resources.⁵⁷ Commissioner Lyman relied on transfer rhetoric to justify the ride, questioning federal ownership and jurisdiction over the lands, and firing up an angry audience:

It's a freedom that's been taken without our consent. . . . We have power and jurisdiction to do things independent of BLM. . . . As we approach independence day, let us contemplate what it means to be free and what we are willing to do to ensure that our children and their children inherit a free and flourishing San Juan County. . . . Remember that our revolutionary forefathers did not declare war, they declared independence, the war was only a consequence.⁵⁸

The Recapture Canyon ride attracted many of the same anti-federal militants who flocked to Mr. Bundy's defense, and dozens of ATV enthusiasts descended on the canyon for the ride.⁵⁹ While Commissioner Lyman and a local blogger were convicted of conspiracy charges related to the ride,⁶⁰ those convictions only exacerbate tensions.

Frustrations turned violent when, in late 2014, militants descended on Burns, Oregon to protest the resentencing of two ranchers who had been convicted of arson after setting fire to public lands in order to destroy evidence of poaching.⁶¹ The district court had imposed sentences that were lighter than the required mandatory minimum sentence,⁶² the court of appeals ordered resentencing in accordance with federal sentencing guidelines, and the two men were sent back to prison.⁶³

Protests over resentencing quickly morphed into a broader protest over public land management, and a small armed splinter group seized control of the nearby Malheur Wildlife

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Phil Taylor, *BLM Pressured to Bring Illegal ATV Riders to Justice*, GREENWIRE, May 13, 2014, <http://www.eenews.net/greenwire/stories/1059999494>.

⁶⁰ Judgment in a Criminal Case, *United States v. Lyman*, 2:14-CR-470 (D. Utah Dec. 29, 2015).

⁶¹ Press Release, United States Attorney's Office, District of Oregon, Eastern Oregon Ranchers Convicted of Arson Resentenced to Five Years in Prison Oct. 7, 2015) (on file with authors).

⁶² *United States v. Hammond*, 742 F.3d 880, 881 (9th Cir. 2014).

⁶³ *Id.* at 884-85.

Refuge. The militants refused to leave until the imprisoned ranchers were released,⁶⁴ the refuge was handed over to adjacent private owners, the county was given control of the refuge, and ranchers were given unfettered rights to graze cattle on refuge lands.⁶⁵ The group's leader and spokesman Ammon Bundy "said the goal is to turn over federal land to local ranchers, loggers and miners."⁶⁶

Tensions escalated, the federal government closed nearby USFS and BLM offices because of threats and intimidation against federal employees,⁶⁷ and local schools were shuttered.⁶⁸ On January 26, 2016, law enforcement officers attempted to arrest eight of the militants as they drove to a public meeting about the occupation. A vehicle driven by one of the militants attempted to avoid a police roadblock. One of the armed militants then attempted to flee the vehicle, reached towards a weapon, and was shot and killed by Oregon State Patrol officers.⁶⁹

The Malheur occupiers, like transfer advocates, claim that the United States could not own

⁶⁴ The ranchers who had been convicted of arson quickly disavowed themselves from the militants, explaining that the militants did not speak for the ranchers. *Oregon Ranchers Reject Cliven Bundy Family Occupation*, CBS NEWS Jan. 3, 2016) available at <http://www.cbsnews.com/news/oregon-ranchers-reject-cliven-bundy-family-occupation/>.

⁶⁵ Les Zaitz, *Demands by Oregon Standoff Leaders Defy Logic and Law, Authorities Say*, THE OREGONIAN (Jan 23, 2016) available at http://www.oregonlive.com/oregon-standoff/2016/01/demands_by_oregon_refuge_occup.html.

⁶⁶ Les Zaitz, *Militia Takes Over Malheur National Wildlife Refuge Headquarters*, THE OREGONIAN (Jan. 2, 2016) available at http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/drama_in_burns_ends_with_quiet.html.

⁶⁷ Criminal Complaint at 6, U.S. v. Bundy et al., No. 3:16-mj-004-1 10-11 (D. Or. Jan. 16, 2016).

⁶⁸ Fedor Zarkhin, *Schools Near Oregon Standoff Site Reopen as Militant Occupation Continues*, THE OREGONIAN (Jan. 11, 2016) available at http://www.oregonlive.com/oregon-standoff/2016/01/burns-area_schools_reopen_as_a.html#incart_river_index_topics.

⁶⁹ Robbie DiMasio, *Oregon Standoff: Amon Bundy in Custody, 1 Dead*, THE OREGONIAN (Jan. 26, 2016) available at http://www.oregonlive.com/oregon-standoff/2016/01/oregon_standoff_ammon_bundy_re.html#incart_river_index_topics.

the refuge lands because the Constitution does not permit the federal government to “forever retain the majority of land within a state.”⁷⁰ Mr. Bundy also justified his actions as a legitimate means of bringing questions of federal constitutional authority before a court. Citing legal work commissioned by the State of Utah, Mr. Bundy contended that “there was a legitimate legal basis for challenging the constitutionality of federal land ownership,” and that lacking the almost \$14 million Utah anticipated to litigate these claims, Mr. Bundy “identified an alternative way to raise the legal challenge.”⁷¹ The tragic ending to the Malheur standoff reminds us of earlier warnings: a key danger of transfer rhetoric is in its ability to embolden those who feel disenfranchised to violent acts.⁷²

II. A Brief History of the Public Lands

A historic perspective regarding Western public lands is important because many “modern problems in public land law grow directly out of that historical legacy. These stem largely from the patchwork, haphazard character of federal disposal policies, and the sometimes dizzying patterns of land ownership that have resulted.”⁷³

A. Acquisition of the Public Domain

The manner of land acquisition, the way in which newly acquired territories were governed, and the rights that states secured when they were created out of federal territories, differ markedly between East and West. The differences between state and territorial governance are at the heart of “equal footing doctrine” considerations, which are addressed more deeply in section III. The

⁷⁰ Order Resolving Round One Motions on the Pleadings, *United States v. Bundy*, 3:16-CR-51 (D. Oregon, June 3, 2016). *See also*, Defendant Ammon Bundy’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, *United States v. Bundy*, No. 3:16-cr-00051 at 7 (D. Oregon May 9, 2016) ECF No. 527.

⁷¹ Defendant Ammon Bundy’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 21.

⁷² Peter D. Coppelman, *The Federal Government’s Response to the County Supremacy Movement*, 12 NAT. RES. & ENV’T 30 (1997).

⁷³ GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 147 (5th ed. 2002).

original thirteen states' title to land stems from the states' victory in the Revolutionary War.⁷⁴ The original thirteen states possessed undiminished territorial sovereignty until they agreed to form a central government and cede specified lands and powers to that government.⁷⁵

Cession to the federal government occurred because landlocked states feared that states with claims to the Western frontier would have disproportionate political and economic power.⁷⁶ By conveying their claims to the Western frontier to the federal government, states with expansive land claims overcame a fear that threatened the Union. The lands ceded to the federal government were conveyed subject to the expectation that the federal government would sell some lands to pay off the states' war debts — debts that the federal government assumed in return for the grants from the states.⁷⁷ New states would be created out of the Western frontier, with some lands passing out of federal ownership and fueling our westward expansion.⁷⁸

Farther West, Spain asserted title to much of the Southwest based on its conquest of North America's first inhabitants.⁷⁹ In 1821 Mexico won the Mexican War of Independence, gaining its

⁷⁴ See Definite Treaty of Peace, U.S.-Britain, Sept. 3, 1783, 1 Malloy 586 at art. I (1910).

See also, *Martin v. Waddell*, 41 U.S. 367, 410 (1842) (“when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.”).

⁷⁵ *Cummings v. Missouri*, 71 U.S. 277, 318-19 (1866).

⁷⁶ *See*, PAUL W. GATES, *HISTORY OF PUBIC LAND LAW DEVELOPMENT*, ch. III (1968).

⁷⁷ Michael C. Blumm & Oliver Jamin, *The Property Clause and its Discontent: Lessons from the Malheur Occupation* 43 *ECOLOGY L. Q.* __ (forthcoming 2017).

⁷⁸ *Id.*

⁷⁹ *Johnson v. McIntosh*, 21 U.S. 543, 545 (1821). *See also*, JOSEPH STORY, 1 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 2-3 (1833) (“There is no doubt, that the Indian tribes, inhabiting this continent at the time of its discovery, maintained a claim to the exclusive possession and occupancy of the territory within their respective limits, as sovereigns and absolute proprietors of the soil.”).

independence from Spain.⁸⁰ Mexico claimed title to most of the Southwest until 1848, when the Treaty of Guadalupe Hidalgo ended the Mexican-American War.⁸¹ In return for cessation of hostilities and \$15 million, Mexico conveyed to the United States title to approximately 336 million acres (525,000 square-miles) of land.⁸² Five years after ratification of the Treaty of Guadalupe Hidalgo, the United States purchased an additional 19 million acres (29,670 square-miles) from Mexico, establishing the border between the United States and Mexico that exists today.⁸³

The land obtained from Mexico was obtained with federal blood and treasure, and when Mexico transferred title to land, it transferred it to the federal government of the United States.⁸⁴ Similarly, all of Washington, Oregon, and Idaho, as well as portions of Montana and Wyoming, were acquired from Great Britain in 1846 as part of the Oregon Compromise.⁸⁵ The remainder of Montana, Wyoming, and a large portion of Colorado (among other states) were acquired from France in 1803, via the Louisiana Purchase.⁸⁶

Once this land was acquired by the federal government, Congress created federal territories and set forth the manner in which those territories would be governed.⁸⁷ As the Supreme Court

⁸⁰ Title was claimed based on the right of discovery. *Id.* at §§ 2, 6. Spain and Mexico signed the Treaty of Cordoba on August 24, 1821, ending the Mexican War of Independence. *See* TIMOTHY J. HENDERSON, THE MEXICAN WAR OF INDEPENDENCE 177-78 (2010).

⁸¹ Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, 9 Stat. 922 (1848) (hereinafter Guadalupe Hidalgo).

⁸² *Id.*

⁸³ *See* Gadsden Treaty, U.S.-Mex., Dec. 30, 1853, as amended and ratified at 10 Stat. 1031 (1854).

⁸⁴ Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848). *See also*, U.S. CONST. art. 2, § 2, cl. 2 (granting the power to enter into treaties with foreign powers exclusively to the federal government).

⁸⁵ Treaty with Great Britain, 9 Stat 869 (1846).

⁸⁶ Treaty Between the United States and the French Republic, 8 Stat. 200 (1803).

⁸⁷ *See e.g.* An act to establish a Territorial Government for Utah, 9 Stat. 453 (1850). *See also* United States v. Nye County, Nevada, 920 Fed. Supp. 1108, 1110 (D. Nev. 1996) (noting that lands were ceded to the United

explained recently, “U.S. Territories . . . are not sovereigns distinct from the United States.”⁸⁸ Rather, territories are subsidiary to the federal government, depending on the federal government for territorial powers of-self governance.⁸⁹ In the Western territories the Territorial Governor, Territorial Secretary, Territorial Supreme Court Justices, Territorial Attorney, and the Territorial Marshall were all federal appointees.⁹⁰ Territorial residents had the right to elect a “delegate” to represent them in the U.S. House of Representatives,⁹¹ but these delegates could not vote,⁹² and territorial residents did not have representation in the U.S. Senate.

Congress anticipated that territorial citizens would form governments of their own and become states.⁹³ This transition, however, was not self-effectuating.⁹⁴ Normally, Congress passed statehood enabling acts, territorial governments drafted a constitution in accordance with the statehood enabling acts, and eligible voters within the territory adopted the draft constitution. Once these steps were complete, Congress passed legislation admitting the latent state into the Union.⁹⁵

States).

⁸⁸ *Puerto Rico v. Sanchez Valle*, 579 U.S. ____, 136 S. Ct. 1863, 1866 (2016).

⁸⁹ *Id.*

⁹⁰ *See e.g.*, an act to establish a Territorial Government for Utah, 9 Stat. 453, 456 (1850).

⁹¹ *Id.* at 457.

⁹² An Act further to regulate the territories of the United States, and their electing delegates to Congress, 3 Stat. 363 (1817). *See also*, Christopher M. Davis, Congressional Research Service, Delegates to the U.S. Congress: History and Current Status 5 (Aug. 25, 2015) (discussing delegates under the Northwest Ordinance).

⁹³ *See e.g.*, An Ordinance for the Governor of the Territory of the United States north-west of the river Ohio, 1 Stat. 51 (1787) (indicating that territories with a free population of 60,000 could obtain statehood).

⁹⁴ Even Vermont, the first state admitted to the new Union, had to petition for and be granted statehood. *See*, An Act for the Admission of the State of Vermont to this Union, 1 Stat. 191 (1791).

⁹⁵ *See e.g.*, An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original states, and to make donations of public land to

Some territories had a more arduous path to statehood than others. Residents of the Utah Territory, for example, petitioned for statehood seven times before Congress passed the Utah Enabling Act.⁹⁶

Upon admission, newly minted states elected government officers, including a Governor, and representatives to the upper and lower houses of the state legislature.⁹⁷ Residents of the newly admitted states would also elect Senators and Representatives for the upcoming session of Congress.⁹⁸ In short, citizens of the new state would assume all the political rights and sovereignty afforded to residents of then existing states.

B. Federal Land Ownership

The TPLA does not assert that Utah held original title to the land at issue, but instead speaks of the federal government’s purported obligation to transfer title to federal public lands to the state. Pundits,⁹⁹ politicians,¹⁰⁰ and even some scholars,¹⁰¹ however, characterize the transfer movement as

such States, 25 Stat. 676 (1889) (hereinafter Montana and Washington Enabling Act).

⁹⁶ See generally, Stanley S. Ivins, *A Constitution for Utah*, XXV UTAH HISTORICAL QUARTERLY 95 (1957) (recounting Utah’s path to statehood), and JEAN BICKMORE- WHITE, *THE UTAH CONSTITUTION: A REFERENCE GUIDE* (1998).

⁹⁷ See e.g., Montana and Washington Enabling Act, 25 Stat. 676, 679 (1889).

⁹⁸ See e.g., *id.* at 683.

⁹⁹ See e.g., Ken Ivory on the Glen Beck Show (April 21, 2014) *available at* <https://www.youtube.com/watch?v=WD1l5zHV2Dk> (discussing how to “get the federal lands returned to the states”)

¹⁰⁰ *Id.* See also, comments of Senatorial candidate Champ Edmunds in, *U.S. Senate Candidates Differ on Public Land Philosophy*, BILLINGS GAZETTE, May 7, 2014, *available at* http://billingsgazette.com/news/opinion/guest/u-s-senate-candidates-differ-on-public-lands-philosophy/article_baff64c5-18ee-5425-95ea-0218c9533acc.html (“It’s time to return these lands to Montana so that we can manage our forests, protect private property, implement responsible and sustainable harvest programs, and reap the economic benefits that come from well-managed lands.”).

¹⁰¹ See Donald J. Kochan, *Public Lands and the Federal Government’s Compact-Based “Duty to Dispose”: A Case Study of Utah’s H.B. 148 — The Transfer of Public Lands Act*, 2013 B.Y.U. L. REV. 1,133 (claiming the federal government obtained the land at statehood), and Spencer Driscoll, Note, *Utah’s Enabling Act and Congress’s*

an effort to “take back” lands that once belonged to the state. Utah, however, did not exist as a state until 1896 when, following satisfaction of its enabling act obligations, it was proclaimed as such by President Grover Cleveland.¹⁰² As Supreme Court Justice Joseph Story explained:

As the general government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possess the power to govern what it has so acquired. The territory does not, when so acquired, become entitled to self government, and it is not subject to the jurisdiction of the State. It must, consequently, be under the dominion and jurisdiction of the Union, or it would be without any government at all.¹⁰³

President Buchanan pulled no punches about federal ownership and control of public lands when he ordered the army into Salt Lake City to quell secessionist efforts.

You have settled upon territory which lies geographically in the heart of the Union. The land you live upon was purchased by the United States and paid for out of their treasury. The proprietary right and title to it is in them, and not in you. Utah is bounded on every side by States and Territories whose people are true to the Union. It is absurd to believe that they will or can permit you to erect in their midst a government of your own, not only independent of the authority which they all acknowledge, but hostile to them and their interests.¹⁰⁴

While influential politicians have long recognized that states cannot “take back” that which was never theirs,¹⁰⁵ those who ignore history or seek political advantage from populist fervor can

Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement, 2012 B.Y.U. L. REV. 999 (same).

¹⁰² Presidential Proclamation of January 4, 1896, 29 Stat. 876 (1896).

¹⁰³ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1324 (1880). Justice Story reached the same conclusion in the first edition of his COMMENTARIES. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1318 (1833).

¹⁰⁴ Proclamation of the President of the United States to the People of Utah, CIS 974 S. Exec. Doc. No. 1/6 p. 69 (Oct, 23, 1858).

¹⁰⁵ Utah’s former Senator, Robert Bennett, penned an op-ed to this effect. Robert Bennett, ‘*Taking Back*’ *Federal Lands Unlikely*, DESERET NEWS (Feb. 17, 2014) 2014 WLNR 4345107 (“I don’t see merit in the argument that the federal government now has a legal obligation to give [Utah] ‘back’ something they never owned.”). *See also*, SCOTT M. MATHESON, OUT OF BALANCE 126 (1986) (former Utah Governor Matheson states that he thought earlier state efforts to seize federal land were legally flawed and unlikely to succeed.).

drown out more reasoned voices. Richard Lamm, former Governor of Colorado, distilled the situation nicely more than thirty years ago:

The West had no conceivable legal claim to land that had never been its own. Legally the West was wrong, but the questions it asked about its place on the public domain went far beyond legalities into shadowy areas of ethics and morality where answers did not come so easily. And in those areas western confusion and protest took on more validity.¹⁰⁶

C. Federal Authority Over Land Pursuant to the Property Clause

The federal government’s authority over the lands it acquired is also clear. The U.S. Constitution’s Property Clause states that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.”¹⁰⁷ As the Supreme Court explained, “[t]he term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States.”¹⁰⁸

Prior sagebrush rebels and some of today’s transfer advocates¹⁰⁹ contend that the Property Clause granted the federal government only the power to “dispose of” land, leaving the United

Utah’s former Attorney General described the state’s threats of TPLA driven litigation as “a quixotic lawsuit that stands no chance of success.” Paul Van Dam, *Op-Ed: Attorneys General Know What They’re Talking About on Public Lands*, Salt Lake Tribune (Oct. 14, 2016).

¹⁰⁶ RICHARD D. LAMM & MICHAEL MCCARTHY, *THE ANGRY WEST: A VULNERABLE LAND AND ITS FUTURE* 215 (1982). Former Utah Governor Scott Matheson concurred in his colleague’s assessment, stating that he had “little confidence in the legal arguments of the Sagebrush Rebels.” MATHESON, *supra* note 105 at 126 (1986).

¹⁰⁷ U.S. Const. art. IV, § 2.

¹⁰⁸ *United States v. Gratiot*, 39 U.S. 526, 537 (1840).

¹⁰⁹ Contemporary assertions are discussed in Report of the Public Lands Subcommittee Western Attorneys General Litigation Action Committee Conference of Western Attorneys General 4 (2016).

<https://wilderness.org/sites/default/files/CWAG%20Public%20Lands%20Subcommittee%20Report.pdf>

States without authority to retain lands in private ownership.¹¹⁰ While the TPLA does not adopt this position, this assertion is often heard from other transfer advocates.¹¹¹ The Property Clause’s power to “dispose of” property, however, is not an obligation to dispose of property because Congress has an “absolute right” to decide upon the disposition of federal land and “[n]o State legislation can interfere with this right or embarrass its exercise.”¹¹² The power to make decisions regarding disposition includes the power to forego disposition and retain property in federal ownership.¹¹³

More than a century ago, the Supreme Court repelled an attack on the nascent National Forest System, concluding that the federal government could retain public lands for broad national benefits, and that it could do so indefinitely. In *Light v. United States*,¹¹⁴ a Colorado resident who had been enjoined from grazing cattle on National Forest System lands attacked the injunction by arguing that Congress could not withdraw public lands from settlement absent state consent. The Court soundly rejected the argument, holding that the United States owns the public lands “and has made Congress the principal agent to dispose of property,” which includes the right to “sell or withhold [public lands] from sale.”¹¹⁵ As an owner and sovereign, “the United States can prohibit absolutely or fix terms on which its property can be used. As it can withhold or reserve the land it

¹¹⁰ See e.g., *United States v. Nye*, 920 F. Supp. 1108, 1117 (D. Nevada 1996) (discussing claim that the Constitution vests in Congress only the power to dispose of lands).

¹¹¹ Defendant Ammon Bundy’s Motion to Dismiss for Lack of Subject Matter Jurisdiction at 21, *United States v. Bundy*, No. 3:16-cr-00051 (D. Oregon May 9, 2016) ECF No. 527.

¹¹² *Gibson v. Chouteau*, 80 U.S. 92, 99 (1872) (upholding claim to land by a federal patent holder against a competing claim reliant on state law).

¹¹³ *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 336 (1936) (holding that where the United States holds title to a hydroelectric dam, all features incident to power generation and the electricity produced “constitutes property belonging to the United States,” and the Property Clause does not constrain Congress’s power to determine the terms of property dispossession).

¹¹⁴ 220 U.S. 523 (1911).

¹¹⁵ *Id.* at 536 (internal citations and quotations omitted).

can do so indefinitely.”¹¹⁶ Moreover, the United States holds the public lands “in trust for the people of the whole country,” not solely for the benefit of adjacent landowners.¹¹⁷

Light is but one chapter in a long line of cases holding that “inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe the conditions upon which others may obtain rights in them.”¹¹⁸ With respect to managing wildlife on federal public lands, a function normally ascribed to the states, the Supreme Court opined that “[t]he argument appears to be that Congress could obtain exclusive legislative jurisdiction over the public lands in the State only by state consent, and that in the absence of such consent Congress lacks the power to act contrary to state law. This argument is without merit.”¹¹⁹ The breadth of the Property Clause is beyond dispute, and the broad view of the federal government’s authority under the Property Clause comports with the intent of our nation’s founding fathers.¹²⁰

Indeed, attorneys for Utah and Wyoming appear to recognize the futility of the argument. In Utah, the Office of Legislative Research and General Counsel appended a review note to the initial draft of the TPLA, explaining that demanding transfer of title to the public lands to Utah, “would interfere with Congress’ power to dispose of public lands. Thus, that requirement, and any attempt

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 537.

¹¹⁸ *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917) (holding that the Enclave Clause does not require cession of state jurisdiction over federal lands and that the United States retains authority under the Property Clause).

¹¹⁹ *Kleppe v. New Mexico*, 426 U.S. 529, 541 (1976). According to Fischman & Williamson, *Kleppe* signals that the Supreme Court will rely primarily on the legislative process to determine the limits of the Property Clause of the U.S. Constitution. Fischman & Williamson, *supra* note 4.

¹²⁰ Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 16 (2001).

by Utah in the future to enforce the requirement, have a high probability of being declared unconstitutional.”¹²¹ The Office of the Wyoming Attorney General reached a similar conclusion, opining that “because the legal bases [sic] for Utah’s demands depend upon a repeatedly rejected reading of the United States Constitution and a strained interpretation of Utah’s statehood act, Utah’s claims will likely fail in court.”¹²²

More recently, the occupiers of the Malheur National Wildlife Refuge contended that the court lacked jurisdiction because “the Constitution does not permit the federal government to ‘forever retain the majority of land within a State’ and, thus, to exercise its current ownership over federal lands including the [Refuge].”¹²³ The court held otherwise, explaining that the federal government never relinquished title to the lands at issue, and that “‘Oregon never had any claim to sovereignty prior to its admission to the Union,’ and, therefore, ‘it had no basis to claim independence or ownership of land.’”¹²⁴ Since the land at issue remained U.S. property, the court then concluded that “the United States’ exercise of regulatory jurisdiction over the [refuge] is authorized by the Property Clause [of the U.S. Constitution], and, therefore, this Court has jurisdiction over the charged offenses that allegedly took place on the [refuge].”¹²⁵

With ownership of and control over the public domain securely in federal hands, Western

¹²¹ H.B. 148, 2012 Gen. Sess. (Utah). The legislative review note was appended to the introduced version of the bill and is available at: <http://le.utah.gov/~2012/bills/static/HB0148.html>.

¹²² Memorandum from Jeremiah I. Williamson, Assistant Attorney General, to Jeremiah L. Rieman, Natural Resource Policy Advisor, re: Utah Transfer of Public Lands Act 1 (May 4, 2012) (on file with author).

¹²³ *United States v. Bundy, et al.*, 3:16-cr-00051-BR, Order Resolving Round One Motions on the Pleadings 11 (D. Or. June 3, 2016).

¹²⁴ *Id.* at 14, quoting Office of the Attorney General, State of Oregon, Op. No. 8237, 48 Or. Op. Atty. Gen. 1, 1995 WL 400487, at *3 (Jul. 7, 1995).

¹²⁵ *United States v. Bundy, et al.*, 3:16-cr-00051-BR, Order Resolving Round One Motions on the Pleadings 15 (D. Or. June 3, 2016).

states can only claim the right to title to federal public lands by demonstrating a legal obligation requiring the federal government to convey public land to the states. Before turning to that issue we must first understand about how public lands have been treated over time.

D. Federal Disposal of the Public Domain

The federal government encouraged westward expansion by selling or granting land to homesteaders, miners, ranchers, railroads, and others, conveying over 512 million acres (over 800,000 square-miles) of land into private ownership.¹²⁶ The federal government made similarly expansive grants to the new states. Upon statehood, all Western states were granted the right to title to specified federal lands. Granted lands could be leased or sold by the states, generating revenue to support purposes such as funding public schools and universities, hospitals, and construction of a state capitol.¹²⁷ Statehood grants were made to each of the eleven contiguous Western States and ranged from 2.7 million acres in Arizona to 12.4 million acres in New Mexico.¹²⁸ See Table 1.

State	Public Schools	Public Buildings	Colleges & Universities	Other	Total
Arizona	8,093,156	100,000	396,000	1,900,000	10,489,156
California	5,534,293	6,400	196,080	2,693,965	8,430,738
Colorado	3,685,618	32,000	137,680	578,080	4,433,378
Idaho	2,963,698	32,000	186,080	482,187	3,663,965
Montana	5,198,258	182,000	186,080	463,120	6,029,458
Nevada	2,061,967	12,800	136,080	512,800	2,723,647
New Mexico	8,711,324	132,000	562,702	3,040,000	12,446,026
Oregon	3,399,360	6,400	136,080	3,543,402	7,085,242
Utah	5,844,196	64,000	356,080	1,150,000	7,414,276
Washington	2,376,391	132,000	136,080	400,000	3,044,471
Wyoming	3,472,872	107,000	136,080	532,480	4,248,432
Total	51,341,133	806,600	2,565,022	15,296,034	70,008,789

¹²⁶ BUREAU OF LAND MGMT. DEP'T. OF THE INTERIOR, PUBLIC LAND STATISTICS 2015, 5 (2106).

¹²⁷ See e.g., An Act to Enable the people of Utah to form a constitution and State government, and to be admitted to the Union on an equal footing with the original states, 28 Stat. 107, 109-10 (1894) (hereinafter the Utah Enabling Act).

¹²⁸ GATES, *supra* note 76 at 804-05.

Table 1 -- Federal Land Grants to States¹²⁹

Even under modern policies dictating that “public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest,”¹³⁰ the BLM still managed to dispose of over 24 million acres of land between 1990 and 2010 — more land than the entire state of Indiana.¹³¹

E. Federal Retention of the Public Domain

While federal land policy long-favored disposal, it is clear that disposal was always balanced against by federal land retention policies. It is also true that disposal was limited by the low economic value of some lands that were available to miners, loggers, and homesteaders.

The federal government has a long history of retaining land in federal ownership. Beginning in 1785, Congress reserved to the federal government four sections of land in each township; plus one section to support the maintenance of schools in that township, “a certain proportion equal to one seventh of all the land surveyed [] to be distributed to the late continental army,” and a one-third interest in gold, silver, lead, and copper found on federal land.¹³² Since at least 1786, the federal

¹²⁹ *Id.* at App. C.

¹³⁰ 43 U.S.C. § 1710(a)(1) (2012).

¹³¹ ROSS W. GORTE ET AL., CONG. RES. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 16 (2012). Congress also continues to dispose of public land when doing so is in the public interest. *See e.g.*, Pub. L. No. 112-138 (2012) (granting land to the town of Alta, Utah), Pub. L. No. 106-460 (2000) (granting land to the Landusky, Montana School District), and Pub. L. No. 103-346 (granting land to the City of Imperial Beach, California).

¹³² CURTIS H. LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS WITHIN THE PUBLIC LAND STATES AND TERRITORIES AND GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN 36 (1897). *See also*, An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territories, May 20, 1785 *available at* <https://www.loc.gov/resource/bdsdcc.11201/?st=gallery>.

government has set aside portions of the public domain as a homeland for Native Americans.¹³³ In 1796 Congress reserved to the federal government salt springs and adjacent lands.¹³⁴ Withdrawals for what would become National Parks began as early as 1832.¹³⁵ Yellowstone National Park was set aside on March 1, 1872.¹³⁶ In 1891, Presidents were authorized to withdraw National Forests from disposal,¹³⁷ leading to reservations of millions of additional acres of land. In 1920, the Mineral Leasing Act directed that hydrocarbons and other valuable minerals be retained in federal ownership and available for development only through government issued leases.¹³⁸ In 1934 Congress enacted the Taylor Grazing Act,¹³⁹ effectively withdrawing “all public lands within the exterior boundaries of such a proposed grazing district from all forms of entry and settlement.”¹⁴⁰

Furthermore, as the Office of the Idaho Attorney General recently opined, the disparity in

¹³³ See Treaty with the Choctaw, 7 Stat. 21 (1786) (allocating lands “within the limits of the United States of America” and which are “under protection of the United States of America” to the Choctaw Nation). Prior to ratification of the U.S. Constitution and formation of a unified federal government, individual colonies set aside land for Native Americans, so federal reservation policy is an extension of even older colonial policies.

¹³⁴ An Act providing for the Sale of the Lands of the United States in the territory northwest of the river Ohio, and above the mouth of the Kentucky river, 1 Stat. 464, 466 (1796).

¹³⁵ An Act authorizing the governor of the territory of Arkansas to lease the salt springs in said territory, and for other purposes, 4 Stat. 505 (1832) (withdrawn lands would become Hot Springs National Park).

¹³⁶ An Act to set apart a certain Tract of Land lying near the Head-waters of the Yellowstone River as a public park, 17 Stat. 32-33 (1872).

¹³⁷ Withdrawals to create forest reserves, which later became national forests, occurred under authority granted by An act to repeal timber-culture laws, and for other purposes, 26 Stat. 1095, 1102-03 (1891).

¹³⁸ An Act To promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain, 41 Stat 437-51 (1920) (codified as amended at 43 U.S.C. §§ 181-287 (2012)).

¹³⁹ An Act To stop injury to the grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent on the public range, and for other purposes, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. §§ 315-315r (2012) (hereinafter the Taylor Grazing Act).

¹⁴⁰ 43 U.S.C. § 315 (2012).

federal land ownership is at least partly attributable to “the fact that many of the lands in Idaho were not suitable for homesteading.”¹⁴¹ Between 1822 and 1884 the federal government made almost 408 million acres of public land available for sale,¹⁴² only forty-four percent of which was sold.¹⁴³ As of 1905, there were still almost 450 million acres of the United States that remained unreserved and open to settlement.¹⁴⁴ Of these acres, over 418 million acres were in the eleven contiguous Western states.¹⁴⁵ The lands that remained were the most difficult to earn a living off of, as settlers selected the best and most valuable lands first.¹⁴⁶

The federal government tried to give additional public land to the states, but many states refused. In 1932 President Hoover convened a committee to investigate turning over the public domain to the states. While Congress drafted legislation giving public lands to the states,¹⁴⁷ those bills died for lack of Western support.¹⁴⁸ States were reluctant to acquire the public domain because the proposed grants excluded sub-surface minerals, and states feared that if they accepted the land they would lose federal reclamation funds, mineral revenue, and highway funds while incurring

¹⁴¹ Letter from Steven W. Stract, Assistant Attorney General, to Representative Ilana Rubel, re: House Bill 582, Idaho Multiple Uses Sustained Yield Act 2 (March 14, 2016) (on file with author). As the letter correctly notes, the shift in federal policy from disposal to reservation was also a factor.

¹⁴² GATES, *supra* note 76 at 802.

¹⁴³ *Id.* at 802.

¹⁴⁴ *Id.* at 502.

¹⁴⁵ REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, 59th Cong. 1st Sess., H. Doc. 4958 5/2, 383 (1905).

¹⁴⁶ Gary M. Anderson & Dolores T. Martin, *The Public Domain and Nineteenth Century Transfer Policy*, 6 CATO J. 905, 910 (1987).

¹⁴⁷ See S. 17, 72nd Cong., 1st Sess. (1932), S. 2272, 72nd Cong., 2d Sess. (1932), and S. 4060, 72nd Cong., 2d Sess. (1932).

¹⁴⁸ Don B. Colton, *Control of the Public Domain: A National or State Function?*, N.Y. TIMES, Apr. 10, 1932, pp. 1, 11 (“if I sense general Western sentiment correctly, and I have had an excellent opportunity to observe it, the West is not in favor of such legislation.”).

increasing administrative costs.¹⁴⁹

Physical realities also played an important role in Western settlement. Average annual precipitation in Boise, Idaho, and Salt Lake City, Utah, for example, average just 11.6 and 18.6 inches respectively. By comparison, annual precipitation in Springfield, Missouri and Columbia, South Carolina average 45.5 and 44.3 inches annually.¹⁵⁰ It was no surprise then that federal programs like those set forth in the Homestead Act failed in the West.

[T]he provisions of the Homestead Act were totally inapplicable to arid-region conditions. A 160-acre tract was much too small for grazing — the only practicable use to which the land could be put without irrigation. Acquisition and improvement of land for irrigation were not possible without expenditures of capital which were infinitely beyond the means of the homesteader. . . . [Similarly, t]he Desert Land Act of 1877 permitted one, upon a small payment, to acquire up to 640 acres of arid land, provided he would irrigate it — a virtual impossibility.¹⁵¹

Even in fertile river valleys, rapid snowmelt could cause devastating floods, and rugged topography combined with the cost of reservoir and irrigation system development to slow development. Until the 1920s and the birth of large federal irrigation projects, much of the Intermountain West was simply too dry for productive homesteading and agriculture.¹⁵² Ironically, while these federal

¹⁴⁹ UTAH CONST. DEF. COUNCIL, REPORT ON UTAH'S TRANSFER OF PUBLIC LANDS ACT H.B. 148, 17-19 (2012) (hereinafter CDC REPORT) (quoting George Dern, then Governor of Utah).

¹⁵⁰ See usclimatedata.com.

¹⁵¹ 4 WATER & WATER RIGHTS 41.02 (Amy K. Kelley, ed. 3d ed. 2016) (internal citations omitted).

¹⁵² Groundwater development was even more problematic, with limited groundwater development occurring in the Southwest or the High Plains until the 1930s and '40s, when the combination of high capacity pumps and rural electrification made widespread groundwater development feasible. S.A. Leake et al., U.S. Geological Survey, *Ground-Water Resources for the Future, Desert Basins of the Southwest* (no date) available at pubs.usgs.gov/fs/0086-00/report.pdf (discussing groundwater development in Arizona), and Steven L. Rhodes and Samuel E. Wheeler, *Rural Electrification and Irrigation in the U.S. High Plains*, 12 J. RURAL STUDIES 311 (1996) (noting that in the 1930s rural electrification “played a central role in the development of the High Plains agricultural economy . . . by delivering energy to well pumps that made large-scale irrigation farming possible.”).

irrigation projects made the Intermountain West more habitable,¹⁵³ they also brought with them the large federal work force that some Westerners now criticize.¹⁵⁴

Disposal laws applied equally across the country, but the Western landscape was simply less hospitable to settlers. To this day, land ownership reflects these realities: on average, Western counties with more arable land have a higher percentage of land in private ownership than counties where arable land are in short supply.¹⁵⁵

III. Legal Arguments for Public Land Disposal

Arguments in favor of transferring the public domain to the states are of either a legal or policy nature, though the latter are often used to convince the public of the merit of the former. As the legal and policy arguments for a public land transfer suggest different remedies, litigation for the former and legislation for the latter, sections III and IV of this article treats them as separate.

Making sense of the TPLA's legal claims is complicated by odd timing — the act was passed before the legal theories behind it were developed fully (or at least expressed publicly). While the TPLA demands that the United States give 31.2 million acres of land to Utah, weak claims to title and strong enabling act disclaimers have forced transfer advocates to pivot towards demanding public land “disposal,” potentially to a broader suite of recipients. Both the TPLA and the evolving legal theory are addressed here.

Legal arguments underpinning the TPLA and its progeny invariably tie back to federal legislation setting forth the conditions residents of federal territories were required to meet if they

¹⁵³ See Paul W. Gates, *The Intermountain West Against Itself*, *supra* note 4 at 227 (explaining that states could not have funded large irrigation projects and that reclamation therefore needed to be a federal endeavor).

¹⁵⁴ Robert L. Glicksman, *supra* note 4 at 662-63.

¹⁵⁵ See Paul M. Jakus et al., *Western Public Lands and the Fiscal Implications of a Transfer to States*, 34 LAND ECON. ____ (forthcoming 2017) (finding a statistically significant relationship between the amount of private land ownership in a county and the quality of land that was available for disposal).

were to form states and join the Union. Statehood enabling acts, for example, guarantee that new states would be admitted on an “equal footing” with previously admitted states, which some contend requires conveying land out of federal ownership. Enabling acts also generally granted states a percentage of the proceeds of public land sales, and discuss “extinguishing” title to certain lands, language that some interpret as demanding public land disposal.

A. Equal Footing / Equal Sovereignty

The equal footing doctrine holds that “all states are admitted to the Union with the same attributes of sovereignty (i.e., on an equal footing) as the original 13 states.”¹⁵⁶ The Utah Enabling Act, like acts enabling admission of other Western States, explicitly guaranteed that Utah would be admitted on an equal footing with the existing states.¹⁵⁷

The equal footing doctrine traces its roots to the Supreme Court’s opinion in *Pollard v.*

¹⁵⁶ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999).

¹⁵⁷ *See* Utah Enabling Act, 28 Stat. 107-12 § 4 (1894). *See also*, An Act To enable the people of New Mexico to form a constitution and state government and be admitted to the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States, 36 Stat. 557, 561 (1910) (hereinafter New Mexico and Arizona Enabling Act); An act to provide for the admission of the State of Wyoming into the Union, and for other purposes, 26 Stat. 222, 222 (1890) (hereinafter Wyoming Enabling Act); An act to provide for the admission of the State of Idaho into the Union, 26 Stat. 215 (1890) (hereinafter Idaho enabling Act); Montana and Washington Enabling Act 25 Stat. 676, 679 (1889); An act to enable the people of Colorado to form a constitution and State government, and for the admission of said State into the Union on an equal footing with the original states, 18 Stat. 474 (1875) (hereinafter Colorado Enabling Act); An Act 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, 13 Stat. 30, 30 (1864) (hereinafter Nevada Enabling Act); AN Act for Admission of Oregon into the Union, 11 Stat. 383, 383 (1859) (hereinafter Oregon Enabling Act); An Act for the Admission of the State of California into the Union, 9 Stat. 452 (1850) (hereinafter California Enabling Act).

Hagan,¹⁵⁸ which involved competing claims to title to submerged lands. Georgia, as one of the original thirteen states, obtained title to the land at issue following the Revolutionary War,¹⁵⁹ and ceded title to the lands at issue to the federal government. Upon Alabama’s admission to the Union the federal government granted the disputed land to Alabama, retaining all navigable water as “public highways.” The dispute turned on whether this provision reserved land title in the federal government. Since the original states held title to submerged lands as an attribute of sovereignty stemming from their victory in the Revolutionary War, and new states were admitted on an equal footing with the original states, the Court held that Alabama was entitled to the submerged lands.¹⁶⁰

In Utah and other Western states, far more land is federal owned. Ownership matters both because of the control it implies, and because federal lands are exempt from state and local taxes.¹⁶¹ Thus, transfer proponents argue, continued federal ownership deprives states of control as well as the tax base needed to fuel economic growth.¹⁶² Federal lands also cannot be condemned by the state which, they contend, deprives states of a critical tool needed for community growth and self-

¹⁵⁸ 44 U.S. 212 (1845).

¹⁵⁹ *See* Definite Treaty of Peace, U.S.-Britain, Sept. 3, 1783, 1 Malloy 586 at art. I (1910). *See also*, *Martin v. Waddell*, 41 U.S. 367, 410 (1842) (“when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.”).

¹⁶⁰ *Pollard v. Hagan*, 44 U.S. 212, 230 (1845).

¹⁶¹ As a condition on admission into the United States, western states also agreed that federal property was nontaxable. *See e.g.*, *Utah Enabling Act*, 28 Stat. 107, 108 (1894). *See also*, *United States v. State Tax Comm’n*, 412 U.S. 363 (1973) (holding that federal lands cannot be subjected to local taxing authority).

¹⁶² Davallier Law Group, *Legal Analysis of the Legal Consulting Services Team Prepared for the Utah Commission for the Stewardship of Public Lands*, ____ (2015). But see section ____, *infra* for a discussion of federal payments to states intended to compensate states for revenue foregone because of federal land ownership.

governance.¹⁶³ Together, transfer advocates argue, these ills make Western states second class states and sub-equal sovereigns. It follows then, according to transfer advocates, that the federal government must dispose of almost all of the remaining public domain, as it did east of the Mississippi River, in order to assure that Western states obtain a level of sovereignty on par with their Eastern peers.¹⁶⁴ The equal footing doctrine and theories of equal sovereignty, however, cannot be contorted to compel this conclusion.

First, the equal footing doctrine simply does not apply to dry land.¹⁶⁵ Second, the equal footing doctrine pertains to political rights and sovereignty rather than economic status or condition.¹⁶⁶ As the Supreme Court explains:

The ‘equal footing’ clause has long been held to refer to political rights and to sovereignty. It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. . . . Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.¹⁶⁷

A factually analogous case out of Nevada is illustrative, as it addresses the equal footing doctrine as well as other popular pro-transfer arguments.

In the 1996 case of *United States v. Gardner*,¹⁶⁸ the Gardners held a permit to graze cattle on National Forest System lands. The USFS suspended the Gardners’ permit following a wildfire, providing time for vegetation to reestablish. The Gardners resumed grazing prematurely, ignoring an

¹⁶³ Davallier Law Group, *supra* note 163 at 62-72.

¹⁶⁴ *Id.* at 55-99.

¹⁶⁵ *Scott v. Lattig*, 227 U.S. 229, 244 (1913).

¹⁶⁶ *See United States v. Texas*, 339 U.S. 707, 716 (1950).

¹⁶⁷ *Id.*

¹⁶⁸ 107 F.3d 1314 (9th Cir. 1996).

order to remove their cattle and pay fees for unauthorized grazing. The United States sued for damages to the range and to enjoin the Gardners from further grazing. The Gardners contended, among other things, that under the equal footing doctrine, “a new state must possess the same powers of sovereignty and jurisdiction as did the original thirteen states upon admission to the Union . . . [so] Nevada must have ‘paramount title and eminent domain of all lands within its boundaries’ to satisfy the Equal Footing Doctrine.”¹⁶⁹

The Ninth Circuit Court of Appeals found the Gardners’ arguments unavailing, reiterating the Supreme Court’s holding that the equal footing doctrine “applies to political rights and sovereignty, not the economic characteristics of the states.”¹⁷⁰ The doctrine is not intended to “eradicate all diversity among states but rather to establish equality among the states with regards to political standing and sovereignty.”¹⁷¹ Accordingly, the equal footing doctrine cannot be used to force the federal government to extinguish title to federal public lands just because few such lands now exist outside of the Western United States.

There is no question that Western lands came into the United States as federal territory.¹⁷² It is equally clear that under the Property Clause of the U.S. Constitution, which Utah concedes is the “supreme law of the land,”¹⁷³ Congress has an “absolute right” to decide upon the disposition of federal land.¹⁷⁴ “[I]nclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe the conditions upon which others

¹⁶⁹ *Id.* at 1318.

¹⁷⁰ *Id.* at 1319.

¹⁷¹ *Id.* (citing *United States v. Texas*, 339 U.S. 707, 716 (1950)).

¹⁷² *See e.g.*, the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848) (ending the Mexican-American War and vesting title to what is now Utah in the federal government of the United States).

¹⁷³ Utah Const. art. I, § 3.

¹⁷⁴ *Gibson v. Chouteau*, 80 U.S. 92, 99 (1872) (upholding claim to land by a federal patent holder against a competing claim reliant on state law).

may obtain rights in them.”¹⁷⁵ Congressional authority to prescribe management requirements applicable to federal lands arises from the United States Constitution, which predates every enabling act, and grants Congress power to place limits on disposal of federal lands to all present and future states. Indeed, the equal footing doctrine does not prevent Congress from placing limits on a state via a statehood enabling act, provided that Congress has authority to place those limits on states that already have been admitted.¹⁷⁶

What the equal footing doctrine does do is guarantee Western states equivalent political rights and sovereignty — and that is precisely what Western states obtained at statehood. As residents of federal territories, Westerners were on a decidedly unequal footing, as they were unable to elect their governor, judges, or other high officials.¹⁷⁷ They also lacked voting representations in Congress.¹⁷⁸ Admission to the Union guaranteed Westerners equal treatment under the law.

The promise contained in the equal footing doctrine has been fulfilled, and while there is no doubt that differences in condition exist, those differences cannot be spun into an entitlement to the public domain. As, the Office of the Attorney General for the State of Idaho recognizes, that equal footing doctrine based claims to the public domain have “no support in the law,”¹⁷⁹ and as the Conference of Western Attorneys General recently concluded:

Court precedents . . . provide little support for the proposition that the principles of equal footing or equal sovereignty may compel transfer of public lands to the western states. The Court has been given ample opportunity to apply such principles to public lands but, when given the opportunity to do so, it has repeatedly

¹⁷⁵ *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917) (holding that the Enclave Clause does not require cession of state jurisdiction over federal lands and that the United States retains authority under the Property Clause).

¹⁷⁶ *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998).

¹⁷⁷ *See supra*, notes 87 through 98 and accompanying text.

¹⁷⁸ *Id.*

¹⁷⁹ Letter from Steven W. Strack, Deputy Attorney General to Representative Ilana Rubel, re: House Bill 582, Idaho Multiple Use Sustained Yield Act 2 (March 14, 2016) (on file with author).

distinguished property issues as independent from the ‘limiting or qualifying of political rights and obligations’ that may trigger additional scrutiny under equal sovereignty principles.¹⁸⁰

B. Enclave Clause Claims

The “Enclave Clause” of the U.S. Constitution grants Congress the power to “exercise exclusive Legislation in all Cases whatsoever over [the District of Columbia] and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.”¹⁸¹ Some transfer backers contend that purchase with state legislative consent is the only way in which the federal government can legitimately acquire and retain property, and in 2012, the Utah Legislature enacted a joint resolution stating that because of the Enclave Clause, “the federal government is only constitutionally authorized to exercise jurisdiction over and above bare right and title over lands that are ‘purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”¹⁸² That is simply not the case.

Indeed, the federal government purchased almost 530 million acres (over 23 percent of the total land area of the U.S.) from France via the Louisiana Purchase, over 378 million acres via the Treaty with Russia for the Purchase of Alaska, as well as hundreds of millions of additional acres from Great Britain, Mexico, and Spain.¹⁸³ This land was acquired pursuant to the federal government’s treaty making power,¹⁸⁴ and is managed pursuant to the Property Clause of the U.S.

¹⁸⁰ Conference of Western Attorneys General, *supra* note 109 at 47.

¹⁸¹ U.S. Const. art. I, § 8, cl. 17.

¹⁸² *See e.g.*, H.J. Res. 3, 2012 Gen. Sess. (Utah 2012).

¹⁸³ PUBLIC LAND STATISTICS 2015, *supra* note 126 at 3.

¹⁸⁴ U.S. Const. art. II, § 2, cl. 2.

Constitution.¹⁸⁵ As the Supreme Court long ago explained:

[S]ince the adoption of the constitution, [the federal government has] . . . , by cession from foreign countries, come into the ownership of a territory still larger, lying between the Mississippi river and the Pacific ocean, and out of these territories several states have been formed and admitted into the Union. The proprietorship of the United States in large tracts of land within these states has remained after their admission. There has been, therefore, no necessity for them to purchase or to condemn lands within those states, for forts, arsenals, and other public buildings, unless they had disposed of what they afterwards needed. Having the title, they have usually reserved certain portions of their lands from sale or other disposition, for the uses of the government.¹⁸⁶

The attorneys general of eleven of twelve Western states concur, concluding that “the clear weight of relevant decisions by the United States Supreme Court is to the effect that ownership of the public lands by the federal government is not limited to those purposes set forth in the Enclave Clause.”¹⁸⁷

C. The Extinguish Provision

Some also contend that statehood enabling acts promise to “extinguish” title to the public domain — a promise breached by the federal government and remedied by either giving the land to the states or by other means of disposal. History casts doubt on their interpretation.

In return for statehood and land grants, Utah agreed to disclaim right and title to additional federal public lands. The statutory disclaimer of title to all other federal lands was incorporated into the Utah Constitution and states:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States.¹⁸⁸

¹⁸⁵ U.S. Const. art. IV, § 3, cl. 2.

¹⁸⁶ *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 532 (1885).

¹⁸⁷ Council of Western Attorneys General, *supra* note 109 at 21.

¹⁸⁸ Utah Enabling Act, 28 Stat. 107, 108 (1894). The language in the Utah Constitution is substantively

Similar language is also found in the Arizona, Colorado, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, and Washington state enabling acts.¹⁸⁹

Those contending that enabling acts obligates the federal government to dispose of public lands claim “that until the title thereto shall have been *extinguished* by the United State, the same shall be and remain subject to the disposition of the United States” obligates the Federal government to dispose of federal public lands.¹⁹⁰ They then argue that the state’s disclaimer of the right to additional land is inoperative because the federal government breached its obligation to dispose of those lands.¹⁹¹ Nothing could be further from the truth.

Legislation must be interpreted in light of congressional intent,¹⁹² and historic context and events.¹⁹³ When enabling acts speak of disclaiming title “until the title thereto shall have been extinguished by the United States,” Congress was referring to ongoing efforts to extinguish American Indian land claims. The House of Representatives confirmed its intent in its report on the Utah Enabling Act:

The convention shall also provide that the proposed State of Utah shall forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and all lands lying within the limits of the State owned or held by any Indian or Indian tribes, *and until the Indian title shall have been extinguished by the United States, such Indian reservation shall be and remain subject to the disposition of the United*

equivalent. *See* UTAH CONST. art. III.

¹⁸⁹ The Idaho and Wyoming enabling acts are slightly different, stating that they “shall not be entitled to any further or other grants of land for any purpose other than as expressly provided in this act.” Idaho Enabling Act, 26 Stat. 215, 217 (1890) and Wyoming Enabling Act, 26 Stat. 222, 224 (1890).

¹⁹⁰ Kochan, *supra* note 101 at 1154 (quoting the Utah Enabling Act (emphasis added)).

¹⁹¹ *Id.*

¹⁹² *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) (“Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.”).

¹⁹³ *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

States.¹⁹⁴

The Senate agreed with the House’s assessment of the intention behind this clause¹⁹⁵ — a clause that apparently generated little controversy even if the language in the House Report and that in the enabling act differ slightly. In subsequently admitting Arizona and New Mexico to the Union, Congress resolved any further question of intent, confirming that “absolute jurisdiction and control” remain with Congress “until the title of such *Indian or Indian Tribes* shall have been extinguished.”¹⁹⁶

The rush to end Indian land ownership occurred because an influx of returning Civil War veterans swelled demand for land. Efforts to remove Indians from lands desired by white settlers and to settle Indians upon reservations proved insufficient to keep up with the demand for land. “There was no place left to remove the Indian, and there was little sympathy for the preservation of a way of life that left farmlands unturned, coal unmined, and timber uncut. Policymakers had determined that the old hunter way and new industrial way could not coexist.”¹⁹⁷

Accordingly, Congress enacted the General Allotment Act of 1887 (the Dawes Act)¹⁹⁸ to address settlers’ demand for valuable farmland. Under the Dawes Act, tribal members surrendered their undivided interest in the tribally owned reservation in return for title to a parcel of land that was allotted to them individually.¹⁹⁹ Upon approval of the allotments, the Secretary of the Interior issued patents, which were held in trust for the benefit of Indian allottees²⁰⁰ until conclusion of the

¹⁹⁴ H.R. REP. NO. 53-162, at 18 (1893) (emphasis added).

¹⁹⁵ S. REP. NO. 53-414 (1894).

¹⁹⁶ New Mexico and Arizona Enabling Act, 36 Stat. 557, 569 (1910) (emphasis added).

¹⁹⁷ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2015).

¹⁹⁸ An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes, 24 Stat. 388-391 (1887) (hereinafter the Dawes Act).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

trust period, when title to the allotment transferred to individual Indians.²⁰¹ Additional lands were held in common by the tribe, and “surplus” land was subject to disposal,²⁰² meaning it was made available for white settlers.²⁰³

Allotment proved to be an effective tool in extinguishing Indian land ownership. “In 1887, when the Dawes Act provided for allotting tribal lands to individual Indians, the American Indian’s heritage in land totaled 138 million acres. Less than 50 years later, when the allotment policy was abandoned, only 48 million acres were left in Indian hands.”²⁰⁴

Notably, the Dawes Act became law in 1887. None of the pre-1887 statehood enabling acts refer to “extinguishing” title to lands. However, the enabling acts authorizing admission for eight of the next ten states, including Utah, all contain the extinguish provision.²⁰⁵

Reading “extinguishment” as referring to Indian land title also comports with Utah’s history. President Lincoln created the Uintah Valley Indian Reservation in 1861.²⁰⁶ In 1864 Congress

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ COHEN, *supra* note 197, § 1.04; *see also*, Marc Slonim, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 GONZ. L. REV. 517, 522 (2009).

²⁰⁴ COHEN, *supra* note 197, § 1.04.

²⁰⁵ Montana and Washington State Enabling Act, 25 Stat. 676 (1889) (also includes North Dakota and South Dakota); Utah Enabling Act, 28 Stat. 107 (1894); An Act To enable the people of Oklahoma and of the Indian Territory to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of New Mexico and of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States, 34 Stat. 267 (1906) (hereinafter Oklahoma Enabling Act); New Mexico and Arizona Enabling Act, 36 Stat. 557 (1910). Idaho and Wyoming were both admitted to the Union in 1890, after petitioning Congress for statehood; the acts recognizing the petitions and granting admission are therefore slightly different for the enabling acts of their sister states.

²⁰⁶ Exec. Order of October 3, 1861, *reprinted in* Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1157 (D. Utah 1981).

directed the Secretary of the Interior to “cause the several Indian reservations . . . in the territory of Utah, excepting the Uinta Valley, to be surveyed into tracts or lots, not exceeding eighty acres each . . . and upon completion of said surveys shall cause said tracts or lots to be sold.”²⁰⁷

In 1888, Congress modified the Uintah Valley Indian Reservation, declaring certain lands within the Reservation’s boundaries “to be the public lands of the United States and restored to the public lands.”²⁰⁸ “Restored” lands were to be “disposed of at public or private sale in the discretion of the Secretary of the Interior.”²⁰⁹

In 1894, Congress authorized allotment of the Uncompahgre Indians’ reservation,²¹⁰ “restoring” lands that were “unsuitable” for allotment to the public domain.²¹¹ After approval of the allotments, these public lands were opened to entry under homestead and mineral laws.²¹²

In 1897, Congress mandated the allotment and opening of the Uncompahgre Reservation.²¹³ No allotments were made before the land was opened to settlement, though Congress confirmed eighty-three allotments by separate legislation.²¹⁴ One year later, the Uncompahgre Reservation was opened to homesteaders and the remaining lands became part of the public domain. That same year the federal government began making allotment to Indians upon the Uintah Indian Reservation and

²⁰⁷ An Act to vacate and sell the present Indian Reservations in Utah Territory, and to settle the Indians of said Territory in the Uinta Valley, 13 Stat. 63 (1864).

²⁰⁸ An act to restore to the public domain a part of the Uintah Valley Indian Reservation, in the Territory of Utah, and for other purposes, 25 Stat. 157 (1888).

²⁰⁹ *Id.* at sec. 2.

²¹⁰ Act of August 15, 1894, sec. 20, 28 Stat. 286, 337-38.

²¹¹ *Id.*, sec. 20.

²¹² *Id.*, sec. 21.

²¹³ Act of June 7, 1897, ch. 3, 30 Stat. 62.

²¹⁴ *Ute Indian Tribe v. State of Utah* 716 F.2d 1298, 1306-07 (10th Cir. 1983).

to claiming all unallotted lands to the United States.²¹⁵

Similar laws, joint resolutions, and presidential proclamations were enacted in 1902,²¹⁶ 1903,²¹⁷ 1904,²¹⁸ and 1905,²¹⁹ removing portions of the Uintah Valley Indian Reservation for use as National Forests, reservoir sites, townsites, and opening reservation lands for homesteading and mineral withdrawals. From the initial reservation, 1,010,000 acres were added to what is now the Uinta National Forest; 2,100 acres were designated as townsites; 60,260 acres were set aside for reclamation and reservoir purposes; 2,140 acres were entered as mining claims; and 1,004,285 acres were opened to homestead entry.²²⁰

²¹⁵ Act of June 4, 1898, ch. 376, 30 Stat. 429.

²¹⁶ Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-64, *see also* 35 Cong. Rec. 6069 (1902) (authorizing the Secretary of the Interior, with consent of the Uintah and White River Bands, to allot the Uintah reservation prior to October 1, 1903, with “surplus” lands being restored to the public domain); Joint Resolution No. 31 of June 19, 1902, 32 Stat. 744 (1902).

²¹⁷ Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-98 (reiterating the 1902 Act’s direction to allot the Uintah reservation, subject to the consent of the Uintah and White River Bands, with surplus lands being restored to the public domain. The Uintah and White River Bands did not consent to allotment).

²¹⁸ Act of April 21, 1904, ch. 1402, 33 Stat. 189, 207-08 (extending the deadline for allotting the Uintah reservation, subject to the consent of the Uintah and White River Bands, as set forth in the 1902 and 1903 acts. The Uintah and White River Bands did not consent to allotment).

²¹⁹ Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70 (providing for inclusion of Uintah Valley Reservation timberlands in the Uintah Forest Reserve and authorizing allotment, by Presidential proclamation, without first obtaining the consent of the Uintah and White River bands, and opening certain unallotted lands under the homestead and town-site laws); Presidential Proclamation of July 14, 1905, 34 Stat. 3116 (providing for inclusion of Uintah Valley Reservation timberlands in the Uintah Forest Reserve); Presidential Proclamation of July 14, 1905, 34 Stat. 3119 (opening to entry all unallotted and unreserved lands; Presidential Proclamation of July 31, 1905, 34 Stat. 3139 (reserving and disposing of townsites); Presidential Proclamation of August 3, 1905, 34 Stat. 3141 (reserving reservoir sites); Presidential Proclamation of August 14, 1905, 34 Stat. 3142 (reserving and disposing of townsites).

²²⁰ ROBERT KEITER ET AL., LAND AND RESOURCE MANAGEMENT ISSUES RELEVANT TO DEPLOYING IN-SITU THERMAL TECHNOLOGIES, U.S. DEPARTMENT OF ENERGY TOPICAL REPORT 113 (2011).

In short, while Utah was pursuing statehood, the federal government was actively extinguishing Indian land ownership. Reservations were being reduced, allotments were being created with the expectation that federal trust obligations would be terminated, and that Indian land title would be extinguished. When the Utah Enabling Act mentions “extinguishing title” claims, this is precisely what Congress was referring to, and what Utah’s residents understood.

D. Denial of the Benefit of the Bargain

Utah also argues that disposal of unreserved public lands was intended to provide a source of revenue to federal, state, and local government, and that failure to dispose of federal lands denies state and local governments the benefit of the statehood bargain.²²¹ Because federal lands are not subject to state or local taxes,²²² and more economic development would presumably occur on these lands if they were transferred to the states, continued federal ownership leaves states without the promised benefits of the statehood bargain.

Under the Payment in Lieu of Taxes (PILT) program, local governments receive payments in accordance with their population and the amount of federally owned land within their borders.²²³ Similarly, the U.S. Forest Service pays twenty-five percent of its receipts to states in order to support roads and schools in the counties where national forests are located.²²⁴ During FY2014, PILT and

²²¹ UTAH CONST. DEF. COUNCIL, TOWARDS A BALANCED PUBLIC LANDS POLICY, A CASE STATEMENT FOR THE H.B. 148: UTAH’S TRANSFER OF PUBLIC LANDS ACT 3-4 (2012) (hereinafter CDC CASE STATEMENT).

²²² *E.g.*, *United States v. State Tax Comm’n of Mississippi*, 412 U.S. 363 (1973).

²²³ 31 U.S.C. § 6902(a)(1) (2012).

²²⁴ 16 U.S.C. § 500 (2012). *See also*, ROSS W. GORTE, KRISTINA ALEXANDER & M. LYNNE CORN, CONG. RES. SERV., FOREST SERVICE PAYMENTS TO COUNTIES — TITLE I OF THE FORESTS COUNTY REVENUES, SCHOOLS, AND JOBS ACT OF 2012: ISSUES FOR CONGRESS 1 (2012). Forest Service payments declined substantially during the 1990s, primarily due to reductions in timber sales. In the Secure Rural Schools and Community Self-Determination Act of 2000, Pub. L. 106-393, Congress addressed these declines by creating

Forest Service payments combined totaled over \$727 million, more than \$557 million of which went to the eleven contiguous Western States.²²⁵ The BLM and U.S. Fish and Wildlife Service also share a portion of non-mineral based receipts generated on public lands with state and local governments.²²⁶

In addition, the Mineral Leasing Act guarantees states 48-percent of the revenue derived from leased mineral development occurring on federal lands.²²⁷ Revenue is shared with the states to offset lost tax revenue and to support local schools and infrastructure,²²⁸ “giving priority to those subdivisions of the State socially or economically impacted by development of minerals . . . for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public services.”²²⁹ Total federal land payments to Utah and the eleven contiguous Western states, including Mineral Leasing Act payments, are summarized in Table 2 and totaled \$266 million and \$3.8 billion respectively in 2014.²³⁰ Payments to the eleven contiguous Western States accounted for 91.9 percent of all federal land payments to states.²³¹

States also impose severance taxes on commodities extracted from the land, including land owned by the federal government,²³² as well as property taxes on equipment associated with

an optional alternative payment system for National Forest System land, providing more predictable funding.

²²⁵ HEADWATERS ECON., A PROFILE OF FEDERAL LAND PAYMENTS, economic data produced with the Economic Profile System-Human Dimensions Toolkit *available at* <http://headwaterseconomics.org/tools/eps-hdt>.

²²⁶ See 43 U.S.C. § 315 (2012) (grazing) and 16 U.S.C. § 715s (2012) (wildlife refuges).

²²⁷ 30 U.S.C. §§ 191(a) and (b) (2012).

²²⁸ 58 Cong. Rec. H. 7769-71 (daily ed. Oct. 30, 1919) (debating the Mineral Leasing Act).

²²⁹ 30 U.S.C. § 191(a) (2012). Revenues due to the State of Alaska are subject to a different formula. This is an increase over the 37.5 percent allocated to states in the initial act. 41 Stat. 450 (1920); 30 U. S. C. § 191 (1970 ed.).

²³⁰ Headwaters Econ., *supra* note 226.

²³¹ *Id.*

²³² Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (upholding a thirty-percent state severance

commodity production or even the value of the commodities themselves.²³³ Severance taxes alone generated more than \$2.9 billion for the eleven contiguous Western states during 2014.²³⁴

It difficult to square \$3.8 billion in federal land payments and billions more in tax revenue from development on federal land with claims that states have been denied the benefit of the bargain.

tax on coal mined from federal land).

²³³ See e.g., UTAH CODE ANN. §§ 59-2-201(1)(a)(v) and (vi) (2014) (tax valuation of mining properties).

²³⁴ Cheryl Lee et al., U.S. Census Bureau, State Government Tax Collections Summary Report: 2014 7 (2015).

State	Severance Taxes	PILT Payments	Forest Service Payments	BLM Payments	USFWS Refuge Payments	Federal Mineral Royalties	Total
Arizona	\$26,190,000	\$34,497,956	\$14,233,459	\$958,851	\$120,122	\$17,821	\$76,044,399
California	\$38,686,000	\$45,298,833	\$33,699,465	\$(21,570)	\$936,682	\$104,096,729	\$222,734,825
Colorado	\$245,087,000	\$34,530,642	\$12,785,953	\$846,240	\$570,361	\$171,674,589	\$465,739,872
Idaho	\$6,004,000	\$28,579,192	\$25,971,900	\$1,652,554	\$49,934	\$5,552,387	\$67,815,971
Montana	\$305,614,000	\$28,809,242	\$20,355,836	\$3,739,764	\$261,651	\$38,164,481	\$397,250,588
Nevada	\$111,395,000	\$25,439,484	\$3,980,106	\$2,623,024	\$70,815	\$7,206,707	\$150,826,531
New Mexico	\$1,066,343,000	\$37,677,905	\$10,224,819	\$3,150,333	\$107,448	\$579,084,340	\$1,697,654,188
Oregon	\$23,424,000	\$17,680,594	\$65,324,385	\$39,020,429	\$288,005	\$287,703	\$146,048,540
Utah	\$155,743,000	\$37,903,225	\$10,099,253	\$1,346,364	\$57,662	\$216,648,402	\$421,953,649
Washington	\$41,950,000	\$19,272,636	\$19,972,728	\$49,762	\$538,396	\$4,799	\$81,830,271
Wyoming	\$883,025,000	\$27,143,411	\$4,179,360	\$2,373,515	\$414,164	\$2,060,219,563	\$2,978,238,038
Total	\$2,903,461,000	\$336,833,120	\$220,827,264	\$55,739,266	\$3,415,240	\$3,182,957,521	\$6,706,136,872

Table 2 -- Payments from Federal Lands and State Severance Taxes FY 2014²³⁵

²³⁵ Severance tax data from Lee et al., *supra* note 234 at 7. Federal land payments from Headwaters Economics, *supra* note 226.

E. A Disposal Obligation, if it Exists, Does Not Require Gifts to States

With its case in doubt the TPLA's demand that the federal government give Utah our public lands have evolved into a more general contention that the federal government is obligated to dispose of the public domain.

Statehood enabling acts specifically granted land to states for multiple purposes and required states to disclaim all other claims to land. In Utah's case, the federal government gave the newly-minted state land to support: "common schools,"²³⁶ "university purposes,"²³⁷ an agricultural college,²³⁸ a school for miners,²³⁹ a normal school,²⁴⁰ a reform school,²⁴¹ an "institution for the blind,"²⁴² an "insane asylum,"²⁴³ a "deaf and dumb asylum,"²⁴⁴ a miners hospital,²⁴⁵ to support construction of the state capital,²⁴⁶ and to fund construction of irrigation reservoirs.²⁴⁷ By enumerating these purposes Congress made clear that intended to grant land for these purposes and no others. And if any ambiguity remained, Congress made clear that the "State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act."²⁴⁸ To now interpret legislation as requiring disposal of almost the entire public domain would

²³⁶ Utah Enabling Act, 28 Stat. 107, 109 (1894).

²³⁷ *Id.* at 109.

²³⁸ *Id.*

²³⁹ *Id.* at 110.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 109.

²⁴⁷ *Id.* at 110.

²⁴⁸ *Id.*

make Congress' carefully enumerated grants superfluous.²⁴⁹

Accordingly, even if a duty to “extinguish” title or dispose of the public domain is held to exist, there is no guarantee that the land transferred out of federal ownership would be conveyed to the states, or that states would not be required to pay for any lands they do receive. If additional public land disposal is required, states like Utah may either need to pay for any land that they receive, or the land may need to go to non-state entities. Indeed, if the public domain is to be disposed of, one can argue that land should be sold at market value in order to maximize revenue generation for the American people.²⁵⁰ The breach alleged by transfer backers, in short, does not necessitate the remedy set forth in the TPLA.

F. “Shall” and the Promise to Sell the Public Domain?

The Utah Enabling Act, like all other Western enabling acts, states that “five percentum of the proceeds of the sale of public lands within the State, which *shall* be sold by the United States subsequent to admission of said State into the Union . . . shall be paid to the said state.”²⁵¹ Transfer backers contend that “shall” is a term of obligation,²⁵² relieving the federal government of discretion to retain the lands in question, and failure to dispose of enough of the public domain is a breach of

²⁴⁹ “It is, however, a fundamental principal of statutory construction that effect must be given, if possible, to every word, clause and sentence of a statute so that no part will be inoperative or superfluous, void or insignificant.” *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1362 (D.C. Cir. 1980) (internal citations omitted).

²⁵⁰ A recent bill proposed market value public land sales, citing the potential revenue raised by the sales and the need to pay down the national debt as justification for disposal. *See* H.R. 2657, 113th Cong. 2d Sess. § 1 (2013).

²⁵¹ Utah Enabling Act, 28 Stat. 107, 110 (1894) (emphasis added).

²⁵² Kochan, *supra* note 101 at 1157-58 (“This mandatory language removes from the federal government the choice to never dispose and instead retain such lands.”).

the federal government's duty to dispose.²⁵³

While it is true that “shall” is normally a term of obligation,²⁵⁴ two important exceptions exists. First, “shall” may be used to show “something that will take place or exist in the future.”²⁵⁵ For example, “we shall arrive tomorrow.” This definition of “shall” was included in legal dictionaries in use at the time of Utah's admission to the Union and therefore presumably understood by Congress.²⁵⁶ Second, at the time of the Utah Enabling Act's passage, “shall” was understood to have different meanings when used against the government and non-government entities. At the turn of the nineteenth century, “shall” meant “[m]ay, when used against a government; and must, when used under other circumstances.”²⁵⁷

Shall should be interpreted as it was understood at statehood, indicating that at some point in time the federal government may choose to sell portions of the public domain, and if it does so, five-percent of sale proceeds must go to the state. Texts purportedly obligating the sovereign to convey away lands are “strictly construed against the grantee.”²⁵⁸ To reinterpret statutes that have been in place for more than a century to create vast and poorly defined obligations requires clear indicia of congressional intent. That intent simply has not been established.

²⁵³ *Id.*

²⁵⁴ *See e.g.*, *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“The mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”).

²⁵⁵ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE. *See also* www.oxforddictionaries.com (defining shall as “expressing the future tense.”), www.merriam-webster.com (shall “used to say that something is expected to happen in the future.”).

²⁵⁶ 1 FREDERICK STROUD, *THE JUDICIAL DICTIONARY OF WORDS AND PHRASES JUDICIALLY INTERPRETED* 722 (photo. reprint 2003) (1890).

²⁵⁷ 1 ARTHUR ENGLISH, *A DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW* 728 (1899).

²⁵⁸ *Shivley v. Bowlby*, 152 U.S. 1, 10 (1894); *see also* *U.S. v. Alaska*, 521 U.S. 1, 55 (1997).

Another challenge posed by transfer backers strained interpretations “extinguish” and “shall” is that even assuming additional public land disposal is required, how much land must be disposed of remains a matter of congressional discretion. The Constitution grants Congress power over the public lands, and it is up to the federal government to decide how much of the public domain to dispose of.²⁵⁹ As noted earlier, the federal government began exempting portions of the public domain from disposal well before Western states joined the Union.²⁶⁰ Congress, when it did embrace disposal, determined the size of grants to states, settlers, and railroads. The federal government also dictated the size of reservations set aside to support Native Americans, as well as reservations creating our national forests, national parks, national monuments, and a host of other uses. Interpreting “shall” to create a vague obligation would open a Pandora’s Box of unintended consequences, creating new and nebulous obligations that threaten the very fabric of the American West.

G. Statute of Limitations

Finally, even if states do come up with a cognizable claim to the public domain, their long delay in making their case may prove fatal to their claims. The federal Quiet Title Act bars claims made more than twelve years “after the date the State received notice of the Federal claims to the lands.”²⁶¹ Knowledge of the alleged breach combined with “substantial improvements or substantial investments [by a federal lessee or right of way grantee,] or on which the United States has conducted substantial activities pursuant to a management plan such as range improvement, timber

²⁵⁹ See e.g., *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 336 (1936) (“It lies in the discretion of the Congress, acting in the public interest, to determine how much of [it’s] property it shall dispose.”).

²⁶⁰ See *supra*, section II.E.

²⁶¹ 28 U.S.C. § 2409a(i) (2012). The former Solicitor of the U.S. Department of the Interior identified statute of limitations concerns more than three decades ago, and transfer advocates have yet to offer a solid rebuttal. See John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, *supra* note 3 at 334.

harvest, tree planting, mineral activities, farming, wildlife habitat improvement, or other similar activities” would trigger the Quiet Title Act’s statute of limitations.²⁶² As the Tenth Circuit recently clarified:

The twelve-year period begins to run when the United States gives notice that it does not recognize (or will not continue to recognize) the legitimacy of a claimant’s use of federal lands. In other words, the period begins when the Quiet Title Act claimant knew or should have known of the existence of some assertion — some claim — by the government of an adverse right. The assertion by the United States need only be sufficient to put potential plaintiffs on notice of the need to timely bring a quiet title action to protect their rights. This is as an exceedingly light trigger for starting [the] twelve-year clock running. But it is a necessary one because we are required to strictly construe the twelve-year limitation period in favor of the United States.²⁶³

According to Utah, FLPMA’s 1976 enactment marked the end of public land disposal policies.²⁶⁴ Moreover, Utah concedes that “[a]t various points throughout the 20th century, Utah restated [it’s objections to public land retention] particularly upon the passage of FLPMA, wherein the policy shift to one of land retention and preservation became express federal law.”²⁶⁵ Utah, like her sister states, therefore knew or should have known of their claims by at least 1976.

For decades the BLM has also made a “substantial investment” in resource inventories and management planning. The BLM has also “conducted” such “substantial activities” as mineral leasing and development, range and habitat improvement projects, fire suppression, recreation management and more “pursuant to a management plan.”²⁶⁶ By at least 1983, the BLM had prepared either Resource Management Plans or Management Framework Plans for all BLM administered lands in Utah.²⁶⁷ By 2001, the Utah BLM had issued 4,762 rights-of-way across BLM managed lands,

²⁶² 28 U.S.C. § 2409a(i) (2012).

²⁶³ *San Juan Cnty. v. United States*, 754 F.3d 787, 793 (10th Cir. 2014) (internal citations omitted).

²⁶⁴ UTAH CONST. DEF. COUNCIL, REPORT ON UTAH’S TRANSFER OF PUBLIC LANDS ACT, H.B. 148 6 (2012).

²⁶⁵ *Id.*

²⁶⁶ 28 U.S.C. § 2409a(i) (2012).

²⁶⁷ *See*, Bureau of Land Mgmt., Dep’t. of the Interior, Planning, www.blm.gov/ut/st/en/prog/planning.html.

and 86,851 such rights-of-way nationwide.²⁶⁸ In 2001 the Utah BLM was also administering livestock grazing permits to 1,372 separate permittees that authorized grazing by over 1 million head of livestock.²⁶⁹ In 2001 the Utah BLM already had 881,319 acres in oil and gas production (over 11.4 million acres nationwide),²⁷⁰ and was administering eighteen recovery plans for twenty-two threatened, endangered, or ESA candidate species.²⁷¹ Taken together, these kinds of activities were likely to set in motion the twelve-year statute of limitations — particularly in light of the “‘exceedingly light’ trigger ‘for starting [the] twelve-year clock running.’”²⁷²

Characterizing inadequate disposal claims as a quasi-contractual breach of the enabling acts’ promise to dispose of the public domain does not resolve the problem.²⁷³ “[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”²⁷⁴ If, as the state appears to contend, FLPMA’s enactment marked the end of the disposal era and thereby breached the United States’ obligation to dispose of more of the public domain, states’ contract-based claims are also time-barred.

If the state overcomes the statute of limitations hurdle it must still contend with a laches defense.²⁷⁵ Laches, of course, “is defined as neglect to assert a right or claim which, taken together

²⁶⁸ BUREAU OF LAND MGMT., DEP’T. OF THE INTERIOR, PUBLIC LAND STATISTICS 2001 Table 3-4 (2012).

²⁶⁹ *Id.* at Table 3-7a.

²⁷⁰ *Id.* at Table 3-17.

²⁷¹ *Id.* at Table 5-10.

²⁷² *San Juan Cnty. v. U.S.*, 754 F.3d 787, 793 (10th Cir. 2014) (internal citations omitted).

²⁷³ One prominent scholar suggests that if ordinary contract rules apply, statehood enabling acts should be set aside because of a mutual mistake of key terms, causing states to revert to territorial status. John D; Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, *supra* note 3 at 325.

²⁷⁴ 28 U.S.C. § 2501(a) (2012).

²⁷⁵ Ironically, one of the first to identify laches as a possible barrier to state claims was also a proponent of state transfer efforts. Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PACIFIC L. J. 693, 704-05 (1981).

with lapse of time and other circumstances causing prejudice to the adverse party, operates as a bar in court of equity.”²⁷⁶ Given the longstanding nature of state grievances and the decades-long delay in filing suit, the United States appears to have a plausible laches defense.

Further complicating matters for Utah, its own state law directs that:

(1) The state may not bring an action against any person for or with respect to any real property . . . based on the state’s right or title to the real property, unless:

(a) the right of title to the property accrued within seven years before any action or other proceeding is commenced; or

(b) the state or those from whom it claims received all or a portion of the rents and profits from the real property within the immediately preceding seven years.

(2) The statute of limitations in this section runs from the date on which the state or those whom it claims received actual notice of facts giving rise to the action.²⁷⁷

That the federal government is a “person” under the statute is not in dispute.²⁷⁸ The question therefore becomes whether the state’s “right or title to the property accrued within seven years before any action or proceeding is commenced.”²⁷⁹ Rights to the lands in question “accrued” to the state as early as 1896 with Utah’s admission to the Union and no later than 1976, with enactment of FLPMA, as Utah concedes that FLPMA’s enactment gave notice that the federal government did

²⁷⁶ BLACK’S LAW DICTIONARY (Abridged 6th ed. 1991).

²⁷⁷ UTAH CODE ANN. § 78B-2-201 (2014). While state law also indicates that “[a]ctions against the federal government regarding real property and that are subject to the federal Quiet Title Act . . . do not expire under this chapter,” UTAH CODE ANN. § 78B-2-118 (2014), this provision is unlikely to apply because the state is not claiming ownership of the lands in question, but rather, asserting that the federal government was statutorily obligated to dispose of the land. The cause of action, therefore, is unlikely to proceed under the Quiet Title Act.

²⁷⁸ See *Abdo v. Reyes*, 91 F. Supp. 3d 1225 (D. Utah 2015) (remanding to state court rule on applicability of UTAH CODE ANN. § 78B-2-118 in a dispute over road rights of way involving the state and federal governments).

²⁷⁹ UTAH CODE ANN. § 78B-2-118(1) (2014).

not intend significant additional public land disposal.²⁸⁰

The next question is whether, under subpart (b), either the state or the federal government received rents or profits “from the real property within the immediately preceding seven years.”²⁸¹ For public lands subject to mineral leases, grazing leases, or other revenue generating uses, collection of rents or royalties would appear to prevent the tolling of this statute. However, which federal lands have generated revenue during the prior seven years is another question of fact that, when applied across a 31.2 million-acre landscape, will drive extensive fact-finding and litigation. There is also an irony that ranchers who refuse to pay grazing fees to operate on federal lands because they dispute federal land ownership may, in so doing, undermine state efforts to take back the public lands.²⁸²

Failure of legal theories aside, it would be a mistake to dismiss the transfer movement as sound and fury signifying nothing. The transfer movement taps into intense feelings, and the threat of litigation is an effective way of keeping land management policy in the public eye. Antagonism towards a federal government increasingly painted as out of touch and inefficient, and the promise of local control over public lands have become powerful rallying cries for a disenfranchised electorate. With an incoming administration that is fixated on deregulation, one can imagine a strategic shift from litigation to federal legislation transferring either ownership or control over the public domain to the states. The fight, in short, appears poised to take on a stronger policy focus.

IV. Policy Considerations and Unintended Consequences

The promise of “better” or “more efficient” management is an often-heard argument in favor of ceding public lands to the states. This section first discusses policy arguments for conveying

²⁸⁰ REPORT ON UTAH’S TRANSFER OF PUBLIC LANDS ACT, *supra* note 264 at 6.

²⁸¹ UTAH CODE ANN. § 78B-2-118(1)(b) has remained effectively unchanged since at least 1953. *See* UTAH CODE ANN. § 78-12-2 (1953).

²⁸² *See* the discussion of the Bundy family, *supra* section I.B.2.

the public domain to the states,²⁸³ and then turns to what state management policies may involve. While policy arguments about being a “better” manager argument do not create a legally cognizable right to wrest control of the public domain from the federal government, federal versus state management capacity is relevant to a broader discussion about public land management and legislative responses to the ills perceived by transfer advocates.

A. Policy and Economics

Some argue that land should be turned over to the states because they would be more efficient managers. The Property and Environment Research Center (PERC) points out that state land managers earned an average of \$14.51 for every dollar spent on trust land management compared to \$3.11 for every dollar spent by the BLM.²⁸⁴ State trust lands and federal multiple use lands, however, are managed for different purposes. State trust lands are managed to maximize revenue generation,²⁸⁵ while federal multiple use lands are managed for a broader suite of values, including non-revenue producing values such as wilderness, habitat, water quality, and scenery.²⁸⁶ “These differing management objectives, while not the only reason, is [sic] a significant reason for the differences in the cost to manage and the revenue generated from School Trust lands versus federal public lands.”²⁸⁷

Changing the manager without changing the management mandate is unlikely to produce more efficient or lower cost management. As the Cato Institute explains:

²⁸³ For an additional inventory of challenges inherent in devolving expansive public land to the states *see*, Michael C. Blumm, *The Case Against Transferring BLM Lands to the States*, 7 FORDHAM ENVTL L. J. 387 (1996).

²⁸⁴ HOLLY FRETWELL & SHAWN REGAN, DIVIDED LANDS: STATE VS. FEDERAL MANAGEMENT IN THE WEST 9 (2015) http://www.perc.org/sites/default/files/pdfs/150303_PERC_DividedLands.pdf.

²⁸⁵ *See e.g.* Utah Code Ann. § 53c-1-302(1)(b)(iii) (2014) (setting forth Utah’s trust land managers mandate to maximize revenue production).

²⁸⁶ *See e.g.*, 43 U.S.C. §§ 1701(a)(7) and 1702(c) (2012) (BLM’s multiple-use mandate).

²⁸⁷ STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING, Y2 Consultants iii (2016).

Examination of state land management policies indicates that state governments are no better managers than are federal bureaucrats. They are just as economically inefficient, ecologically short-sighted, and politically driven as their federal counterparts. . . . The fundamental problem is, not federal incompetence, but the political allocation of natural resources to favored constituencies, which subsidizes some at the expense of others and inflicts harm on both the ecological system and the economy as a whole. Transferring land to the states will only change the venue of those political manipulations.²⁸⁸

PERC similarly contends that states' hopes of generating more revenue depend on changing the management mandate, not the manager.²⁸⁹

A direct transfer of lands to the states under similar rules and regulations as federal lands is unlikely to result in lower costs or higher revenues. On the other hand, if the transferred lands are managed like state trust lands, their fiscal performance may improve, but land management practices and existing rights could be affected in important ways.²⁹⁰

Economists hired by the State of Utah concluded that “in Utah, state land management agencies do not enjoy a cost advantage over federal agencies.”²⁹¹ Similarly, a study commissioned by the state of Wyoming concluded that transferring management obligations to the state without also transferring ownership — and therefore authority to re-define management objectives — would do little address frustrations over public land management. The same federal statutory framework would apply and the “conflicts encountered would largely be the same for the state that exist under present management.”²⁹² In short, the mandate, not the manager, is the critical difference.

1. The Cost of Managing the Targeted Lands

Critically, much of the revenue the federal government collects from public lands is already

²⁸⁸ Randal O’Toole, *Should Congress Transfer Federal Lands to the States?* CATO INSTITUTE POLICY ANALYSIS NO. 276 (1997).

²⁸⁹ FRETWELL & REGAN, *supra* note 284 at 29-30.

²⁹⁰ *Id.* at 10.

²⁹¹ ECONOMIC ANALYSIS, *supra* note 7 at ___.

²⁹² STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING, *supra* note 287 at Viii.

directed back to the states where the development occur. It is therefore the marginal revenue, not gross revenue, that must exceed expenses if states are to avoid financial disaster.

Managing the targeted public lands within Utah is estimated to cost the state \$248.0 million annually.²⁹³ A transfer of federally managed public lands to the states would also reduce state revenue. States receive a share of the revenue derived from the use of public lands.²⁹⁴ Future state receipts from the targeted public lands depends on the amount of development that occurs, the price of the commodities produced, and the percent of revenues returned to the state. Over the past decade, mineral leasing (primarily oil, natural gas, and coal) produced, on average, ninety-three percent of all revenue from public lands in Utah.²⁹⁵ Over the last decade, total federal land revenue sharing payments to Utah (excluding PILT) averaged \$186.8 million annually.²⁹⁶ Additionally, PILT payments offset tax revenue foregone because federal lands are not subject to state and local taxes.²⁹⁷ Utah intends to offset lost PILT payments, which are routed to counties with federal lands, by paying equivalent sums to the counties.²⁹⁸ Over the last ten years, Utah's PILT payments averaged \$34.2 million annually.²⁹⁹

²⁹³ ECONOMIC ANALYSIS, *supra* note 7 at 150.

²⁹⁴ For example, under the federal Mineral Leasing Act, forty-eight percent of this revenue is distributed to the state where the development occurs. 30 U.S.C. §§ 191(a) and (b) (2012).

²⁹⁵ Headwaters Econ., unpublished data on file with author. *See also*, ECONOMIC ANALYSIS, *supra* note 7 at xxvi. Other federal laws require revenue sharing for non-mineral revenue and account for the remaining seven percent of revenue. *See e.g.*, 16 U.S.C. § 715s (2012) (wildlife refuges), and 43 U.S.C. § 315 (2012) (grazing).

²⁹⁶ Headwaters Econ., unpublished data on file with author. Mineral revenue sharing payments are highly volatile and in 2011 totaled \$289.2 million for Utah; four years later, mineral revenue sharing payments fell to \$116.2 million. *Id.*

²⁹⁷ 31 U.S.C. § 6902(a)(1) (2012).

²⁹⁸ UTAH CODE ANN. § 63J-4-606(2)(b)(vi)(E) (2014).

²⁹⁹ Headwaters Econ., unpublished data on file with author. PILT payments are stable compared to shared

Considered together, Utah would need to generate approximately \$469.0 million annually from the acquired lands to maintain current revenue distributions while offsetting new management expenses: \$248.0 million for new management costs, plus \$186.8 million to maintain ongoing programs that are currently funded by federal revenue sharing, plus \$34.2 million to offset lost PILT payments.

These costs occur against a backdrop of a multi-billion dollar maintenance backlog.³⁰⁰ Utah will inherit this deferred maintenance obligation if it acquires federal public lands. Even if Utah can dramatically increase revenue and cut expenses, increasing cash flow will take time. Where will Utah find the money to manage the public's lands during the intervening years? Will Utah forego resource management or seek to subsidize management by diverting revenue from another source? Will Utah be forced to sell lands or collateralize lands and bond against future revenue production, as proposed in Nevada?³⁰¹

2. Covering Management Costs

Whether Utah could generate sufficient additional revenue from the targeted lands depends on the amount of revenue generated from those lands and the percentage of any marginal increase in revenue generation that Utah could capture. Economists commissioned by the state found that

mineral royalties. Between 2008 and 2015, Utah's PILT annual receipts ranged between \$35.6 and \$38.0 million. In contrast, annual federal mineral revenue sharing payments ranged from \$116.2 to \$289.2 million. *Id.*

³⁰⁰ The Congressional Research Service estimated the Department of the Interior and USFS's total backlog at \$19.56 billion in 2010. CONG. RES. SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 20 (2012). Data are not broken out by state, but with over 31 million acres of land under BLM and USFS management, Utah's costs are likely to be substantial.

³⁰¹ A REPORT OF THE NEVADA LAND MGMT. TASK FORCE TO THE NEVADA INTERIM COMM. ON PUBLIC LANDS: CONG. TRANSFER OF PUBLIC LANDS TO THE STATE OF NEVADA PURSUANT TO A.B. 227 OF THE 2013 NEVADA LEGISLATIVE SESSION 3 (2014) (on file with author).

during 2013, total revenue from the public lands targeted by Utah totaled \$331.7 million.³⁰² With costs exceeding revenue by \$137.3 million annually, balancing the budget will pose a challenge.³⁰³

With ninety-three percent of revenue from the targeted public lands tied to mineral development,³⁰⁴ Utah's ability to break even links directly to future mineral production volumes, prices, and revenue sharing. On December 31, 2015, West Texas Intermediate (WTI) crude oil sold for \$37.13 per barrel, and natural gas sold for \$2.34 per thousand cubic feet.³⁰⁵ The U.S. Energy Information Administration (EIA) expects global oil inventories to continue to build, keeping downward pressure on oil prices.³⁰⁶ Accordingly, the EIA expects WTI crude oil prices to average \$38 per barrel in 2016, rising to \$47 per barrel in 2017.³⁰⁷ Natural gas prices are projected to rise to \$2.70 per thousand cubic feet in 2016 and \$3.31 in 2017.³⁰⁸

Utah crude oil sells at a discount compared to WTI. This discount fluctuates over time, averaging \$5.36 per barrel between January 1986 and July 2014.³⁰⁹ With WTI selling for around \$37

³⁰² ECONOMIC ANALYSIS, *supra* note 7 at 125.

³⁰³ A 2016 assessment by the Utah Office of Legislative Research and General Counsel estimated management costs at \$125 to \$275 million annually. The Office concluded that marginal revenue would increase by \$102 to \$127 million annually. Based on mid-range estimates, management costs would exceed new revenue by \$85.5 million annually. Utah Office of Legislative Research and General Council, Fiscal Note H.B. 276, 2016 Gen. Sess. (Utah 2016) <http://le.utah.gov/~2016/bills/static/HB0276.html>.

³⁰⁴ See *supra* note 295.

³⁰⁵ Oil and gas spot pricing data was obtained from the U.S. Energy Information Administration *at* http://www.eia.gov/dnav/pet/pet_pri_spt_s1_d.htm (oil) and *at* http://www.eia.gov/dnav/ng/ng_pri_fut_s1_d.htm (natural gas). Natural gas pricing was quoted per million BTUs, and converted to cubic feet based on 1,027 BTUs per cubic foot.

³⁰⁶ U.S. ENERGY INFO. ADMIN., SHORT-TERM ENERGY OUTLOOK 5 (Jan. 2016) *at* http://www.eia.gov/forecasts/steo/pdf/steo_full.pdf (last accessed Jan. 13, 2016).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at ___.

³⁰⁹ Bureau of Econ. and Bus. Res., Univ. of Utah, Oil & Gas Scenarios Frequently Asked Questions (2014)

per barrel and prices projected to increase by \$9 per barrel through 2017, it follows that Utah crude oil will sell for between \$32 and \$41 per barrel over the next two years.

Low hydrocarbon prices mean low mineral royalty revenue. Recent economic modeling considered a scenario under which oil sells for an average of \$62 per barrel (Utah First Purchase Price), natural gas for \$3.30 per thousand cubic feet, and Utah increases the projected number of wells drilled by fifteen percent.³¹⁰ Under this scenario, Utah could generate \$219 million in revenue during 2017 from the targeted lands.³¹¹ This assumes that Utah receives fifty percent of production royalties from existing wells, and all production royalties from wells drilled after transfer occurs.³¹² Revenues are projected to peak in 2022 at \$250 million and fall thereafter.³¹³ But, with Utah crude projected to sell for half to two-thirds the modeled price, Utah has almost no chance to generate the \$469 million needed to break even.

With Utah's ability to cover management costs linked to mineral development, one or more of five factors must change for Utah to break even: Utah must increase mineral development much faster than predicted; commodity prices must increase dramatically; Utah must increase production royalty rates; Utah must capture more than fifty percent of the revenue from existing production; or Utah must dramatically increase coal production. None of these scenarios appear likely.

First, increasing development by significantly more than fifteen percent annually appears

(on file with authors). Five dollars per barrel is a conservative estimate because the discount between January 2004 and July 2014 averaged \$10.26/bbl, and averaged approximately \$15 per barrel during the first half of 2014. *Id.*

³¹⁰ ECONOMIC ANALYSIS, *supra* note 7 at ___.

³¹¹ *Id.* at xxviii. This scenario is not a management recommendation, but rather, one possible outcome. We focus on this scenario because it represents what we believe to be the most likely scenario should the state succeed in its efforts.

³¹² *Id.* at xxvii.

³¹³ *Id.*

unlikely, as low prices will drive production down rather than up. Indeed, drilling rig counts have declined steadily, and precipitously, since December 2014, with just three drill rigs operating in Utah during December of 2015.³¹⁴ Second, commodity prices are not projected to increase, let alone at the dramatic rate needed to make development profitable.³¹⁵ Third, while Utah could conceivably increase the royalty rate on new mineral leases, royalty rates for existing leases are set by contract and cannot be changed unilaterally. Because it would take years for the state to begin generating significant revenue from new leases, increasing royalty rates would produce minimal short-term benefits. Fourth, the United States has historically retained mineral rights when conveying federal public lands to the states in their statehood enabling acts, and to do otherwise now would reverse longstanding precedent.³¹⁶ Finally, Utah could increase coal production, possibly targeting deposits within the Grand Staircase-Escalante National Monument, but with Utah's coal royalties averaging less than \$29 million annually,³¹⁷ production would need to increase many times over to fill the revenue gap. The ongoing transition from coal to natural gas for power production makes such an increase unlikely. Furthermore, it is hard to imagine the American public embracing coal production from within a National Monument.³¹⁸

³¹⁴ For drill rig counts, *see* Baker Hughes, North American Rig Count, <http://phx.corporate-ir.net/phoenix.zhtml?c=79687&p=irol-reports>.

³¹⁵ *See* SHORT-TERM ENERGY OUTLOOK, *supra* note 306.

³¹⁶ *See* section IV.A.4.

³¹⁷ ECONOMIC ANALYSIS, *supra* note 9 at xxvii.

³¹⁸ It is also noteworthy that when the Grand Staircase-Escalante National Monument was created, the federal government acquired all of Utah's trust land located within the Monument's borders. In return for the state trust lands and other state inholdings within national forests, Indian reservations, and National Park Service managed lands, Utah received title to federal public lands elsewhere within the state, substantial coal resources, and \$50 million dollars in cash. Pub. L. No. 105-225, 112 Stat. 3139, at § 2(15) (1998). Demanding the return of lands that the state voluntarily conveyed away, and for which the state already received compensation, hardly seems fair — unless the state intends to return the compensation it already received.

While TPLA promise not to sell off acquired lands and note that under the TPLA the state would receive only five percent of land sale proceeds,³¹⁹ Utah may have little choice but to consider mortgaging or selling land. As, the TPLA is not an agreement between the state and federal government, Utah could unilaterally amend the TPLA and attempt to retain a greater share of sale proceeds. Such an amendment and subsequent sales could create a sizeable new source of revenue, and a strong incentive to sell transferred lands, especially if Utah faces a significant revenue shortfall.

These kinds of fiscal challenges are not unique to Utah. In timber-rich Idaho, the cost of managing transferred public lands would exceed revenue under all but the most optimistic scenario.

According to a legislatively-commissioned report:

The total net cost to the State of Idaho for the [Idaho Department of Land] transfer proposal would range from a loss of \$111 million/year under the low-end scenario to a loss of \$60 million/year under the medium scenario to a gain of \$24 million/year under the high-end scenario. Only under the high-end scenario . . . would the state realize a gain after covering costs of wildfire, recreation, highway maintenance and payments to counties.³²⁰

Furthermore, “it would take [Idaho] 10-15 years to ramp up to timber harvests on the transferred lands to their full potential.”³²¹ Wyoming reached the same conclusion when considering management of the public domain: “Without significant changes to federal law, we would not anticipate any substantial gains in revenue production or additional sources of revenue with any transfer of management — certainly not enough to offset the enormous cost such an endeavor would likely entail.”³²²

Given the need to rapidly increase revenue production, states would likely increase fees

³¹⁹ UTAH CODE ANN. § 63L-6-103(2) (2014).

³²⁰ Jay O’Laughlin, Univ. of Idaho C. of Nat. Res., *Issue Brief: Would a Transfer of Federal Lands to the State of Idaho Make or Lose Money?* 5 (2014), at <http://www.uidaho.edu/cnr/pag/publications/pag-issue-briefs>.

³²¹ *Id.* at 4.

³²² STUDY ON MANAGEMENT OF PUBLIC LANDS IN WYOMING, Y2 Consultants xxi (2016).

charged to all public land users. Montana is finalizing its selection of lands promised to the state upon admission to the Union, a move that is anticipated to result in a “a 500 percent increase in grazing fees for any ranchers who lease BLM lands that get transferred to the state.”³²³ This increase is in line with the disparity in grazing fees found in other states. During 2016, the BLM charged \$2.11 per animal unit month (AUM)³²⁴ to graze livestock on federal land.³²⁵ By comparison, Colorado’s grazing fees average \$11.88 per AUM during 2014.³²⁶ Public land grazers, therefore, should expect their grazing fees to increase if state takeover efforts succeed, as states would likely increase revenue to create consistency with their ongoing grazing programs.

Skiers, snowboarders, and recreational cabin owners may fare similarly. Across the eleven contiguous Western states, there are 120 ski resorts operating on national forest lands, including iconic resorts like Vail and Sun Valley.³²⁷ The U.S. Forest Service also administers approximately

³²³ Brett French, *State, BLM Negotiate Land Transfer to Settle 127-Year-Old Debt*, BILLINGS GAZETTE (MT) (Oct. 20, 2016) (2016 WLNR 39052589). *See also* Laura Lundquist, *The Other Land Transfer Effort*, HIGH COUNTRY NEWS (Dec. 5, 2016) http://www.hcn.org/articles/states-receive-final-school-trust-lands-after-more-than-a-century?utm_source=WEBBER&utm_medium=mag (explaining in lieu selection and indicating that grazing fees may rise by a factor of ten).

³²⁴ An AUM is the amount of forage necessary to sustain one cow or its equivalent for one month. 43 C.F.R. § 4100.0-5 (2015).

³²⁵ Bureau of Land Mgmt., Dep’t. of the Interior, Instructional Memo. No. 2016-050, 2016 Grazing Fee, Surcharge Rates, and Penalty for Unauthorized Grazing Use (March 2, 2016) http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2016/IM_2016-050.print.html. This represents a twenty-five percent increase over 2015 rates.

³²⁶ Letter from Matthew A. Pollart, Field Operations Section Supervisor, Colorado State Board of Land Commissioners to State Land Board Lessees re: Changes to Standard Grazing Rates Effective April 1, 2014 (March 24, 2014), *at* <http://trustlands.state.co.us/NewsandMedia/Documents/AUM%20Equivalent%20Table%20and%202014%20Grazing%20Rate%20Increase%20Letter.pdf>.

³²⁷ Downhill Thrills: Skiing and Boarding in our National Forests, http://www.recreation.gov/marketing.do?goto=acm/Explore_Go_Lists/downhillthrills.htm. *See also*, 16

14,000 special use permits for recreational cabins and residences on forest lands.³²⁸ Presumably states that acquire public lands would honor existing ski area and recreation residence permit terms. The terms and conditions that states would impose upon new permits and permit renewal are uncertain, but may need to increase if states find themselves strapped for cash. Fee increases could directly impact resort operators, the millions of skiers and snowboarders who visit our national forests every winter, and thousands of cabin users.

Royalties for oil and gas production occurring on formerly public land would also likely increase. The USFS and BLM charge a 12.5-percent royalty on oil and natural gas production.³²⁹ Within the Intermountain West, states charge 16.67- to 25-percent production royalties.³³⁰ States would likely impose these higher rates on new production from transferred lands. Mineral lease renewals would also presumably prompt rate increases, bringing them into line with existing state leases and market conditions.

Hard rock mineral claimants face similar uncertainty. Federal mining laws allow entities to locate and stake a claim to certain minerals, and to develop those minerals without paying a royalty.³³¹ Claimants can retain rights to unpatented mineral claims indefinitely with only minimal

U.S.C. § 497b (2012) (National Forest Ski Area Permit Act).

³²⁸ FOREST SERV., U.S. DEP'T OF AGRIC., A GUIDE TO MAINTAINING THE HISTORIC CHARACTER OF YOUR FOREST SERVICE RECREATION RESIDENCE 1 (2014)

<http://www.fs.fed.us/eng/pubs/pdfpubs/pdf14232815/pdf14232815Pdpi100.pdf>.

³²⁹ 43 C.F.R. § 3103.3-1(a)(1) (2015).

³³⁰ CTR. FOR WESTERN PRIORITIES, A FAIR SHARE: THE CASE FOR UPDATING FEDERAL ROYALTIES 3 (2013). *See also* CONG. BUDGET OFF., OPTIONS FOR INCREASING FEDERAL INCOME FROM OIL AND NATURAL GAS ON FEDERAL LANDS 20 (2016) https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51421-oil_and_gas_options-2.pdf.

³³¹ 30 U.S.C. § 29 (2012).

financial outlays.³³² These claims dot the West, including lands targeted by transfer proponents. It is unclear how these rights would be impacted if public land is transferred to the states. States would presumably seek to convert claims into leases in order to capture revenue and bring management in line with programs regulating mining on state trust lands, which impose production royalties.³³³ How states would proceed and the implications for existing right holders are unclear.

3. Wildfire Cost and Policy

One cannot discuss public lands without addressing wildfires. Between 2002 and 2015 an average of more than 3.6 million acres burned annually across the eleven contiguous Western states. That average, however, belies tremendous annual variability. In 2004 just 854,772 acres burned across that entire eleven state area, yet on twelve separate occasions over that same period, wildfires in a single state consumed more than a million acres.

Within Utah, the USFS and the BLM annually spend an average of \$24.4 million³³⁴ and \$10.3 million³³⁵ respectively to suppress wildfires. These costs would presumably fall to Utah if public lands are transferred to the state.³³⁶ And again, averages mask tremendous year-to-year variability in acreage burned. Furthermore, both the total cost and cost per acre of fire suppression have

³³² 30 U.S.C. § 28 (2012).

³³³ See e.g., UTAH ADMIN. CODE r. 850-25-100 and -300 (2014) (requiring royalty payments on leased trust lands). As of 1996, all of the eleven contiguous Western states surveyed imposed royalties on hard rock mineral development occurring on state trust lands. Jon A. SOUDER & SALLY K. FAIRFAX, STATE TRUST LANDS: HISTORY, MANAGEMENT, & SUSTAINABLE USE 226 (1996).

³³⁴ Greg Zimmerman, Center for Western Priorities, The Wildfire Burden (2016) <https://medium.com/@WesternPriorities/the-wildfire-burden-f70570e5d9a4#.uma1511g8>.

³³⁵ *Preliminary Data*, provided by the Bureau of Economic and Business Research, University of Utah.

³³⁶ In contrast, the Department of Forestry, Fire & State Lands' total budget was less than \$17 million in 2012. STATE OF UTAH, BUDGET SUMMARY, FISCAL YEAR 2012, FISCAL YEAR 2011 SUPPLEMENTALS 118 (2011).

increased steadily over the past 20 years.

In a normal year, wildfire suppression may be a manageable burden. In a severe fire year or when the area at risk requires intensive and expensive suppression efforts (such as for fires near homes or critical infrastructure), unpredicted costs could severely strain state resources. The risk of a catastrophic wildfire cannot be overstated. Across the eleven contiguous Western States, there are over 1.9 million homes within the wildland-urban interface (WUI).³³⁷ Protection of private property within the WUI accounts for the lion's share of firefighting expenses,³³⁸ and would presumably become a state responsibility.

The promise of "active management" does change these realities. Utah is not using prescribed fire to reduce catastrophic fire risks on state lands, and there is no reason to believe that would change if it took over public lands. Between 2002 and 2013, prescribed fire accounted for only one percent of state lands consumed by fire; by comparison prescribed fire accounted for over twenty-seven percent of the USFS lands burned within Utah.³³⁹

"Salvaging" timber that has succumbed to mountain pine beetle does not offer a solution for most states as costs far more than the timber can be sold for. In Utah, for example, salvage sale costs average \$719 per acre but produce just \$8 per acre in revenue.³⁴⁰ Arizona, Colorado, Nevada, New Mexico, and Wyoming all fare similarly, with sale costs exceeding proceeds.³⁴¹

³³⁷ Headwaters Econ., Summary Wildfire Statistics, <http://headwaterseconomics.org/interactive/wui-development-and-wildfire-costs>.

³³⁸ OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REPORT, FOREST SERVICE LARGE FIRE SUPPRESSION COSTS 7 (2006).

³³⁹ Nat'l Interagency Fire Ctr., Historical Year-End Fire Statistics by State http://www.nifc.gov/fireInfo/fireInfo_statistics.html.

³⁴⁰ Jeffrey P. Prestemon et al., *An Economic Assessment of Mountain Pine Beetle Timber Salvage in the West* 28 W. J. APPLIED FORESTRY 143, 148 (2013).

³⁴¹ *Id.*

While transfer theory is grounded in a sincere belief that states would be better managers, the evidence simply does not support these claims. Asking the public to trust in states to do better in the absence of clear evidence of either plans or capacities is foolish.

4. Federal Mineral Reservations

Even if states succeed in establishing a duty to dispose of public lands, that duty is unlikely to extend to mineral lands. Absent mineral lands, states will have a very hard time covering anticipated management expenses.

The 1889 act authorizing Montana, North Dakota, South Dakota, and Washington state to join the Union provides that “all mineral lands shall be exempt from the grants made by this act.”³⁴² Similar provisions apply to Colorado,³⁴³ Idaho,³⁴⁴ Wyoming,³⁴⁵ New Mexico,³⁴⁶ and Arizona.³⁴⁷ Enabling acts for California, Oregon, and Utah did not include an explicit federal mineral reservation, but the U.S. Supreme Court long ago dispelled any notion that Congress intended to convey mineral lands to these states.

Ivanhoe Mining v. Keystone Consol. Mining Co. involved a dispute over ownership of a mining claim, with Keystone claiming that they received title to the land from the United States, while Ivanhoe claimed title from the state. The state’s claim of title derived from California’s statehood enabling act, which granted the state the right to title to certain enumerated lands. Despite the lack of an express mineral reservation in the enabling act, the Supreme Court held that “[m]ineral lands are, by the settled policy of the government, excluded from all grants; therefore the grant . . . of

³⁴² Montana and Washington Enabling Act, 25 Stat 676, 681 (1889).

³⁴³ Colorado Enabling Act, 18 Stat. 474, 476 (1875), as amended Apr. 2, 1884, c. 20, 23 Stat. 10.

³⁴⁴ Idaho Enabling Act, 26 Stat. 215, 217 (1890).

³⁴⁵ Wyoming Enabling Act, 26 Stat. 222, 224 (1890).

³⁴⁶ New Mexico and Arizona Enabling Act, 36 Stat. 557, 561 (1910).

³⁴⁷ *Id.* at 572.

public lands to the state of California for school purposes, was not intended to cover mineral lands.”³⁴⁸ The High Court reached the same conclusion in a case originating in Utah,³⁴⁹ and its holdings are consistent with administrative practice contemporaneous with Utah’s admission to the Union.³⁵⁰

It is also noteworthy that the express reservation contained in the Montana, North Dakota, South Dakota, Washington state, Colorado Idaho, Wyoming, New Mexico, and Arizona enabling acts all apply to “all mineral lands” without regard to the means of conveyance. To grant Utah lands that were expressly excluded from grants to her sister states would give Utah a unique advantage that is at odds with Utah’s insistence that must be placed on an equal footing with other states.

Legal barriers aside, it is worth considering the questions that would arise if the Supreme Court sets aside more than a century of settled law. The Supreme Court has interpreted the term “mineral,” which is not defined in statehood enabling acts, quite broadly. “[M]ineral lands include not merely metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.”³⁵¹ Once “minerals” are defined, the question becomes whether minerals are of sufficient quantity and quality to justify

³⁴⁸ *Ivanhoe Mining Co. v. Keystone Consol. Mining Co.*, 102 U.S. 167, 174-75 (1880).

³⁴⁹ *U.S. v. Sweet*, 245 U.S. 563 (1919).

³⁵⁰ In 1898, the General Land Office (GLO, the precursor agency to the BLM) recognized an implied reservation of minerals in section eight of the Utah Enabling Act precluding grants of mineral lands for universities. *Richter v. Utah*, 27 Pub. Lands Dec. 95 (1898). One year later the GLO recognized an implied reservation of minerals in section seven of the act, precluding grants of coal and mineral lands as part of the grant supporting construction of the state capitol. *State of Utah*, 29 Pub. Lands Dec. 69 (1899). Four years later, the GLO observed that “[i]t is settled law that a grant of school lands to a State [under section six of the act] does not carry lands known to be chiefly valuable for mineral at the time when the State’s right would attach, if at all.” *State of Utah*, 32 Pub. Lands Dec. 117 (1903), *see also*, *Mahogany No. 2 Lode Claim*, 33 Pub. Land Dec. 37 (1904).

³⁵¹ *Northern Pacific Railway Co. v. Soderberg*, 188 U.S. 526, 536-37 (1903).

classifying the lands as “mineral in character.” The reservations of mineral lands, “are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness, and to justify expenditure for its extraction.”³⁵² A leading treatise on mining law in effect at the time of the Utah’s admission to the Union summarizes the rules for determining the mineral character of land:

The mineral character of the land is established when it is shown to have upon or within it such a substance as — (a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or (b) Is classified as a mineral product in trade or commerce; or (c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts.³⁵³

In sum, the existence and extent of the federal reservation depends on both the nature and quantum of the mineral resource, and whether the value of those resources outweighs the value of the land for agricultural purposes.³⁵⁴ These are highly fact intensive and site-specific questions that the California Supreme Court summarized nicely 151 years ago when it said:

It is not easy in all cases to determine whether any given piece of land should be classed as mineral lands or otherwise. The question may depend upon many circumstances such as whether it is located in those regions generally recognized as mineral lands, or in a locality ordinarily regarded as agricultural in its character. Lands may contain the precious metals, but not in sufficient quantities to justify working them as mines, or make the locality generally valuable for mining purposes, while they are well adapted to agricultural or grazing pursuits; or they may be but poorly adapted to agricultural purposes, but rich in minerals; and there may be every gradation between the two extremes. There is, however, no certain, well defined, obvious boundary between the mineral lands and those that cannot be classed in that category. Perhaps the true criterion would be to consider whether upon the whole the lands appear to be better adapted to mining or other purposes. However that may be, in order to determine the question, it would, at all events, be necessary to know the condition and circumstances of the land itself, and of the immediate

³⁵² *Davis v. Wiebbold*, 139 U.S. 507, 519 (1891); *Deffebach v. Hawke*, 115 U.S. 392, 404 (1885).

³⁵³ LINDLEY, *supra* note 132 at § 98.

³⁵⁴ *Diamond Coal & Coke Co.*, 233 US at 239-40.

locality in which it is situated.³⁵⁵

Knowledge of coal, oil, and natural gas formations has been largely established, but knowledge of other minerals may be less well defined.³⁵⁶ Where mineral resources are known to exist but development has yet to occur, the question of whether the lands are indeed mineral in character will need resolution. That means that any state claim to potential mineral lands will necessitate extensive fact finding and litigation for each parcel claimed by the state. Such litigation would take decades to sort out.

B. Unintended Consequences

As we have seen, establishing a duty to dispose of the public domain would open a Pandora's Box of fact-intensive litigation. If transfer advocates succeed, Endangered Species Act (ESA)³⁵⁷ compliance would also become more complicated, access to what were previously public lands would be diminished as economic imperatives force states to increase revenue generation, and opportunities for the public to engage on the future management of our public lands would decline.

1. ESA Compliance³⁵⁸

Transferring land out of federal ownership will increase ESA compliance costs and shift the burden of ESA compliance to non-federal landowners. Increasing compliance costs could

³⁵⁵ Ah Yew v. Choate, 24 Cal. 562, 567-68 (1864).

³⁵⁶ With respect to coal and oil bearing lands, mineral classification may be based on facts creating a reasonable belief that the lands contain minerals, which can be established by inference from nearby geologic features. *Diamond Coal & Coke Co. v. U.S.*, 233 U.S. 236, 249 (1914) (inferring knowledge of coal from proximate geology and development activity). *See also*, 1 - ROCKY MTN. MINERAL L. FOUND., AMERICAN LAW OF MINING, 2D ED. § [12.02[4]] (LEXISNEXIS MATTHEW BENDER 2015).

³⁵⁷ 16 U.S.C. §§ 1531–1543 (2012).

³⁵⁸ The discussion on ESA compliance draws heavily from Ruple et al., *Shooting the Albatross: Why a State Takeover of Federal Public Lands Would Make Endangered Species Act Compliance More Difficult*, 39 ENVIRONS ENVTL. L. & POLICY J. 115 (2016).

discourage development — precisely what transfer backers are trying to avoid.

The ESA prohibits the “take” of listed animals, except when the take is authorized in a federal permit.³⁵⁹ “Take” includes “harm,” which is any act that actually kills or injures wildlife, including habitat modifications that significantly impair feeding or sheltering.³⁶⁰ An unauthorized take is punishable by imprisonment for up to one year, fines of up to \$50,000 per violation, or both.³⁶¹ One avoids ESA liability by complying with the Act’s procedural requirements.

Actions on federal land, requiring federal authorization, or receiving federal funding require federal agencies to consult with the U.S. Fish and Wildlife Service (FWS)³⁶² to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [designated critical] habitat.”³⁶³ If the proposed action is likely to adversely affect a listed species or its critical habitat, then the agency must submit a biological assessment to the FWS.³⁶⁴ The assessment “evaluate[s] the potential effects of the action” on listed species and that species’ critical habitat.³⁶⁵ After reviewing the assessment, the FWS prepares and issues a biological opinion addressing whether the proposed action is likely to jeopardize any listed species, and if so,

³⁵⁹ 16 U.S.C. § 1538(a)(1)(B) (2012). Section nine of the ESA provides lesser protections for listed plants. *Id.* at §1538(a)(2).

³⁶⁰ 50 C.F.R. § 222.102 (2015).

³⁶¹ *See* 16 U.S.C. §§ 1540(b) (2012) (criminal penalties), and 1540(a) (civil penalties).

³⁶² The FWS administers the ESA with respect to terrestrial plant and animal species; NOAA Fisheries administers the ESA with respect to marine and anadromous species. This article discusses only the FWS because, as it focuses on activities in the Intermountain West.

³⁶³ 15 U.S.C. § 1536(a)(2) (2012).

³⁶⁴ 50 C.F.R. § 402.14(c) (2015).

³⁶⁵ 50 C.F.R. § 402.12(a) (2015).

whether “reasonable and prudent alternatives” exist to avoid jeopardy.³⁶⁶

If the biological opinion concludes that jeopardy is unlikely and that there will not be an adverse modification of critical habitat, the FWS issues an incidental take statement (ITS).³⁶⁷ ITS compliance shields its holder and their agents from liability for the inadvertent taking of an ESA-listed species.³⁶⁸ Conversely, deviation from ITS terms and conditions may result in ITS revocation, or loss of the liability shield.³⁶⁹ Agencies must reinitiate consultation on an ITS if the proposed action is “modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.”³⁷⁰ When reinitiation of consultation is required, the biological opinion loses its validity, and the ITS no longer shields the agency from taking liability.³⁷¹

Actions lacking a federal nexus are still subject to the prohibition against harming a listed species, though the path to liability protection for an inadvertent take changes. Under section ten of the ESA, an incidental take permit (ITP) is available to parties undertaking otherwise lawful projects that lack a federal nexus and that might result in the unintended take of a listed species. To apply for an ITP, the proponent must prepare a Habitat Conservation Plan (HCP).³⁷²

ITP issuance is a federal action independent of the activity necessitating HCP development. The FWS must therefore comply with section seven and consult with itself on the impact of HCP issuance before granting the HCP. The FWS must also comply with NEPA independent of the

³⁶⁶ 16 U.S.C. § 1536(b)(3)(A) (2012).

³⁶⁷ 16 U.S.C. § 1536(b)(4) (2012). Incidental take is a take that results from, but is not for the purpose of, carrying out an otherwise lawful activity. 50 C.F.R. § 402.02 (2015).

³⁶⁸ 16 U.S.C. § 1536(b)(4)(C)(iv) (2012).

³⁶⁹ See 50 C.F.R. § 402.14 (2015); *Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001) (holding that a “take” under ITS noncompliance may result in civil and criminal liability).

³⁷⁰ 50 C.F.R. § 402.16(c) (2015).

³⁷¹ *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgt.*, 698 F.3d 1101, 1108 (9th Cir. 2012).

³⁷² HCP requirements are set forth at 16 U.S.C. §§ 1539(a)(2)(A)(i)-(iv) and 1539(a)(2)(B)(i)-(v) (2012).

analysis completed in association with the project for which the HCP was originally developed.³⁷³

Transferring public land from the federal government would eliminate the federal nexus, nullify existing section seven consultations, and invalidate associated ITSs.³⁷⁴ All activities on what were formerly federal lands that could “take” an ESA-listed species and which were formerly covered by an ITS, would need an HCP and ITP. Until both are approved, proponents could be liable for any inadvertent “take” their activities might cause.

The impact of developing HCPs to replace existing ITSs could be significant. In Utah, loss of a federal nexus could impact 3,240 wells that are currently producing oil or natural gas from areas known to contain a threatened or endangered species — 2,155 of these wells are on federal land targeted for transfer under the TPLA.³⁷⁵ As of November 10, 2015, there were also 972 active service wells (primarily disposal wells and wells used for secondary production) on federal lands containing a threatened or endangered species,³⁷⁶ all of which would need to revisit ESA compliance. There were also 1,103 wells in Utah in areas with known ESA species occurrences that were approved but where drilling had not commenced, plus an additional 36 pending Applications for a Permits to Drill in areas with known ESA species occurrences. For these and other future wells, operators and landowners would also need an HCP.

Wells on non-federal land could also be impacted. When the FWS consults on a project involving mixed federal and non-federal land it considers the entire action area, not just federally

³⁷³ 42 U.S.C. 4321-4370a (2012), *see* Christopher H.M. Carter, *A Dual Track for Incidental Takings: Reexamining Sections 7 and 10 of the Endangered Species Act*, 19 B.C. ENVTL. AFF. L. REV. 135, 161 (1991) (“By sanctioning [a HCP], the Secretary allows other parties to take actions that could significantly affect the quality of the environment.”).

³⁷⁴ *Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife*, 273 F.3d 1229, 1239 (9th Cir. 2001).

³⁷⁵ *Ruple et al.*, *supra* note 358 at ___.

³⁷⁶ *Id.* at ___.

owned land.³⁷⁷ Eliminating the federal nexus created by federal ownership could therefore invalidate ITS protection for oil and gas development on intermixed state, tribal, or privately owned land.

Notably, HCP permitting often takes two to three times longer to complete than section seven consultation, and HCP preparation can be quite expensive.³⁷⁸ If public lands are transferred out of federal control, the ESA compliance burden will increase, possibly impeding the economic development that transfer advocates seek.

2. Public Access

A management mandate emphasizing revenue generation, whether driven by ideology or fiscal necessity, would displace other users and increase access costs. Access to state trust land already involves substantial hidden costs, foreshadowing costs that are likely to arise if the transferred lands are managed with an eye towards revenue generation. The New Mexico Game Commission recently agreed to pay the New Mexico Land Office \$1 million for a one-year easement allowing hunters, anglers, and trapping access to state trust lands.³⁷⁹ Non-wildlife related access to New Mexico's state trust lands requires a \$25 annual recreational access permit for each hiker or recreator.³⁸⁰ During 2016, the Utah Division of Wildlife Resources paid \$775,664 to SITLA “for public access to school and institutional trust lands for hunting, fishing, trapping, and viewing of wildlife.”³⁸¹ Such recreation user fees are common throughout the West.³⁸²

³⁷⁷ 50 C.F.R. § 402.14(g)(1) (2015).

³⁷⁸ Ruple et al., *supra* note 358 at ___.

³⁷⁹ State of New Mexico, Comm’r of Public Lands, State Game Commission Easement 3 (Nov. 2015) (on file with author).

³⁸⁰ New Mexico State Land Office, Recreational Access, http://www.nmstatelands.org/Recreational_Access.aspx#RecreationalPermit.

³⁸¹ Memorandum of Agreement between the Utah School and Institutional Trust Lands Administration and the Utah Department of Natural Resources, Division of Wildlife Resources 1 (2007) (on file with author).

³⁸² State trust land managers in Colorado, Montana, Nebraska, New Mexico, Oklahoma, and Texas all either

Across the eleven contiguous Western States, over 27.5 million people visited developed recreation sites on BLM lands during 2014, and an additional 30.0 million engaged in dispersed recreation on BLM lands. See Table 3. Between 2008 and 2012, annual National Forest visitation in Utah, Nevada, southern Idaho, and southwestern Wyoming (USFS Region 4) averaged over 20.8 million, with over ninety-five percent of those visits occurring outside of congressionally designated Wilderness areas.³⁸³ Upwards of seventy-five percent of hunters utilize public lands in Montana, Nevada, New Mexico, Utah, and Wyoming.³⁸⁴ Emphasizing commodity production and revenue generation or increased application of access fees may impact these users.

State	Recreation Site Visits	Dispersed Recreation Visits	Anglers	Hunters	Wildlife Viewers
Arizona	2,260	1,097	637	269	1,566
California	3,966	4,020	1,674	394	6,733
Colorado	3,442	3,434	767	259	1,782
Idaho	2,671	3,359	447	246	558
Montana	1,689	3,337	267	150	402
Nevada	3,642	3,534	147	43	643
New Mexico	1,169	2,215	278	69	566
Oregon	3,662	4,309	638	196	1,440
Utah	3,469	3,401	414	193	717
Washington	--	--	938	219	2,168
Wyoming	1,557	1,316	303	140	518
Total	27,527	30,022	6,510	2,178	17,093

Table 3 -- Recreation on BLM Lands (FY 2014) ³⁸⁵
(in thousands)

limited access or required some form of payment to hunt, fish, or camp on state trust lands. SOUDER & FAIRFAX, *supra* note 333 at 271-73. Arizona, Washington, Louisiana, and Minnesota also impose recreation user fees. Western Lands and Communities, *at* <http://statetrustlands.org/current-issues/recreational-uses.html>.

³⁸³ U.S. FOREST SERV., DEP'T. OF AGRIC., NATIONAL VISITOR USE MONITORING RESULTS USDA FOREST SERVICE NATIONAL SUMMARY REPORT Table 2 (2013),

http://www.fs.fed.us/recreation/programs/nvum/2012%20National_Summary_Report_061413.pdf.

³⁸⁴ *Backcountry Hunters Anglers, Our Public Lands Not for Sale* 6 (2014), *at*

http://www.backcountryhunters.org/images/Public_Lands_Report.pdf.

³⁸⁵ BUREAU OF LAND MGMT. DEP'T OF THE INTERIOR, PUBLIC LAND STATISTICS 2014 187, 195 (2015).

Two examples from Utah foreshadow potential impacts on public access. In 2013, SITLA announced an agreement to lease 96,000 acres of trust land in the Book Cliff Mountains. The lessee, Anadarko Petroleum, would develop oil and natural gas from the tract, generating millions of dollars for trust beneficiaries.³⁸⁶ The development area, however, is home to prized mule deer and elk populations, and the site of an aggressive effort to recover Bonneville cutthroat trout.³⁸⁷ Utah’s Governor, members of Utah’s congressional delegation, and a host of sportsmens’ organizations — none of whom had an opportunity to provide input on the transaction — all opposed the lease.³⁸⁸ The SITLA Board, however, voted unanimously to proceed with the lease.³⁸⁹

Similarly, in 2005, SITLA offered to lease 356-acres of land near “Little Hole,” along the Green River. The parcel was put up for auction after a developer proposed to build a lodge at the site. Little Hole is a key recreation access point to this blue-ribbon trout stream, and also provides important winter habitat for deer and elk. Trout Unlimited, the Rocky Mountain Elk Foundation, and the Utah Division of Wildlife Resources all opposed the sale.³⁹⁰ Despite these objections, SITLA

³⁸⁶ Amy Joi O’Donoghue, *Is Oil Lease a Choice Between Schoolchildren and Hunters?* DESERET NEWS Aug. 27, 2013, at <http://www.deseretnews.com/article/865585338/Gov-Gary-Herbert-says-SITLA-decision-on-Book-Cliffs-lease-should-be-reconsidered.html>?

³⁸⁷ The states of Utah and Nevada both have in place conservation agreements for the Bonneville Cutthroat Trout that were significant factors in the FWS’s decision not to list the trout as either endangered or threatened under the ESA. *See* Fish and Wildlife Service, Dep’t. of the Interior, 12-Month Finding on a Petition to List the Bonneville Cutthroat Trout as Threatened or Endangered, 73 FED. REG. 52,235, 52,247 (Sept. 9, 2008).

³⁸⁸ Amy Joi O’Donoghue, *State School Board Votes in Favor of Oil and Gas Lease*, DESERET NEWS Sept. 6, 2013, at <http://www.deseretnews.com/article/865585960/State-School-Board-votes-in-favor-of-oil-and-gas-lease.html>?

³⁸⁹ *Id.*

³⁹⁰ Lezlee E. Whiting & Dustin Gardiner, *Plan Angers Anglers*, DESERET MORNING NEWS, July 5, 2006, 2006 WLNR 11556120.

auctioned off the property, forcing the Utah Division of Wildlife Resources to pay \$1.4 million to purchase the parcel, maintain public access, and prevent development.³⁹¹ State trust land development poses a similar risk to Grand Teton National Park, where Wyoming threatens to sell off inholdings within the Park unless the federal government purchases the land from the state.³⁹²

While these transactions exemplify efficient revenue generation, they also show that other values suffer when market efficiency is elevated above multiple-use management. If states take over land management, fiscal realities will force more development. When this happens, hunting, fishing, camping, and recreational access will all likely suffer.

3. Public Input

Federal law guarantees an opportunity for public input on resource management decisions involving our public lands. State laws generally do not provide comparable opportunities to provide input on land management decisions. A public land transfer, therefore, could leave the public with a diminished voice on management of the targeted lands.

Under federal law, the BLM and USFS must inventory public lands and the resources the lands contain.³⁹³ The agencies must then develop and update resource management plans for those lands, establishing management priorities and direction.³⁹⁴ The planning process incorporates NEPA, under which federal agencies must consider and document the impacts of various land management scenarios.³⁹⁵ Under NEPA, federal agencies must also solicit and consider public

³⁹¹ Ben Caballero, *Wildlife Division Buys 356 Acres of Trust Land*, DESERET MORNING News, May 12, 2007, 2007 WLNR 9007881.

³⁹² Mead Gruver, *Reappraisal in Works for Pricey Grand Teton Tracts*, CASPER STAR TRIBUNE JULY 10, 2014. *See also*, Mead Gruver, *Groups Back Legislation to Help Grand Teton Deal*, Nov. 15, 2011 AP ALERT - WY 23:15:39.

³⁹³ 43 U.S.C. § 1711 (2012) (BLM); 16 U.S.C. §§ 1601 and 1603 (2012) (USFS).

³⁹⁴ 43 U.S.C. § 1712 (2012) (BLM); 16 U.S.C. § 1604 (2012) (USFS).

³⁹⁵ 42 U.S.C. § 102(2)(c) (2012).

input.³⁹⁶ Of the eleven Western states, only California, Montana, and Washington have state environmental policy acts.³⁹⁷ Although states will presumably not allow agencies to act without any public notice or input, there is currently no guaranteed voice for the interested public.³⁹⁸

C. The Hollow Sound of Victory

Assuming, solely for argument's sake, that TPLA backers succeed in establishing a federal obligation to dispose of significant additional portions of the public domain, we would then need to determine which lands would be disposed of, how lands would be disposed of, and a host of other thorny substantive and procedural questions.

1. Surveying the Public Domain and the Minerals they Contain

Land cannot be conveyed out of federal ownership until it is surveyed and a mineral character determination has been completed. Both steps would likely take years to complete. The public land survey system divides the landscape into townships, each of which contains thirty-six sections. Each section is normally one square-mile in size (640 acres).³⁹⁹ The Arizona, New Mexico, and Utah enabling acts grant the states four sections in every township within the state.⁴⁰⁰ See Figure 3. Enabling acts for other western states contain similar provisions, but grant states two sections in

³⁹⁶ 40 C.F.R. §§ 1501.7, 1503.1, and 1503.4 (2015).

³⁹⁷ Council on Env'tl Quality, *State NEPA Contacts* (2013), at http://energy.gov/sites/prod/files/2013/09/f2/States_NEPA_Like_22June2013.pdf.

³⁹⁸ In 2016 the Utah legislature enacted the Public Land Planning and Management Act, which calls for management plan development and public involvement. The Act, however, does not contain specific public notice or involvement requirements. There are therefore no substantive guarantees that Utahns, let alone citizens of other states, will have a meaningful voice in management of transferred lands. H.B. 276, 2016 Gen. Sess. (Utah 2016) (to be codified at UTAH CODE ANN. §§ 63L-8-101 through -602 and 79-6-101 through -105).

³⁹⁹ See 43 U.S.C. § 751 (2012).

⁴⁰⁰ Arizona and New Mexico Enabling Act, 36 Stat. 557, 561 (1910); Utah Enabling Act, 28 Stat. 107, 109 (1894).

each township.⁴⁰¹ Where these “in place” grants were subject to prior sales, grants, or reservations, states have the right to select “in-lieu” lands. States also received “quantity grants,” which included a specified number of acres that the state could select from the surveyed public domain.⁴⁰²

6	5	4	3	2	1	6	5	4	3	2	1	6	5	4	3	2	1
7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12
18	17	16	15	14	13	18	17	16	15	14	13	18	17	16	15	14	13
19	20	21	22	23	24	19	20	21	22	23	24	19	20	21	22	23	24
30	29	28	27	26	25	30	29	28	27	26	25	30	29	28	27	26	25
31	32	33	34	35	36	31	32	33	34	35	36	31	32	33	34	35	36
6	5	4	3	2	1	6	5	4	3	2	1	6	5	4	3	2	1
7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12
18	17	16	15	14	13	18	17	16	15	14	13	18	17	16	15	14	13
19	20	21	22	23	24	19	20	21	22	23	24	19	20	21	22	23	24
30	29	28	27	26	25	30	29	28	27	26	25	30	29	28	27	26	25
31	32	33	34	35	36	31	32	33	34	35	36	31	32	33	34	35	36
6	5	4	3	2	1	6	5	4	3	2	1	6	5	4	3	2	1
7	8	9	10	11	12	7	8	9	10	11	12	7	8	9	10	11	12
18	17	16	15	14	13	18	17	16	15	14	13	18	17	16	15	14	13
19	20	21	22	23	24	19	20	21	22	23	24	19	20	21	22	23	24
30	29	28	27	26	25	30	29	28	27	26	25	30	29	28	27	26	25
31	32	33	34	35	36	31	32	33	34	35	36	31	32	33	34	35	36

Figure 1 -- Public Land Survey and Land Grants

Conveyance of these lands to the states required completion of public land surveys because the boundary of lands to be conveyed could not be marked on the ground or defined with adequate legal precision until surveys were finalized.⁴⁰³ Where surveys were completed prior to states joining

⁴⁰¹ See GATES, *supra* note 76 at app. C (summarizing the grants made to each state upon admission to the Union).

⁴⁰² See e.g., Utah Enabling Act, 28 Stat, 107, 109-10 (1894).

⁴⁰³ GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, 2 PUB. NAT. RESOURCES L. § 13:51 (2nd ed.) (“Precise boundaries are necessary for secure land titles.”).

the Union, the effective date of the grants coincides with statehood.⁴⁰⁴ Where statehood preceded surveys, as was the case in much of the West, lands remain in federal ownership until surveys are completed.⁴⁰⁵ The Court went on to express its reluctance at upsetting this well-established rule, noting that many prior decisions rest on its application, and that a departure could produce unequal outcomes among the several states.⁴⁰⁶

Despite ongoing efforts to survey the West,⁴⁰⁷ millions of acres of the public domain have never been surveyed. In Nevada, for example, approximately thirty-percent of the state remains unsurveyed.⁴⁰⁸ Maps depicting the condition of surveys in Utah were completed during 2008-09, and indicate that roughly one-third of the state has not been surveyed.⁴⁰⁹ Many existing surveys are also quite old and may need to be updated before a conveyance could occur.

Furthermore, as we have already seen, the federal government had a longstanding policy of

⁴⁰⁴ United States v. Wyoming, 331 U.S. 440, 443-44 (1947).

⁴⁰⁵ *Id.* at 443-44; *see also* Heydenfeldt v. Daney, Gold & Silver Mining Co., 93 U.S. 634 (1877) (interpreting Nevada Enabling Act), and Andrus v. Utah, 446 U.S. 500, 506-07 (1980) (internal citations omitted) (“Whether the Enabling Act contained words of present or future grant, title to the numbered sections did not vest in the State until completion of an official survey. Prior to survey, the Federal Government remained free to dispose of the designated lands in any manner and for any purpose consistent with applicable federal statutes.”).

⁴⁰⁶ United States v Wyoming, 331 U.S. at 454 (internal citations omitted).

⁴⁰⁷ During FY 2015, the Department of the Interior completed original surveys of 2,157,820 acres and resurveyed 485,796 acres. Almost all of the newly surveyed acres were in Alaska. PUBLIC LAND STATISTICS 2015 *supra* note 126 at 24.

⁴⁰⁸ “In Nevada, the GLO/Cadastral surveys were initiated in 1861. Current survey conditions in Nevada have approximately 40% of Nevada townships surveyed prior to 1910 and monumented with stone or wooden posts at the corner points. Another 30% are [sic] surveyed after 1910 utilizing metal post and brass cap monuments at the corner points. The remaining 30% is unsurveyed land.”

http://www.blm.gov/nv/st/en/prog/more_programs/geographic_sciences/cadastral.html.

⁴⁰⁹ Estimates are based on fifteen Geographic Coordinate Database Section Status (GCDB) maps prepared by the Bureau of Land Mgmt., U.S. Dep’t of the Interior (on file with author).

reserving lands that were known to be mineral in character before transferring lands out of the public domain.⁴¹⁰ Geological survey maps have not traditionally been considered in determining the mineral or non-mineral character of the public domain.⁴¹¹ A more critical eye was required because surveyors were generally not qualified as geologists, nor were they charged with reviewing the lands within the interior of surveyed areas. Accordingly, the mineral or non-mineral character of the land has “always been a question of fact, to be determined, generally speaking, by the land department, on hearings ordered for that purpose.”⁴¹² Today:

In making mineral character determinations the Department of the Interior acts as a special tribunal with judicial functions. Once the Secretary issues a patent, certifies a list, or makes a survey . . . the findings of fact that precede the issuance of the patent or other instrument are conclusive upon the Department and the courts. Although questions of law are reviewable by the courts, they are not subject to reexamination by the Department.⁴¹³

As the mineral or non-mineral character of the lands at issue must be determined before a court can determine whether a particular parcel of land would be subject to transfer, the Department of the Interior would need to complete an unprecedented number of adjudicatory decisions, as well as the factual investigations each adjudication requires. Those proceedings would likely cause decades of delay before any transfers could occur.⁴¹⁴

⁴¹⁰ See *supra*, section IV.A.4.

⁴¹¹ LINDLEY, *supra* note 132 at 118. While the federal surveyor general was required to note mineral features encountered during public land surveys, these notations serve as prima facie evidence of mineral or non-mineral character but are not dispositive. *Id.* at 118-20.

⁴¹² *Id.* at 123.

⁴¹³ AMERICAN LAW OF MINING, *supra* note 356 at § 12.02[1].

⁴¹⁴ Faced with a near impossible task of investigating every section of land subject to grant or state selection, as well as a growing number of cases challenging the validity of prior grants, Congress passed the Jones Act. 44 Stat. 1026 (1927) (codified as amended at 43 U.S.C. §§ 870-71 (2012)). The Jones Act released to the states grants of numbered school sections that had been previously withheld because of mineral classification. The Act, however, applies only to in-place numbered section grants supporting public schools. The TPLA does

V. Understanding the Roots of Frustration and Exploring Alternatives to Land Transfers

The number of transfer bills taken up by state legislators and the proliferation of self-help remedies to perceived mismanagement of the public domain attest to the depth of frustration some feel. If we are to find a tenable path out of the cycle of sagebrush rebelliousness we must understand and address the roots of frustration. At their most basic, the frustrations come down to the challenge of striking an acceptable balance in managing our public lands. As one prominent scholar explains, “[b]iological sciences cannot tell us how much Wilderness is enough, and economists cannot calculate whether the money spent to save bald eagles was worth it.”⁴¹⁵ Accordingly, “decisions regarding multiple use policy are policy decisions and they will continue to be driven by politics no matter who manages those lands.”⁴¹⁶ This section reviews several of the factors involved in striking that balance, and then turns to possible means of addressing those problems.

A. Policy and Demographic Evolution — And the Challenges They Wrought

Between 1976 and 2013, the population of the eleven contiguous Western states grew at more than twice the pace of the rest of the country, swelling from 38.1 million to 72.1 million.⁴¹⁷ The three fastest growing states over that period were Nevada, Arizona, and Utah, and their growth dramatically impacts the landscape. Between 2001 and 2011, more than 2 million acres of natural areas in the West were lost to human development, with Wyoming and Utah experiencing the largest

not contend that the federal government breached its obligation to dispose of enumerated in-place school sections. Rather, the TPLA contends that the federal government failed to dispose of sections other than those specifically identified in statehood enabling acts. The Jones Act, therefore, does not apply to TPLA claims.

⁴¹⁵ George Cameron Coggins, *‘Devolution’ in Federal Land Law: Abdication by any Other Name. . .*, 14 HASTINGS WEST-NORTHWEST J. ENVTL. L & POLICY 485, 489 (2008).

⁴¹⁶ Y2 Consulting, Study of Management of Public Lands in Wyoming v (2016).

⁴¹⁷ Population data obtained from multiple Bureau of the Census, U.S. Dep’t of Comm. sources.

percentage change in area modified by human development.⁴¹⁸ Management policies and priorities necessarily evolved to reflect both changing demographic realities and social priorities. Communities sometimes struggle to adapt to these changes, and understanding evolutionary change can help us understand the discontent we face today.

Changes occurred on multiple fronts. Prior to 1934 and enactment of the Taylor Grazing Act, the federal government made little effort to manage livestock grazing on the public domain. The Taylor Grazing Act marked a profound change in public land management philosophy, creating grazing districts which included portions of the public domain deemed “chiefly valuable for grazing and raising forage crops.”⁴¹⁹ Proposed grazing districts were withdrawn from all forms of entry of settlement.⁴²⁰

The Wilderness Act of 1964⁴²¹ set aside large tracts of public land as free from development. Today, Wilderness areas overlay more than 109 million acres mostly in the West.⁴²² While many see the Wilderness Act as protecting irreplaceable natural landscapes, some in timber- or mineral-dependent communities see access to prosperity-sustaining commodities foregone.

The Endangered Species Act of 1973⁴²³ requires all federal agencies to conserve endangered species and threatened species,⁴²⁴ prohibiting actions that harm a listed species or its habitat.⁴²⁵ Efforts to protect endangered species have placed lands containing valuable commodities out of

⁴¹⁸ Ctr. for American Progress, The Disappearing West <https://disappearingwest.org> (last visited May 17, 2016).

⁴¹⁹ 43 U.S.C. § 315 (2012).

⁴²⁰ 43 U.S.C. § 315 (2012).

⁴²¹ 16 U.S.C. § 1131-26 (2012).

⁴²² See www.wilderness.net/NWPS/factsheep.cfm.

⁴²³ 16 U.S.C. §§ 1531-44 (2012).

⁴²⁴ 16 U.S.C. § 1531(c)(1) (2012).

⁴²⁵ 16 U.S.C. § 1532(19) (2012), 50 C.F.R. § 222.102 (2015).

reach to developers, often to the consternation of those who see jobs lost and tax revenue foregone.

The Federal Land Policy and Management Act of 1976 (FLPMA)⁴²⁶ repealed a host of statutes allowing for the disposal of federal public lands,⁴²⁷ replacing those statutes with a commitment to retaining most public lands in federal ownership.⁴²⁸ FLPMA also recognized numerous non-commodity values, pivoting the BLM towards multiple-use, sustained-yield management.⁴²⁹

The National Forest Management Act (NFMA)⁴³⁰ and the Multiple-Use, Sustained-Yield Act of 1960⁴³¹ broadened the Forest Service’s mandate, requiring management for “outdoor recreation, range, timber, watershed, and wildlife and fish,”⁴³² and “judicious use of the land . . . and harmonious and coordinated management of the various resources.”⁴³³

Balancing competing public lands uses often trigger NEPA, and can require evaluation in an environmental impact statement.⁴³⁴ While NEPA provides valuable opportunities for public involvement,⁴³⁵ it also increases the time and expense involved obtaining agency approvals, and decisions may need to be revisited in light of new information and changed conditions,⁴³⁶ injecting

⁴²⁶ 43 U.S.C. §§ 1701-1784 (2012).

⁴²⁷ 43 U.S.C. § 161-254 (____) (repealed 1976).

⁴²⁸ 43 U.S.C. § 1701(a) (2012).

⁴²⁹ 43 U.S.C. § 1701(a)(8) (2012).

⁴³⁰ 16 U.S.C. §§ 1600-1614 (2012).

⁴³¹ 16 U.S.C. § 528 (2012).

⁴³² 16 U.S.C. § 528 (2012).

⁴³³ 16 U.S.C. § 531(a) (2012).

⁴³⁴ 42 U.S.C. § 4332(2)(C) (2012). A less intensive environmental assessment may be required if it is unclear whether the impacts are significant. 43 C.F.R. § 1501.3 (2015).

⁴³⁵ See 40 C.F.R. §§ 1501.7, 1502.19, 1503.1—1503.4, and 1506.6 (2015).

⁴³⁶ See e.g., 40 C.F.R. § 1502.9(c) (2015) (requiring supplemental NEPA analysis where agency actions change or new information becomes available).

an additional level of uncertainty into development planning. Striking the balance required under these and other laws is a daunting task that can engender frustration with public land managers.

B. Evolutionary Pain & Western Discontent

Not all communities have anticipated or adapted to evolving conditions or management requirements. Some see management changes as an attack on the Western way of life and the communities that developed in reliance on public lands.⁴³⁷ The pain many feel is real, as is their interest in engaging in the management of lands that are close to their livelihoods.⁴³⁸ This section introduces several examples of the frustrations that undergird transfer efforts, and that must be overcome by any successful effort to address the true causes of frustration.

1. Fragmented Landscape; Divergent Objectives

“[Today, t]he land ownership map of the West in many places resembles a crazy quilt, without reason or coherent pattern . . . [and] fragmented ownership patterns generate a plethora of disputes over access and similar problems.”⁴³⁹ Upon admission to the Union, states received the right to title to specified sections of land. Arizona, New Mexico, and Utah, for example, each received the right to title to four non-contiguous sections in every township.⁴⁴⁰ See Figure 3. These

⁴³⁷ See e.g., BRIAN ALLEN DRAKE, *LOVING NATURE, FEARING THE STATE: ENVIRONMENTALISM AND ANTIGOVERNMENT POLITICS BEFORE REAGAN* (2013) (discussing early federal-state tensions over public land management); R. MCGREGOR CAWLEY, *FEDERAL LAND WESTERN ANGER: THE SAGEBRUSH REBELLION & ENVIRONMENTAL POLITICS* (1993) (discussing the “Sagebrush Rebellion”); and James R. SKILLEN, *THE NATION’S LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT IN THE AMERICAN WEST* (2009) (discussing “neosagebrush politics”).

⁴³⁸ See Charles F. Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 U.C.L.A. J. ENVTL. L & POL’Y 145 (1982) (addressing the legitimacy of state interests and the disconnect between those interests and state actions).

⁴³⁹ GEORGE CAMERON COGGINS & ROBERT L. GLICKMAN, 1 *PUBLIC NATURAL RESOURCES LAW*, § 2:9 (2d ed. 2010, Feb 2016 update).

⁴⁴⁰ 28 Stat. 107, 109 (1894).

grants extended across a state, providing nascent state governments with a representative sample of marketable natural resources, and creating an incentive to develop all parts of the state.⁴⁴¹

Lands were granted to states in order to generate revenue in support of public schools and institutions, and are managed by the states as part of a trust to support those beneficiaries.⁴⁴² Across the eleven contiguous Western states, state trust lands administrators today manage 40.4 million acres of surface estate.⁴⁴³ In Utah, for example, SITLA manages 3.3 million acres — a land area larger than Connecticut,⁴⁴⁴ but scattered across the landscape in over 9,000 individual parcels. The challenges inherent in managing a fragmented landscape come into focus when we consider competing management objectives.⁴⁴⁵

SITLA, like other states' trust lands administrators, must manage lands in the most “prudent and profitable manner possible” to support public schools and institutions.⁴⁴⁶ Specifically, SITLA must “obtain the optimum values from use of trust lands and revenues for the trust beneficiaries, including the return of not less than fair market value for the use, sale, or exchange of school and

⁴⁴¹ Additionally, states received the right to select hundreds of thousands of additional acres from across the unreserved lands within the state. These grants are often referred to as “quantity grants,” because the quantity of land granted to the states was set forth by statute.

⁴⁴² SOUDER & FAIRFAX, *supra* note 333.

⁴⁴³ Headwaters Econ., *supra* note 226.

⁴⁴⁴ The land area of Connecticut is 4,840 square-miles or 3,097,600 acres. U.S. CENSUS BUREAU, DEP'T OF COMM., 2012 STATISTICAL ABSTRACT OF THE UNITED STATES, Table 358. Land and Water Area of States and Other Entities: 2008 *available at* <http://www.census.gov/compendia/statab/>.

⁴⁴⁵ Fairfax argues persuasively that public land fragmentation is more of a challenge for the BLM than for other federal land managers, and the need to cooperate with other land owners makes the BLM weaker than other agencies that are both better funded and able to act with greater independence. Sally Fairfax, *Old Recipes for New Federalism*, 12 ENVTL. L. 945, 975 (1982).

⁴⁴⁶ UTAH CODE ANN. § 53C-1-102(2)(b) (2014); *see also* SOUDER & FAIRFAX, *supra* note 333, chs. 1&2 (discussing mandate as applied across the West).

institutional trust assets.”⁴⁴⁷ “[T]rust beneficiaries do not include the general public or other governmental institutions, and the trust is not to be administered for the general welfare of the state.”⁴⁴⁸

Most state trust lands remain in individual 640 acre parcels that are surrounded by federal lands. The BLM is directed to “prevent unnecessary or undue degradation of the lands,”⁴⁴⁹ and the USFS must insure that timber harvests do not unnecessarily impair other sensitive resources.⁴⁵⁰ Both agencies manage large tracts of congressionally designated Wilderness, and the BLM manages Wilderness Study Areas (WSAs) to prevent impairment to wilderness values until Congress acts on pending Wilderness proposals.⁴⁵¹ Across the West, Wilderness and WSAs cover over 48 million acres. Other parts of the federal landscape, such as National Parks and Wildlife Refuges are also managed for conservation objectives.⁴⁵² The intertwining of lands that are managed by different entities and for cross purposes invites conflict.⁴⁵³

State trust land inholdings are also found in BLM managed National Monuments and National Conservation Areas in Alaska, Arizona, California, Idaho, Montana, and New Mexico,⁴⁵⁴ as well as in BLM managed National Conservation Areas in Arizona and Idaho.⁴⁵⁵ While inholdings

⁴⁴⁷ UTAH CODE ANN. § 53C-1-302(1)(b)(iii) (2014).

⁴⁴⁸ Utah Code Ann. § 53C-1-102(2)(d) (2014), Nat’l Parks Conservation Ass’n v. Bd. of State Lands, 869 P.2d 909, 919 (Utah 1994).

⁴⁴⁹ 43 U.S.C. § 1732(b) (2012).

⁴⁵⁰ 16 U.S.C. § 1604(g)(3)(E) (2012).

⁴⁵¹ 43 U.S.C. § 1782(c) (2014).

⁴⁵² 16 U.S.C. §§ 1 – 18f-3 (2012) (National Parks), and 16 U.S.C. § 460K (2012) (National Wildlife Refuges).

⁴⁵³ See Bruce Babbitt, *supra* note 4 At 853-54 (noting the challenges of lack of management control and competing management objectives).

⁴⁵⁴ PUBLIC LAND STATISTICS 2015, *supra* note 126 at 199, 201.

⁴⁵⁵ *Id.* at 205.

within National Forests are not broken out by ownership type, inholdings are found in USFS managed Wilderness Areas in each of the eleven contiguous Western states.⁴⁵⁶ All told, inholdings in National Forest System lands managed under a conservation designation total 416,615 acres across this landscape.⁴⁵⁷ Statewide in Arizona, “over one million surface and subsurface acres of Trust land are effectively removed from revenue-generating opportunities because they are included within the boundaries of federal holdings.”⁴⁵⁸ Grants or sales to private entities further complicate this landscape. In Montana, for instance, federal and private land surrounds approximately 1.2 million of the state’s 5.1 million acres of state trust lands.⁴⁵⁹

In Utah, SITLA manages approximately 96,000 acres of surface estate and 97,000 acres of minerals that are located within WSAs.⁴⁶⁰ An additional 20,220 acres are within National Conservation Areas, which are managed, in part, “to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the ecological, scenic, wildlife, recreational, cultural, historical, natural, educational, and scientific resources of the National Conservation Area.”⁴⁶¹ The recently created Bears Ears National Monument surrounds another 109,106 acres of

⁴⁵⁶ Compiled from, U.S. FOREST SERV., DEP’T. OF AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM (2013). Also note that National Forest System lands contain approximately 6 million acres of outstanding mineral claims. Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 LAND AND WATER L. REV. 419, 430 (1998).

⁴⁵⁷ Compiled from, U.S. FOREST SERV., DEP’T. OF AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM (2013).

⁴⁵⁸ *Id.*

⁴⁵⁹ Karl Puckett, *A New Approach: Program Aims to Open Islands of Landlocked State Land*, GREAT FALLS TRIBUNE March 4, 2014, available at 2014 WLNR 6117724.

⁴⁶⁰ E-mail from Jessica Kirby, GIS Manager, Utah School and Institutional Trust Lands Administration, to John Ruple, Research Associate, S.J. Quinney College of Law (March 6, 2013 5:40 PM) (on file with author).

⁴⁶¹ 16 U.S.C. § 460www(a) (2012) (Red Cliffs NCA); 16 U.S.C. § 460xxx(a) (2012) (Beaver Dam Wash NCA). Acreage calculations are from PUBLIC LAND STATISTICS 2015, *supra* note 126 at 201.

state land.⁴⁶² Surrounding lands that are supposed to generate revenue with lands that are managed for conservation deprives trust beneficiaries of the revenue they were promised and drives significant frustration. .

2. Perceived Lack of Voice in Public Land Management

Perceived injuries help explain the animosity underpinning the transfer movement, and Utah’s experience offers a telling example. Utah’s first white settlers were members of the Mormon Church who fled persecution in New York, Ohio, Missouri, and then Illinois, hoping to be left alone to follow their faith.⁴⁶³ They witnessed the murder of their founder and leader, Joseph Smith,⁴⁶⁴ were pilloried for their religious beliefs,⁴⁶⁵ had federal troops called out against them,⁴⁶⁶ and saw the federal government target their church for dissolution.⁴⁶⁷ These injuries and the distrust they engender are still felt in the tightly knit and predominantly Mormon communities that dominates

⁴⁶² Bureau of Land Mgmt., Dep’t of the Interior, Bears Ears National Monument Fact Sheet and Q&A (Dec. 28, 2016) <https://www.blm.gov/programs/national-conservation-lands/national-monuments/utah/bears-ears/fast-facts>.

⁴⁶³ BICKMORE-WHITE, *supra* note 96 at 1-2.

⁴⁶⁴ *Id.*

⁴⁶⁵ Opposition to Utah’s attempts at statehood was often vitriolic and salacious, centering on the religious practices of the territory’s Mormon residents. *See e.g.* Against Admission of Utah as a State, H.R. Misc. Doc. No. 208, 42nd Cong., 2d. Sess. (May 6, 1872) (including testimony from thirty apostate Mormons alleging that the Church “counseled murder and robbery,” are “enemies of the United States Government,” and would not obey federal law or the Constitution.). *See generally*, BICKMORE-WHITE, *supra* note 96 at __.

⁴⁶⁶ BICKMORE-WHITE, *supra* note 96 at 4.

⁴⁶⁷ 24 Stat. 635 (1887). In 1887, Congress passed the Edmunds-Tucker Act dissolving the Mormon Church and directing the federal government to confiscate all church properties valued over \$50,000. Application of the Edmunds-Tucker Act was upheld by the U.S. Supreme Court in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890). The direct effects of the Act were short lived because on October 25, 1893, Congress authorized the release of seized assets because “said church has discontinued the practice of polygamy and no longer encourages or gives countenance to any manner of practices in violation of law, or contrary to good morals or public policy.” 28 Stat. 980 (1893).

rural Utah and much of the Intermountain West.

These scars might have healed in time, but in the eyes of many, the injuries continued. Between 1951 and 1962, eighty-six aboveground nuclear tests were conducted at the Nevada Test Site,⁴⁶⁸ dispersing radioactive material across much of Utah and the West, and resulting in an increased incidence of certain types of cancers.⁴⁶⁹ Nevada is still seen by many as the location of choice for long-term storage of high-level nuclear waste.⁴⁷⁰ Similarly, chemical weapons were stored, and later incinerated in Colorado, Utah, and in Oregon.⁴⁷¹

Utah and Nevada were also the destination of choice in a failed proposal to construct an intercontinental ballistic missile system shuttling more than 200 nuclear missiles between 4,600 shelters — “a colossal system extending over one-third of Utah and two-thirds of Nevada.”⁴⁷² Most of that landscape, which for generations had been home to ranching families, would have been made off-limits because of national security concerns. Residents saw themselves as an afterthought to the federal government. As Utah’s Governor Matheson explained, “The draft EIS devoted thirty-one pages of discussion to the pronghorn antelope, seventeen pages to rare plants, . . . but only five and one-half pages to the impacts on human beings.”⁴⁷³

Another perceived injury occurred in 1996 with designation of the Grand Staircase-Escalante National Monument.⁴⁷⁴ At roughly 1.9 million acres, the Monument is the largest in the continental

⁴⁶⁸ Steven Simon, André Bouville & Charles Land, *Fallout from Nuclear Weapons Tests and Cancer Risks*, 94 AM. SCIENTIST 48 (2006).

⁴⁶⁹ *Id.* See also, MATHESON, *supra* note 105 at 87-103.

⁴⁷⁰ For a history of efforts to develop Yucca Mountain, see J. SAMUEL WALKER, *THE ROAD TO YUCCA MOUNTAIN: THE DEVELOPMENT OF RADIOACTIVE WASTE POLICY IN THE UNITED STATES* (2009).

⁴⁷¹ MATHESON, *supra* note 105 at 104-13.

⁴⁷² *Id.* at 59, 55-86.

⁴⁷³ *Id.* at 82.

⁴⁷⁴ See Proclamation 6920 Establishment of the Grand Staircase-Escalante National Monument, 61 FED. REG.

United States.⁴⁷⁵ Former County Commissioner Joe Judd tells of an eleventh-hour trip to Washington D.C. to lobby against monument designation:

When we asked about the area being discussed for the Monument, they chose to tell us that they had no monument plan. ‘Nothing was going to happen. We don’t know anything about it.’ Then, when we told them where we thought it was going to be, they said, ‘Do people really live there?’ And then I knew we were in trouble.⁴⁷⁶

Commissioner Judd’s description and the actions that proceeded it reinforce a perception of federal ignorance of, and disregard for, the lives of rural Westerners that fuels the current discontent.⁴⁷⁷

Adding to these frustrations, many state leaders across the West contend that the federal government’s failure to actively manage public lands contributes to the “vast expansion of

50223 (Sept. 18, 1996).

⁴⁷⁵ See www.blm.gov/ut/st/en/fo/grand_staircase-escalante.html.

⁴⁷⁶ Joe Judd, *County Collaboration with the BLM on the Monument Plan and its Roads*, 21 J. LAND, RES. & ENVTL. L. 553 (2001).

⁴⁷⁷ While the monument’s detractors correctly note that it was designated without contemporaneous state or public input, establishment was not surprise and the federal government was well aware of state or local interests. As early as the 1930s, President Roosevelt considered withdrawing part of the region to create a national monument. James R. Rasband, *Utah’s Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 489 (1999). See also, Christopher Smith, *Grand Staircase National Monument: It’s a New Name But an Old Idea; Monument: New Status, Old Idea*, SALT LAKE TRIBUNE Oct, 6, 1996, at A1 (“In January 1936, the Park Service announced that as a result of the recommendations of the Utah Planning Board, the agency was planning to seek congressional approval for the 6,968-square-mile ‘Escalante National Monument.’”). Over the decades that followed, multiple proposals were all brought forward in an effort to protect federal lands in Southeastern Utah. See generally, SAMUEL J. SCHMIEDING, NAT’L PARK SERV., FROM CONTROVERSY TO COMPROMISE TO COOPERATION: THE ADMINISTRATIVE HISTORY OF CANYONLANDS NATIONAL PARK (2009). Development in Southern Utah was hotly debated for more than twenty years prior to the designation, and state as well as local concerns were well known. John D. Leshy, *Putting the Antiquities Act in Perspective*, in VISIONS OF THE GRAND STAIRCASE-ESCALANTE, EXAMINING UTAH’S NEWEST NATIONAL MONUMENT 86-88 (Robert B. Keiter et al. eds.1998). Many of these concerns were addressed in the Proclamation creating the Monument, which included express recognition of valid existing rights. See Proclamation 6920, *supra* note 474.

catastrophic wildfire, damaging insects, disease and invasive species.⁴⁷⁸ Together, this results in a wildfire season that is longer, more extreme, and which produces larger, more damaging fires.⁴⁷⁹ Others blame the federal government for allowing wild horses populations to grow unchecked, consuming forage needed to support wildlife and cattle.⁴⁸⁰ Utah is also suing the federal government over claims of title to road rights-of-way across federal public lands,⁴⁸¹ alleging both a state ownership interest and ongoing injury at the hands of the federal government. Set against this backdrop of perceived mistreatment by federal officials, it is not surprising that many Westerners would prefer to manage the public domain themselves.

3. Economic Instability

The federal government controls the type and level of development that occurs on public lands. In the eyes of some, this leaves local communities at the mercy of federal agencies for access to the resources and resulting revenue upon which their future depends.⁴⁸²

The federal government has taken steps to offset these concerns through programs like PILT that offset lost tax revenue.⁴⁸³ Congress also directs that revenue generated on the public domain be shared with state and local governments that are experiencing the development,⁴⁸⁴

⁴⁷⁸ W. GOVERNORS ASS'N, *Policy Resolution 2012-01, Wildfire Management and Resilient Landscapes* (June 4, 2012).

⁴⁷⁹ *Id.*

⁴⁸⁰ See *W. Rangeland Conservation Ass'n et al v. Jewell*, Docket No. 2:14-cv-00327 (D. Utah Apr 30, 2014) (suing to force the federal government to remove wild horses from the range).

⁴⁸¹ Separate complaints were filed for each county. Copies of the complaints are *available at* <http://publiclands.utah.gov/rs-2477-roads/current-litigation/statewide-complaints/> (last visited May 28, 2014).

⁴⁸² See generally, Robert L. Glicksman, *Fear and Loathing on the Federal Lands*, 45 U. KANSAS L. REV. 647 (1997), and John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, *supra* note 3 at 317, 343-50.

⁴⁸³ 31 U.S.C. § 6902(a)(1) (2012). See also, section III.D., *supra*.

⁴⁸⁴ See e.g., 30 U.S.C. § 191 (2012) (sharing revenue derived from mineral development occurring on public lands). See also, section III.D., *supra*.

offsetting the cost of public services (like emergency medical services and road maintenance) incurred because of federal activity.⁴⁸⁵

Revenue sharing payments can be substantial. From 2006 through 2015, federal land and revenue sharing payments to the eleven contiguous Western States averaged over \$3.0 billion annually.⁴⁸⁶ Budgets in states like Wyoming, where significant mineral development occurs on public lands, depend on commodity production from federal land. For the past nineteen-years, at least ninety-nine percent of Wyoming’s federal land payments are attributable to mineral revenue sharing, and over the past decade these payments averaged almost \$1.3 billion annually.⁴⁸⁷

Revenue sharing programs are, however, highly susceptible to commodity price volatility and to production volume changes. In Oregon, federal land payments declined from \$537 million in 1989 to \$112 million in 2000, bouncing back to \$364 million the next year, and then declining steadily back to \$114.7 million in 2015.⁴⁸⁸ In Utah, for instance, federal land payments to the state have been impacted by oil price instability. The state received around \$70 million annually through the late 1990s, with payments increasing steadily until 2006 when they hit \$229 million and peaking at \$341 million in 2011.⁴⁸⁹ Year-to-year changes in payments, however, exceeded \$45 million in eight of the last ten years.⁴⁹⁰

Most federal land payments are directed back to rural the communities where the revenue originates.⁴⁹¹ Accordingly, when federal land payments cycle wildly those shifts have a

⁴⁸⁵ Thomas G. Alexander, *Senator Reed Smoot and Western Land Policy, 1905-1920*, 13 ARIZONA & THE WEST 245, 263 (1971) (discussing political compromises leading to enactment of the Mineral Leasing Act of 1920).

⁴⁸⁶ Headwaters Economics, *supra* note 226.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *See e.g.*, 30 U.S.C. § 191(a) (2012) (directing states to give “priority to those subdivisions of the State

disproportionate impact on rural counties. This fiscal uncertainty can create profound difficulties for counties trying to plan for major investments like schools and infrastructure.

4. Bellicose State Rhetoric

While frustrations may be understandable, strident state language can drive a wedge between the state and federal governments, making cooperation more difficult. As a BLM spokesperson recently explained to the Utah Legislature, “It is frustrating as we work to identify the best possible path forward for everyone when some of the entities we are trying to work with consistently feel the need to poke us in the eye and then complain we are not working with them.”⁴⁹²

Utah’s hard line positions have been codified into state law, leaving little room for compromise. Under Utah law, BLM and USFS land management plans should not “designate, establish, manage, or treat” public lands in ways that resemble Wilderness, “including the nonimpairment standard applicable to WSAs or anything that parallels, duplicates, or resembles the nonimpairment standard.”⁴⁹³ Rather, federal plans should “achieve and maintain at the highest reasonably sustainable levels a continuing yield of energy, hard rock, and nuclear resources,”⁴⁹⁴ “achieve and maintain livestock grazing . . . at the highest reasonably sustainable levels,”⁴⁹⁵ and except in very rare instances, the BLM should not designate Areas of Critical Environmental Concern, “as the BLM lands are generally not compatible with the state’s plan and policy for managing the subject lands.”⁴⁹⁶ Similar demands apply to including rivers in the National Wild and

socially and economically impacted by development of minerals leased under this chapter”).

⁴⁹² Amy Joy O’Donoghue, *Battle Between Utah’s Rural Counties and BLM Intensifies*, DESERET NEWS, June 28, 2014, 2014 WLNR 17629725.

⁴⁹³ UTAH CODE ANN. § 63J-8-104(1)(b) (2014).

⁴⁹⁴ UTAH CODE ANN. § 63J-8-104(1)(d) (2014).

⁴⁹⁵ UTAH CODE ANN. § 63J-8-104(1)(e) (2014).

⁴⁹⁶ UTAH CODE ANN. §§ 63J-8-104(1)(l) and 63J-4-401(8)(c) (2014).

Scenic River Systems,⁴⁹⁷ and to Wilderness Area designation.⁴⁹⁸

To advance its land management objectives, the Utah legislature establishes expansive “energy zones” where the “highest management priority . . . is responsible management and development of existing energy and mineral resources.”⁴⁹⁹ Accordingly, the state supports “full development of all existing energy and mineral resources”⁵⁰⁰ within these zones and calls upon the federal government to “expedite the processing, granting, and streamlining of mineral development and energy leases and applications to drill, extract, and otherwise develop all existing energy and mineral resources” within them.⁵⁰¹ The legislature has also created “Timber Agricultural Commodity Zones” where the federal government is directed to “expedite the processing, granting, and streamlining of logging and forest product harvesting,”⁵⁰² and “Grazing Agricultural Commodity Zones” where grazing permitting is to be expedited.⁵⁰³

Utah’s commodity-production-first direction conflicts with federal land managers’ multiple-use mandate and direction contained in land management plans. There is little room for compromise

⁴⁹⁷ UTAH CODE ANN. § 63J-8-104(8)(a) (2014).

⁴⁹⁸ UTAH CODE ANN. § 63J-8-104(8)(j) (2014).

⁴⁹⁹ UTAH CODE ANN. § 63J-8-105.5(3)(b) (2014) (Uintah Basin Energy Zone). The Green River Energy Zone contains a similar statement regarding energy development being the “highest management priority” for Carbon County, but notes that energy development within Emery County is only a “high priority” that must be “balanced” with other ecological, cultural, and recreational values. *Id.* at § 63J-8-105.7(3)(b) and (c). In 2015, the Utah created an energy zone in San Juan County that overlaps proposed Wilderness and National Conservation Area designations. UTAH CODE ANN. § 63-8-105.2 (____).

⁵⁰⁰ UTAH CODE ANN. §§ 63J-8-105.5(4)(a) (Uintah Basin Energy Zone) and § -105.5(4)(a) (Green River Energy Zone).

⁵⁰¹ UTAH CODE ANN. §§ 63J-8-105.5(5)(b) (Uintah Basin Energy Zone) and § -105.5(5)(b) (Green River Energy Zone).

⁵⁰² UTAH CODE ANN. § 63J-8-105.9(7)(b) (____).

⁵⁰³ UTAH CODE ANN. § 63J-8-105.8(7)(b) (____).

when state employees must demand the impossible. Untenable demands also mislead the public into believing that the state can dictate federal management, and that full development is a viable goal. When these demands are not met, those that expect results consistent with legislative edicts become only more frustrated. The result is a self-fueling cycle that increases tension.

C. Alternatives to Land Transfers

Improving public land management is a laudable goal, and addressing the root causes of frustration is necessary to dampen the fires fueling the transfer movement. The ideas presented below are not an exhaustive list, but rather, examples intended to drive further discussions.

1. Comprehensive Review and Revision of Public Land Laws

The last systematic review of federal public land law, policy, and governance was conducted by the Public Land Law Review Commission of 1965-1969.⁵⁰⁴ Since that commission released its final report in 1970, the challenges and opportunities facing federal public lands have become more numerous and complex. Our scientific understanding of science and ecological process has also increased dramatically, and the difficulties inherent in striking a balance between competing interests has grown with those changes. We have responded by modifying both law and policy, but these revisions are poorly integrated. The result is a complex web of overlapping laws that are challenging for even the most sophisticated of managers to navigate.

As we approach the fiftieth anniversary of the last federal public land law review, it is time to ask what we want from our public lands, and what public land heritage we want to leave for our children. The current political climate makes it difficult to envision Congress proposing the kind of comprehensive bipartisan review we need, and those who benefit from the status quo, whether on the left or the right of the political spectrum, will likely oppose any effort that threatens their

⁵⁰⁴ THE PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF OUR NATION'S LAND: A REPORT TO THE PRESIDENT AND THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION (1970).

position. The possibility of failure, however, should not prevent us from seeking improvement.

2. Adequate Agency Funding

We cannot continue to bemoan resource conditions and permitting delays while simultaneously depriving public land managers of the staff and resources required to do their jobs. “Staffing levels for those dedicated to managing National Forest System lands has decreased by 39 percent — from approximately 18,000 in 1998 to fewer than 11,000 in 2015.”⁵⁰⁵ Land management funding fell by thirty-three percent, impacting “critical projects involving energy pipelines, geothermal, electric transmission, hydropower, telecommunication infrastructure, including cellular towers and traditional line service and broadband facilities.”⁵⁰⁶ Land management planning funding fell by sixty-four percent, significantly effecting the USFS’s “ability to engage with the public and partners to address management issues and opportunities. . . . These efforts are essential for garnering public support and reducing appeals and litigations, which impacts our ability to implement key restoration efforts and increases implementation costs.”⁵⁰⁷

Charging market rates for commodities produced from public lands, and returning those funds to the agencies that manage those lands, is a simple way to begin addressing the funding shortfall. Under federal law, the United States charges a 12.5 percent royalty on oil and gas produced from federal lands.⁵⁰⁸ In contrast, within the Intermountain West, states charge between 16.67 percent and 25 percent production royalties.⁵⁰⁹ Raising the federal oil and gas royalty rate to 16.67%

⁵⁰⁵ Forest Serv., Dep’t of Agric., *The Rising Cost of Wildfire Operations: Effects on the Forest Service’s Non-Fire Work* 7 (2015).

⁵⁰⁶ *Id.* at 12.

⁵⁰⁷ *Id.* at 14.

⁵⁰⁸ 43 C.F.R. § 3103.3-1(a)(1) (2015).

⁵⁰⁹ CTR. FOR W. PRIORITIES, *A FAIR SHARE: THE CASE FOR UPDATING FEDERAL ROYALTIES* 3 (2013).

would have produced over \$800 million in additional revenue during 2012.⁵¹⁰ Under federal law roughly half of these funds would have been distributed to the states where the development occurred — the remainder could have been used to fund the agencies managing our public lands.

Modernizing federal coal leasing regulations provides a similar opportunity. Current regulatory subsidies, marketing loopholes, and royalty valuation policy deprived the federal government of about \$850 million between 2008 and 2012,⁵¹¹ and changing the point at which coal value is measured would have generated an additional \$5.6 billion in federal revenue.⁵¹² Roughly half of this revenue would have gone to the states where the development occurred; the remainder could have funded public land management.

Hard rock mining is also ripe for reform. Hard rock miners on federal land do not pay any federal mineral royalty. The federal government is, however, free to impose a royalty on minerals mined from federal lands, or to tax mined minerals.

Though some will argue that any royalty or tax increase will slow economic growth, the prevalence of state taxes on natural resource commodity development belies the point. As of 2014, at least thirty-four states imposed a severance tax on natural resources, and these taxes provided states with \$17.8 billion in revenue.⁵¹³ All eleven contiguous Western states have severance taxes, which generated over \$2.9 billion to support state government programs.⁵¹⁴ New Mexico's severance tax does not appear to have chilled energy development, as the state ranks sixth in the nation in oil

⁵¹⁰ *Id.* at 10.

⁵¹¹ HEADWATERS ECON., AN ASSESSMENT OF U.S. FEDERAL COAL ROYALTIES CURRENT ROYALTY STRUCTURE, EFFECTIVE ROYALTY RATES, AND REFORM OPTIONS 25 (2015) <http://headwaterseconomics.org/wphw/wp-content/uploads/Report-Coal-Royalty-Valuation.pdf>.

⁵¹² *Id.* at 21.

⁵¹³ Cheryl Lee et al., *supra* note 234 at 7.

⁵¹⁴ *Id.*

production, seventh in natural gas production, and twelfth in coal production.⁵¹⁵ Wyoming also ranks eighth in oil production, fifth in natural gas production, and first in coal production despite taxing development.⁵¹⁶

3. Collaboration

Federal land management agencies are required to coordinate their management activities with state and local governments. If utilized to their full potential, these requirements could help states and local residents address land management challenges.⁵¹⁷ Under FLPMA, the BLM must develop and periodically revise plans for public land management.⁵¹⁸ Critically, the BLM must:

[T]o the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management of activities of or for such lands with the land use planning and management actions of . . . the States and local governments within which the lands are located. . . . Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent [s]he finds consistent with Federal law and the purposes of this Act.⁵¹⁹

Similarly, regulations implementing the National Forest Management Act require the USFS to “coordinate land management planning with the equivalent and related planning efforts of . . . state and local governments.”⁵²⁰ In preparing or revising land and resource management plans, the USFS must consider state and local government objectives and the “compatibility and interrelated impacts of these plans and policies; Opportunities for the plan to address the impacts identified or contribute to joint objectives; and Opportunities to resolve or reduce conflicts, within the context of

⁵¹⁵ Ranking obtained from U.S. Energy Information Administration, State Profiles and Energy Estimates available at <http://www.eia.gov/state/rankings/>.

⁵¹⁶ *Id.*

⁵¹⁷ See Study on Management of Public Lands in Wyoming, *supra* note 287 at §§ 21.3 – 21.4.

⁵¹⁸ 40 U.S.C. §§ 1712(a) (2012) (develop and maintain land use plans) and 1712(c)(4) (2012) (rely on public land inventories).

⁵¹⁹ 43 U.S.C. § 1712(c)(9) (2012).

⁵²⁰ 36 C.F.R. § 219.4(b)(1) (2015).

developing the plan’s desired conditions or objectives.”⁵²¹

FLPMA’s consistency requirement provides the eleven contiguous Western states with a seat at the table for decisions involving management of over 174 million acres of BLM land. USFS regulations grant these states and their local governments a substantial role in planning for the over 140 million National Forest System acres. But to be effective, local input and plans must contain detailed and realistic descriptions of future land use objectives and specific steps to move towards that desired future condition. While many Utah counties have undertaken some planning, many county plans lack critical information or detail. This problem may be more acute in rural counties that lack the staff and resources to complete a comprehensive planning process. State funding to build planning capacity and to prepare high-quality plans could give local governments a more effective voice in public land management, but funding alone is not a panacea.

NEPA also provides an opportunity for local governments to engage in public land management decisions. NEPA requires a detailed statement on the environmental impacts of, and alternatives to, every “major federal action significantly affecting the quality of the human environment.”⁵²² State or local agencies may become a cooperating agency⁵²³ and assist in the NEPA analysis.⁵²⁴ Cooperating agency status can give state and local governments significant leverage, as the lead federal agency must “[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.”⁵²⁵

As with FLPMA’s coordination requirement, a state or local government’s ability to

⁵²¹ 36 C.F.R. § 219.4(b)(2) (2015)

⁵²² 42 U.S.C. § 4332(2)(c) (2012).

⁵²³ 40 C.F.R. § 1508.5 (2015).

⁵²⁴ 40 C.F.R. § 1501.6 (2015).

⁵²⁵ 40 C.F.R. § 1501.6(2)(a)(2) (2015).

influence the NEPA process depends heavily on the quality of the information brought to the table. Opinions and suggestions are not enough, and strident demands are unlikely to foster collaboration. States and local governments must invest the time and effort to prepare rigorous fact-based plans, environmental analyses, and thoughtful proposals. Where state and local input is not developed fully, plans stand little chance of influencing federal decisions. Indeed, strident or poor quality plans may do more harm than good if they demand the undeliverable, are ignored by federal agencies, and local governments do not understand why their plans are not incorporated into federal decisions.

4. Rationalizing the Landscape

Western landscapes are highly fragmented. See Figure 3. Reducing fragmentation by consolidating state trust lands reduces planning and management conflicts for federal land managers and facilitates planning and management for revenue-generating uses of state trust lands. FLPMA authorizes both the BLM and USFS to undertake fragmentation-reducing land exchanges by trading developable federal lands for state trust lands that are better suited for conservation.⁵²⁶ The two key requirements for a FLPMA land exchange involve determinations that the parcels to be exchanged are of equal value, and that the exchange is in the public interest.⁵²⁷ Congress can bypass FLPMA, specifically authorizing a land exchange and streamlining the approval process.

The Utah Recreational Land Exchange (URLE) is an example of a successful recent exchange. The URLE authorized the BLM to trade 35,609 acres of federal land for 25,553 acres of state lands.⁵²⁸ The exchange removed the threat of development from sensitive lands along the Colorado River and near two National Parks while allowing the state to pursue revenue generation in more appropriate locations.

⁵²⁶ See 43 U.S.C. §§ 1715(a) and 1716(a) (2012).

⁵²⁷ 43 U.S.C. §§ 1716(a) and (b) (2012).

⁵²⁸ 123 Stat. 1982 (2009).

Although the fragmentation-reducing benefits of land exchanges are clear, high transaction costs and the challenges posed by enacting project-specific legislation foil most exchange efforts.⁵²⁹ Reform could improve the process, and groups such as the Western Governors' Association are moving towards that end.⁵³⁰ But even absent reform, land exchanges provide a proven valuable tool for addressing a profound and pervasive challenge.

5. Transition Assistance

Western communities sprung up around the resources settlers needed to survive and flourish — water, rich farmland, timber, and minerals. As the era of manifest destiny drew to a close and our nation began the transition from public land disposal to multiple-use, sustained-yield management, communities often saw access to the resources on our public lands decline. The transition from commodity development has been painful for communities that struggled to anticipate and adapt to changing societal priorities, and for communities that were unable to diversify their economies. It behooves us to assist communities that developed on promises of ready natural resource access to transition to a less commodity-dependent future. Past efforts to aid in this transition are often ungainly, but they contain valuable lessons nonetheless. The timber crisis of the 1980s provides a particularly acute example of both the risk and the opportunity presented.

During the 1980s the Pacific Northwest was immersed in a bitter controversy over logging of old-growth forests, declining old-growth forest dependent species, and the role of federal forests in regional and local economies. The northern spotted owl was protected under the ESA in 1990,⁵³¹

⁵²⁹ See JOHN RUPLE & ROBERT KEITER, *THE FUTURE OF FEDERAL-STATE LAND EXCHANGES* (2014) (explaining the benefits of, and barriers to, land exchange effectuation) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2457272.

⁵³⁰ See W. Governors' Ass'n Policy Resolution 2016-04, *Federal-State Land Exchanges and Purchases* (2016) http://www.westgov.org/images/2016-04_Federal-State_Land_Exchanges.pdf.

⁵³¹ 55 Fed. Reg. 26114 (June 26, 1990).

and lawsuits over federal timber harvests shut down the federal timber sale program on nine national forests.⁵³² Timber harvests from federal land fell by eighty percent between 1989 and 1994,⁵³³ and 14,000 forest products jobs were lost.⁵³⁴

In convening a conference to address these issues, President Clinton set forth five principles to guide development of a management strategy supporting both old-growth related species and a sustainable timber industry, including direction that “we must never forget the human and the economic dimensions of these problems. Where sound management policies can preserve the health of forest lands, sales should go forward. Where this requirement cannot be met, we need to do our best to offer new economic opportunities for year-round, high-wage, high-skill jobs.”⁵³⁵

The Northwest Economic Adjustment Initiative (NWEAI) was an outgrowth of that effort and sought to provide relief for distressed timber communities, fostering long-term and environmentally responsible economic development consistent with and respectful of rural community character, and improving cooperation between governments.⁵³⁶ The NWEA provided economic development and impact mitigation funds for assisting workers and their families, business and industry, communities and infrastructure, and support ecosystem services.⁵³⁷ From

⁵³² Seattle Audubon Soc’y v. Moseley, 798 F. Supp 1484 (W.D. Wash. 1992) (enjoining Forest Service timber sales that would log suitable habitat for the northern spotted owl).

⁵³³ TERRY L. RAETTIG & HARRIET H. CHRISTENSEN, TIMBER HARVESTING, PROCESSING, AND EMPLOYMENT IN THE NORTHWEST ECONOMIC ADJUSTMENT INITIATIVE REGION: CHANGES AND ECONOMIC ASSISTANCE 3 (1999) available at http://www.fs.fed.us/pnw/pubs/pnw_gtr465.pdf.

⁵³⁴ *Id.*, at 8.

⁵³⁵ PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: WILLIAM J. CLINTON 388 (1993, Book I).

⁵³⁶ *Id.* at 4.

⁵³⁷ Terry L. Raettig & Harriet H. Christensen, *The Northwest Economic Adjustment Initiative: Background and Framework in*, NORTHWEST FOREST PLAN: OUTCOMES AND LESSONS LEARNED FROM THE NORTHWEST ECONOMIC ADJUSTMENT INITIATIVE 2 (Harriet Christensen et al., eds., 1997).

1994 through 1999, NWEAI funding totaled approximately \$1.2 billion.⁵³⁸

Admittedly, “no program can make career transition simple or painless, and the diversity of people and their approaches to changes in their lives must be accommodated. Positive outcomes may take a long time and cannot be measured simply in terms of wages or job placement.”⁵³⁹ Efforts like the NWEA are needed across the West to help resource-dependent communities transition to more diverse, stable, and prosperous futures. But helping communities adapt to our changing world and societal priorities needs to begin *before* harsh social dislocations occur. With early and effective assistance, maybe we can help residents across the West retain the ties to the land, the stable economies, and a future for their kids that celebrates multi-generational ties to the land. In the end, after all, that appears to be what many rural Westerners want most. With PILT and revenue sharing programs providing millions of dollars to states annually state do not need to wait for the federal government to fund such programs. States can begin investing more heavily in transition assistance today, and begin addressing a pressing cause of frustration.

VI. Conclusion

Like the sagebrush rebels before them, today’s transfer advocates feel left behind by evolving public land management priorities that depart from their vision of how the West should be managed.

The TPLA and its progeny appeal to that pain and frustration, but offer only empty answers to real questions, and in so doing, distract us from opportunities to address the root causes of frustration over public land management. The law is clear, the federal government possesses plenary

⁵³⁸ *Id.*

⁵³⁹ Paul Sommers, *Research on the Northwest Economic Adjustment Initiative: Outcomes and Process in*, NORTHWEST FOREST PLAN: OUTCOMES AND LESSONS LEARNED FROM THE NORTHWEST ECONOMIC ADJUSTMENT INITIATIVE 69 (Harriet Christensen et al., eds., 1997).

power over the public domain, including the power to retain the land in federal ownership, and to do so indefinitely. The federal government is not obligated to dispose of additional public land — beyond the almost 400 million acres of land surface it already gave up in the eleven contiguous Western states — and statehood enabling acts do nothing to change this settled legal reality.

Even if transfer advocates overcome long legal odds and a disposal obligation is found to exist, such an obligation would not necessitate giving the land away, let alone giving the land to the states. Furthermore, that duty to dispose would almost certainly not extend to lands that are mineral in character, leaving states without the revenue they would need to manage the lands they fought so hard to obtain. States would be faced with significant fiscal and policy challenges, and the public would see fewer and fewer opportunities to engage in land management decisions.

The fate of our Western public lands matters, as does the fate of those communities that depend on our public lands. We must look beyond the empty promise of easy riches and begin the hard work needed to address profound questions raised by evolutions in public land management policies, including what we owe to those who live closest to the public domain. Their pain and frustration are real, and that pain and frustration need to be addressed if the next generation is to avoid revisiting these same battles. There are opportunities to improve public land management: updating laws, consolidating lands, fully funding agencies and community development, and cooperating with our neighbors all hold promise.