A Legal Overview of Utah's H.B. 148 — The Transfer of Public Lands Act

By Donald J. Kochan

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Introduction

Recent legislation passed in the State of Utah has demanded that the federal government extinguish title to certain public lands that the federal government currently holds. The State of Utah claims that the federal government made promises to it (at statehood when the federal government obtained the lands) that the federal ownership would be of limited duration and that the bulk of those lands would be timely disposed of by the federal government into private ownership or otherwise returned to the State. This White Paper provides a legal overview of these claims.

On March 23, 2012, Governor Gary Herbert of the State of Utah signed into Utah law the "Transfer of Public Lands Act and Related Study," ("TPLA")[1] also commonly referred to House Bill 148 ("H.B. 148").[2] This legislation demands that the federal government "extinguish" its title to an estimated more than 20 million[3] (or by some reports even more than 30 million[4]) acres of federal public lands in the State of Utah by December 31, 2014.[5] It also calls for the transfer of such acreage to the State and establishes procedures for the development of a management regime for this increased state portfolio of land holdings resulting from the transfer.[6]

Advocates for the TPLA claim that the current federal retention of these public lands deprives the state of revenue that would come from, *inter alia*, (1) the State's receipt of a guaranteed percentage of the proceeds from disposal sales it has expected the federal government to conduct; and (2) the State's ability to tax property after it is disposed into private hands, whereas while the federal government retains those lands they are exempt from taxation.[7] Moreover, the State has a variety of other arguments it offers for transferring ownership into State hands, including claims that the federal government is a poor manager of the lands and that it has an unwise concept of multiple use, among other things.[8] This White Paper makes no attempt to resolve whether H.B. 148 is good policy in these areas or even whether it will result in an increase in revenue. Instead, it is concerned with conducting an overview of the legal arguments surrounding the legislation and its validity.

Whether the State has the authority to demand that the federal government extinguish rights depends, in large part, on the proper interpretation of the Property Clause in the Constitution. Article IV, Section 3 of the U.S. Constitution provides that: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."[9] This White Paper will consider some of the implications of different theories of the Property Clause on the determination of the TPLA's validity.

H.B. 148, whose chief sponsor was Utah Representative Ken Ivory,[10] represents a new chapter in the long book of wrangling between states in the west

1 Utah Code Ann. § 63L-6-101 *et seq.* (2012).

2 All H.B. 148 "Bill Documents" are available at http://le.utah.gov/~2012/htmdoc/hbillhtm/hb0148.htm. H.B. 148 as Enrolled is available at http://le.utah.gov/~2012/bills/hbillenr/hb0148.pdf.

3 *See, e.g.*, Kirk Johnson, *Utah Asks U.S. to Return 20 Million Acres of Land*, N.Y. Times, Mar. 24, 2012, at A9. *See also* U.S. Dep't of Interior, Bureau of Land Management, Public Land Statistics 2011, 24 (May 2012), available at http://www.blm.gov/public_land_statistics/pls11/pls2011.pdf (Table 1-4).

4 *See, e.g., Local Republicans Back Fight for Control of Federal Lands*, The Spectrum (St. George, UT), May 4, 2012, at A1.

5 Utah Code Ann. § 63L-6-102 (2012).

6 Utah Code Ann. § 63L-6-101 *et seq.* (2012).

7 *See* Constitutional Defense Council, *Toward a Balanced Public Lands Policy, A Case Statement for the H.B. 148: Utah's Transfer of Public Lands Act*, Nov. 2012, at 4 [hereinafter "CDC Nov. 2012 Case Statement"], available at http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148SummaryInteractive.pdf.

8 *See also* Kathleen Clarke, *Finding a Balanced Public Lands Policy*, Deseret News, Nov. 14, 2012, at A12 ("Utah's public lands would be better managed, more productive and more accessible under state stewardship. Current federal land policy and management is inefficient, ineffective and threatens the long-term use and enjoyment of the public lands.").

9 U.S. Const., Art. IV, Sec. 3.

10 A copy of the bill as introduced, which includes appended to it a Legislative Review Note critical of the bill authored by Utah's Office of Legislative Research and General Counsel, is available at http://le.utah.gov/~2012/bills/hbillint/hb0148.pdf.

and the federal government over natural resources and public lands ownership, control, and management.[11] Thirty-one percent of our nation's lands are owned by the federal government and 63.9 percent of the lands in Utah are owned by the federal government.[12] Of these federal holdings, "[t]he BLM manages nearly 22.9 million acres of public lands in Utah, representing about 42 percent of the state," according to the U.S. Department of Interior ("DOI") Bureau of Land Management ("BLM") Utah State Office website.[13]

Utah's H.B. 148 is a controversial, bold demand made against the federal government and has expectedly raised eyebrows in the political and legal discourse.[14] This White Paper is designed to describe the TPLA and to provide a summary of some of the legal questions related to the enforceability of the State of Utah's demands. While the politics of the demand, the prudence of reallocating ownership, and the practicalities of public lands reforms implicated by H.B. 148 are certainly topics worth analyzing and pursuing, this White Paper will not engage in those fields of discussion.

As Governor Herbert has noted, the legal case for H.B. 148 may not be a "slam dunk,"[15] but there are legitimate arguments to support the law and certainly critics of the law overstate their legal case against the law. At the very least, there are open legal questions involved in the TPLA that have never received definitive resolution in the courts.[16] As such, critics cannot make a cut and dry case against the law. In fact, if anything, opposition statements made so far regarding the law may reflect an over-confidence in its unconstitutionality and an overstatement of the strength of precedent. To prevail, Utah's legal case will need to, in part, distinguish some past court decisions. And, in some situations where precedent might seem to weigh against validity of the TPLA demand, Utah may need to make a case for revisiting such interpretations if necessary.

The TPLA has, to date, received a strikingly low level of press coverage and public attention (even inside Utah). Perhaps part of the reason for a low level of news coverage or serious analysis of the TPLA is that people have not taken it seriously. For example, in April 2012, the Secretary of the U.S. Department of Interior is quoted as saying that Utah's law is "nothing more than a political stunt."[17] Despite this perception that some hold, the research leading to this White Paper supports a finding that there are indeed serious legal questions to consider with the TPLA. The legal case for it should not be quickly dismissed. Moreover, other states are

11 As one report explained:

> "Private land ownership has been the cornerstone for freedom in this country and economic opportunity. It's one of the blessings we've had as a country when we came here and had for the first time in a universal way the ability to own our own land," [Governor] Herbert said prior to signing the legislation. "And loss of that ownership in fact takes away freedom and liberty to the public and the people. Federal control of our public lands has put us at a distinct disadvantage compared to other states."

Charles Geraci, *Governor Signs Bill That Challenges Feds Over Land Control*, The Herald Journal (Logan, UT), Mar. 23, 2012.

12 James Rasband et al., Natural Resources Law & Policy 141 (2d ed. 2009).

13 U.S. Dep't of Interior, Bureau of Land Management, Utah State Office Homepage, *available at* http://www.blm.gov/ut/st/en.html.

14 *See, e.g.*, Johnson, *supra* note 3, at A9 (reporting reactions to the TPLA).

15 Associated Press, *Utah Law Demands Release of Federal Land*, Tulsa World, Mar. 24, 2012, at A11 (quoting Governor Herbert as saying "'It's not a slam dunk, but there is legal reasoning and a rational thought process'").

16 Utah's Constitutional Defense Council makes this point, stating: "The question of whether the Property or Supremacy Clauses of the United States Constitution permit this unilateral reversal in federal land policy or repudiation of the terms of the State's enabling act is not resolved, because no federal appellate court has directly addressed this issue." CDC Nov. 2012 Case Statement, *supra* note 7, at 4.

For those advocates who wish to advance that there is more than a policy dispute at issue but also a substantive legal claim that must be taken seriously, the next statement by the CDC is troubling, where they state: "However, *the larger and more significant question is whether the shift* from disposal to permanent federal retention of a large portion of public lands in the Western States *is good public policy* today." *Id.* (emphasis added). Such public policy concerns are beyond the scope of this White Paper.

17 Matt Canham, *Salazar: Utah just playing politics in land fight*, Salt Lake City Trib., Apr. 24, 2012 (claiming "Salazar sees it all as nothing but show," and quoting Salazar as saying the Act is only "political rhetoric you see in an election year.").

exploring similar avenues to assert their claims vis-à-vis the federal government and are in various stages of developing land transfer strategies that will model or learn from H.B. 148.[18] That fact further underscores the need for a serious and informed legal discussion on the issues related to disposal obligations of the federal government. This White Paper takes a first step into that discussion.

I. The Transfer of Public Lands Act – H.B. 148

The legislation originally known and proposed as H.B. 148, and as enacted known as the Transfer of Public Lands Act and Related Study ("TPLA"), has three basic parts codified in Utah Code §§ 63L-6-101 through 104.[19] These three main parts can be loosely described as the following: (1) the *scope* part explaining the breadth of the TPLA by defining terms and identifying exceptions;[20] (2) the *demand* part;[21] and (3) the pre- and post-extinguishment *planning and management* part, which describes the entities that will govern and prepare for a transition of ownership into State hands.[22]

The "definitions" set out in Utah Code § 63L-6-101, the most significant part of the first portion of the Act, establish the TPLA's scope by defining what is not included in the demand. It states that "'Public lands' means lands within the exterior boundaries of [Utah] *except,*" to one degree or another: private lands, Indian lands, lands held in trust for the state, lands reserved for state institutions, a few other lands with distinct ownership characteristics, and finally and most significantly certain identified federally controlled areas of the State including the National Parks, National Monuments, Wilderness, and several other special-designation federal holdings.[23] Thus, especially as a

18 Dianne Stallings, *County Pushes for Interstate Forest Management Plan*, Ruidoso News, Aug. 14, 2012 ("Bills patterned after Utah's [H.B. 148] are being prepared for filing next year in Colorado, Idaho, Montana, and New Mexico, according to reports."); Johnson, *supra* note 3, at A9 (same).

19 Utah Code Ann. § 63L-6-101 *et seq.* (2012).

20 *Id.* § 63L-6-102.

21 *Id.* § 63L-6-103.

22 *Id.* § 63L-6-103 & H.B. 148, Sec. 5 (As Enrolled Mar. 16, 2012).

23 *Id.* § 63L-6-102 (emphasis added). The TPLA provides:

> § 63L-6-102. Definitions As used in this chapter:
>
> (1) "Governmental entity" is as defined in Section 59-2-511.
>
> (2) "Net proceeds" means the proceeds from the sale of public lands, after subtracting expenses incident to the sale of the public lands.
>
> (3) "Public lands" means lands within the exterior boundaries of this state except:
>
> (a) lands to which title is held by a person who is not a governmental entity;
>
> (b) lands owned or held in trust by this state, a political subdivision of this state, or an independent entity;
>
> (c) lands reserved for use by the state system of public education as described in Utah Constitution Article X, Section 2, or a state institution of higher education listed in Section 53B-1-102;
>
> (d) school and institutional trust lands as defined in Section 53C-1-103;
>
> (e) lands within the exterior boundaries as of January 1, 2012, of the following that are designated as national parks:
>
> (i) Arches National Park; (ii) Bryce Canyon National Park; (iii) Canyonlands National Park; (iv) Capitol Reef National Park; and (v) Zion National Park;
>
> (f) lands within the exterior boundaries as of January 1, 2012, of the following national monuments managed by the National Park Service as of January 1, 2012:
>
> (i) Cedar Breaks National Monument; (ii) Dinosaur National Monument; (iii) Hovenweep National Monument; (iv) Natural Bridges National Monument; (v) Rainbow Bridge National Monument; and (vi) Timpanogos Cave National Monument;
>
> (g) lands within the exterior boundaries as of January 1, 2012, of the Golden Spike National Historic Site;
>
> (h) lands within the exterior boundaries as of January 1, 2012, of the following wilderness areas located in the state that, as of January 1, 2012, are designated as part of the National Wilderness Preservation System under the Wilderness Act of 1964, 16 U.S.C. 1131 et seq.:
>
> (i) Ashdown Gorge Wilderness; (ii) Beartrap Canyon Wilderness; (iii) Beaver Dam Mountains Wilderness; (iv) Black Ridge Canyons Wilderness; (v) Blackridge Wilderness; (vi) Box-Death Hollow Wilderness; (vii) Canaan Mountain Wilderness; (viii) Cedar Mountain Wilderness; (ix) Cottonwood Canyon Wilderness; (x) Cottonwood Forest Wilderness; (xi) Cougar Canyon Wilderness; (xii) Dark Canyon Wilderness; (xiii) Deep Creek Wilderness; (xiv) Deep Creek North Wilderness; (xv) Deseret Peak Wilderness; (xvi) Doc's Pass Wilderness; (xvii) Goose Creek Wilderness; (xviii) High Uintas Wilderness; (xix) LaVerkin

result of this last exception, most of the federal lands within the State of Utah that have received a heightened status of protection (beyond the more general category of "public lands" that are typically open to multiple use, for example) are not subjects of the TPLA.

The heart of the TPLA is in the "demand" part. Utah Code § 63L-6-103 (1) states: *"On or before December 31, 2014, the United States shall: (a) extinguish title to public lands; and (b) transfer title to public lands to the state."*[24]

Within the last substantive parts dealing with planning and managing the transfer of lands, the first major provision in Utah Code § 63L-6-103(2) requires that: "If the state transfers title to any public lands with respect to which the state receives title under Subsection (1)(b), the state shall: (a) retain 5% of the net proceeds the state receives from the transfer of title; and (b) pay 95% of the net proceeds the state receives from the transfer of title to the United States."[25] Thus, if after the State gets the lands back it decides to sell that property to private owners, the division of the proceeds will replicate the same division and school trust commitment that would exist according to the terms of the Utah Enabling Act[26] had (and as if) the United States sold the property itself.

The final portion of the management part is in the uncodified Section 5 of H.B. 148 where the Act calls for the creation of a Utah Constitutional Defense Council ("CDC") study to evaluate implementation strategies and develop legislation to plan for the State management of its soon to be acquired lands.[27] As part of this requirement, the CDC published both a "case statement"[28] and a separate "report"[29] in November 2012. These management and implementation portions of the Act, including the division and commitment of proceeds and the CDC report and proposed legislation, are beyond the scope of this White Paper.

The remaining parts of this White Paper will analyze the legal arguments regarding the demand portion of the legislation. Whether and to what extent the State of Utah may demand that the federal government extinguish title to certain of its public lands holdings in the State of Utah will depend on whether the federal government owes the State a "duty to dispose."

II. Historical Predecessors to the TPLA/H.B. 148

The long history of conflict over control of lands in the Western states and disputes over the proper level of federal control dates back to the very formation of the new states across the decades after the Revolutionary War.[30] In some ways, the TPLA/H.B. 148 is yet another – although arguably distinguishable – chapter in federal-state tensions and battle for control of the public

Creek Wilderness; (xx) Lone Peak Wilderness; (xxi) Mount Naomi Wilderness; (xxii) Mount Nebo Wilderness; (xxiii) Mount Olympus Wilderness; (xxiv) Mount Timpanogos Wilderness; (xxv) Paria Canyon-Vermilion Cliffs Wilderness; (xxvi) Pine Valley Mountain Wilderness; (xxvii) Red Butte Wilderness; (xxviii) Red Mountain Wilderness; (xxix) Slaughter Creek Wilderness; (xxx) Taylor Creek Wilderness; (xxxi) Twin Peaks Wilderness; (xxxii) Wellsville Mountain Wilderness; and (xxxiii) Zion Wilderness;

(i) lands with respect to which the jurisdiction is ceded to the United States as provided in Section 63L-1-201 or 63L-1-203;

(j) real property or tangible personal property owned by the United States if the property is within the boundaries of a municipality; or

(k) lands, including water rights, belonging to an Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

Utah Code Ann. § 63L-6-102 (2012).

24 *Id.* § 63L-6-103 (1) (emphasis added).

25 *Id.* § 63L-6-103 (2).

26 Utah Code Ann., Enabling Act, available at http://archives.utah.gov/research/exhibits/Statehood/1894text.htm.

27 H.B. 148, Sec. 5 (Enrolled Copy (Mar. 16, 2012)), *available at* http://le.utah.gov/~2012/bills/hbillenr/hb0148.pdf.

28 *See* CDC Nov. 2012 Case Statement, *supra* note 7.

29 Constitutional Defense Council, *A Report on Utah's Transfer of Public Lands Act: H.B. 148 – Presented to Utah State Legislature Interim Committees Natural Resources, Agriculture and Environment, and Education*, Nov. 2012 [hereinafter "CDC Nov. 2012 Report"], available at http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148.pdf.

30 *See generally* Paul W. Gates, History of Public Land Law Development (1968 & photo. reprint 1979).

lands.[31] A few examples of the historical predecessors to the TPLA are provided below as a sampling of the efforts in Utah and other states that have attempted to wrest ownership, control, and management of lands away from the federal government across the years.

Consider, for example, a 1915 "memorialization" resolution from the Utah Senate to the President, the U.S. Senate, and the U.S. House of Representatives exclaiming Utah's understanding that the federal government had made a promise to dispose of the public lands it acquired when Utah became a state.[32] That statement, titled Senate Joint Memorial 4, read, in part:

> In harmony with the spirit and letter of the land grants to the National government, in perpetuation of a policy that has done more to promote the general welfare than any other policy in our national life, and in conformity with the terms of our Enabling Act, we, the members of the Legislature of the State of Utah, memorialize the President and the Congress of the United States for the speedy return to the former liberal National attitude toward the public domain, and we call attention to the fact that the burden of State and local government in Utah is borne by the taxation of less than one-third the lands of the State, which alone is vested in private or corporate ownership, and we hereby earnestly urge a policy that will afford an opportunity to settle our lands and make use of our resources on terms of equality with the older states, to the benefit and upbuilding of the State and to the strength of the nation.[33]

Several similar resolutions have issued across the years from other states with arguments based on their compacts and agreements with the federal government where the states believed the federal government has a fiduciary or contractual duty to dispose of its land ownership.[34] As the Utah CDC Report from November 2012 explains, many other efforts stand in the same company as the 1915 resolution:

> When the federal government began to move more toward policies of reservation and conservation in the early 1900's, Utah registered its objections by urging the return to active disposal. At various points throughout the 20th century, Utah restated these objections, particularly upon the passage of FLPMA, wherein the policy shift to one of land retention and preservation became express federal law. For various reasons, mostly political, these prior Utah efforts to restore the benefits contemplated by the Enabling Act have been unsuccessful.[35]

In their claims, many states asserted that the original and longstanding policies in the United States were dedicated to the disposition (not retention) of federal lands,[36] and these states have been concerned when paradigmatic shifts toward retention (and against disposal) seemed to begin.

Across the 20th century, there were increasing legislative and regulatory movements toward federal retention of public lands, in many ways critically culminating in the Federal Land Policy and Management Act of 1976 ("FLPMA") which ultimately provided that "Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless . . . it is determined that disposal

31 This White Paper makes no attempt to provide a survey of these disputes and instead only acknowledges the existence of longstanding and enduring conflicts.

32 Utah S.J.M. No. 4, *A Memorial Asking for a More Liberal Policy in the Disposition of the Public Domain and Urging that the Natural Resources of the State of Utah be Made Available for Development* (Mar. 15, 1915), *excerpted and reprinted in* CDC Nov. 2012 Report, *supra* note 29, at 17.

33 *Id.*

34 *See, e.g., Granting Remaining Unreserved Public Lands to States: Hearings Before the Senate Committee of Public Lands and Surveys*, 72nd Cong. (1932) (lengthy hearings that documented past state demands and included debate over a policy of returning land to states).

35 CDC Nov. 2012 Report, *supra* note 29, at 6.

36 Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 818 (1980) (explaining that "[d]uring most of our history, the national government pursued a policy of promoting settlement and private development of the public domain."); *see also* GATES, *supra* note 30, at 57 (asserting that "the use of the public lands was to be a vital nationalizing factor in American development").

of a particular parcel will serve the national interest."[37] As Rasband notes regarding the gradual shift in public lands policy, "The move toward reservation of public lands . . . was a substantial change in public lands policy. Nevertheless these reservations can still be understood as exceptions to the still prevailing idea that the public lands were largely intended for disposition to private owners."[38]

In the years immediately before and after the passage of FLPMA, States and their state and federal representatives became increasingly vocal and present with their concerns over federal ownership, management, and control, and they became increasingly bold in their efforts to assert rights or powers over lands within their respective states and assertive in arguing that such claims were superior to federal claims. Due to the volume and seriousness of the political and legal efforts during this period in the late 1960s and 1970s, that era became known (for better or worse) as the "Sagebrush Rebellion."[39] A variety of legal maneuvers were tried by states and others during this period to diminish federal control over public lands, although none looked exactly like the TPLA. For example, while Nevada passed a law declaring ownership of certain federal lands and while that law was invalidated by a federal district court,[40] the TPLA does not "declare" that Utah owns land and makes no effort to *take* land away from the federal government. Instead, the TPLA merely articulates the federal government's duty to dispose and demands that it comply.

In order to fully understand the current state of affairs in Utah, much more of the history of land disputes would be extremely helpful, and readers are encouraged to explore other sources in this area. In order to keep this White Paper relatively brief, however, any more detailed history will be left to those other avenues of research. But, the TPLA is sufficiently distinct and can be studied effectively in isolation as well. Although some have called the TPLA a "new Sagebrush Rebellion,"[41] the nature of the TPLA is different from measures that have come before it and the new law involves some very unique legal concerns.[42] The next Part deals with a selection of these legal issues.

III. A Legal Analysis of the Transfer of Public Lands Act (H.B. 148)

Interest groups from a variety of both supportive and opposition positions are debating the enforceability, and, quite separately, the wisdom of H.B. 148.[43] In light of the fact that there has not yet been much independent

37 FLPMA, §102(a)(1); 43 U.S.C. § 1701(a)(1).

38 Rasband et al., *supra* note 12, at 139.

39 For a summary of some of the major state and federal initiatives to limit federal ownership or control of lands in the West in what has become known as the "Sagebrush Rebellion," see Rasband et al., *supra* note 12, at 156-58. *See also* CDC Nov. 2012 Report, *supra* note 29, at 20-23 (describing the major efforts that occurred at the federal and state level during the Sagebrush Rebellion).

40 *See* United States v. Nye County, 920 F.Supp. 1108 (1996) (applying broad Property Clause power to reject Nevada's claims of title using Equal Footing theory). In *Nye*, for example, one could argue that the Court *only held* that Nevada went too far because the state claimed ownership outright rather than demanding that the federal government fulfill a duty to dispose or return property to the state. And beyond that, even if one cannot or does not wish to distinguish the cases, the *Nye* case is only the opinion of one district court and therefore has limited precedential effect.

41 *See, e.g.*, Robert Gehrke, *Senate approves Utah's new Sagebrush Rebellion*, Salt Lake City Trib., Mar. 7, 2012.

42 *See* Johnson, *supra* note 3, at A9 ("'This is not your father's sagebrush rebellion,' said State Representative Ken Ivory . . . referring to the wave of antifederal protests that rippled through the West in the 1960s and '70s. 'There are very sound legal bases for doing this.'")

43 One of the chief advocacy groups in favor of H.B. 148 is the American Lands Council, led by the chief sponsor of the legislation, Utah Representative Ken Ivory. The American Lands Council provides several key primary documents along with resources designed to support the legislation on their website. *See* American Lands Council, Resources Page, available at http://www.americanlandscouncil.org/resources.html. Another pro-H.B. 148 website with resources is titled "Are We Not a State", available at http://www.arewenotastate.com/index.html. One of the primary organizations advocating against H.B. 148 is the Southern Utah Wilderness Alliance ("SUWA") which makes some resources and commentary available on its website as well. *See* Southern Utah Wilderness Alliance, *The Facts About HB 148: Unconstitutional, Bad Public Policy and Won't Help Utah Schools*, Mar. 23, 2012, available at http://www.suwa.org/2012/03/23/the-facts-about-hb-148-unconstitutional-bad-public-policy-and-won%E2%80%99t-help-utah-schools/.

legal analysis published on the TPLA,[44] this White Paper provides a preliminary summary of the legal arguments at issue and presents an initial legal assessment of some of those arguments.[45]

Much of the narrative of Utah's legal case is set forth in documents supporting the legislation. Included in those documents is what amounts to an outline of the State's legal theories best seen in the "whereas" clauses in Utah's House Joint Resolution 3 of March 16, 2012, passed concurrently with H.B. 148.[46]

This section will consider some of that outline, while providing some independent supplemental legal material critical to evaluating the legal legitimacy of the TPLA. The State of Utah may make several arguments to defend its legislation – including those based on the Equal Footing Doctrine, general principles of Federalism, and a *Pollard*-based interpretation of the Property Clause (these theories will be briefly addressed at the end of this section). The State's arguments based on the Utah Enabling Act are its strongest, however, and an analysis of those legal claims will be taken up in the first subsection below.

A. An Enforceable Compact/Contract Theory of the Utah Enabling Act ("UEA") with a Federal "Duty to Dispose"

A contract-based theory – including a compact-based duty to dispose – is one of the strongest arguments that proponents of the TPLA make to support the validity of Utah's demand.[47] The argument includes claims that the TPLA simply enforces a promise made when Utah became a state that the federal government has heretofore seemed unwilling to completely honor and fulfill.[48]

Utah's Enabling Act ("UEA") establishing its

44 As of this writing in November 2012, only one published law review article or comment *claims* to analyze H.B. 148. *See* Spencer Driscoll, Comment, *Utah's Enabling Act and Congress's Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Amendment*, 2012 B.Y.U. L. Rev. 999 (2012). Although this student paper does have some relevance to understanding developments in disputes between Utah and other states over federal land ownership and control – anyone wishing to *analyze H.B. 148* should not rely on the Driscoll Comment. The Driscoll Comment appears to have been written with a separate Utah 2010 eminent domain act in mind, and then, in order to take account of recent events before publication, adds into the paper a reference to H.B. 148 and at times tries to equate the two pieces of legislation but really conflates arguments where only separate analysis will do. As the Comment fails to recognize that H.B. 148 is quite distinct from the 2010 legislation or other past Utah efforts, most of its analysis is non-instructive for those who wish to explore the legal issues with H.B. 148.

45 This White Paper provides only an introductory legal analysis. It does not claim to be comprehensive of all of the available legal arguments for or against the validity of the TPLA. Furthermore, as previously stated, this Paper does not intend to explore the policy reasons for or against the legislation. It also passes no judgment on any other legislation or initiatives designed to adjust the relative positions of the State of Utah and the federal government vis-à-vis the public lands (such as roads lawsuits, eminent domain legislation, and other unrelated (or related but independent) actions).

46 Utah H.J.R. 3, Enrolled Mar. 16, 2012, available at http://le.utah.gov/~2012/bills/hbillenr/hjr003.htm.

47 A *New York Times* article – one of the only major, national newspaper articles even touching on any coverage of H.B. 148 – summarized the argument proponents make as the following:

> "The federal government, Mr. Ivory and other proponents said, reneged on Congressional promises going back to the 1800s, which held that Washington's control of tens of millions of acres in the West in national forests, rangelands and parks was only temporary. That pledge, they say, was written into contractual obligations in the founding documents of many states, and was followed through in some places but not others. The Midwest and Plains states, for example, are now almost entirely private lands, but hop a meridian or two west and the picture changes completely."

Johnson, *supra* note 3, at A9. This is, in fact, consistent with what can be found in public statements and speeches supporting H.B. 148.

48 An early news report on the TPLA on the day it was signed into law summarized, in part, the State of Utah's likely legal defenses of the Act based on a compact theory of the Enabling Act:

> Rep. Ken Ivory, R-West Jordan, and other political leaders have said the bill is an effort to exert rights rooted in the 1894 Enabling Act, which led to Utah's statehood. U.S. Sen. Mike Lee, R-Utah, echoed that point Friday. "When we became a state over a century ago, we were given a promise — a promise that some will insist was explicit in Section 9 of the statehood Enabling Act; others will say (it) was implicit, if not explicit," Lee said. "But the understanding based on what had happened in other states was that eventually the federal government would no longer continue to hold all of this land in perpetuity."

Geraci, *supra* note 11.

statehood was approved July 16, 1894.[49] Utah ratified its new constitution on November 5, 1895.[50] Where required by the UEA, the Utah Constitution codified certain parts of the UEA, including relevant portions of UEA Section 3.[51] This sub-section of this White Paper will focus on whether the Utah Enabling Act[52] and surrounding circumstances created a duty to dispose on the part of the Federal Government as part of its compact with the State of Utah memorialized in the UEA.

The question becomes whether: (1) inherent in the original compact, the federal government accepted a duty to dispose of the public lands it acquired in the UEA; and separately (2) whether the State of Utah can enforce such a duty by demanding that the federal government live up to its obligation to dispose of such property into private hands. Such a duty would include disposal in a manner that would timely allow the state to obtain/receive/enjoy the benefits of tax revenues and other contributions after the land is unlocked from the limitations on the imposition of taxes against the lands while under federal ownership. Upon disposal, the state can also otherwise obtain the benefits that flow to the State generally from private ownership and investment that is precluded while retained in federal control.

What follows in this White Paper is an analysis of the UEA generally along the lines of this argument. The subsequent discussion then examines the contract-based nature of the UEA, reveals selected instructive historical analyses of enabling acts as enforceable contracts and as creating a duty to dispose, and explains that the legal rules for construction of written instruments requires that the UEA is read and interpreted as a whole document to give effect to the full bargain struck in the agreement.

Longstanding precedents support the theory that the UEA is a bilateral compact that should be treated like it is, and interpreted as, a binding contractual agreement. For one thing, the U.S. Supreme Court has consistently held that federal commitments made to the sovereign states at their time of entry into the Union are serious and enforceable.[53]

Furthermore, as the U.S. Supreme Court explained in *Andrus v. Utah*, promises in Enabling Acts are "'solemn agreement[s]' which in some ways may be analogized to a contract between private parties."[54] That statement from the *Andrus* majority was also reflected in Justice Powell's opinion dissenting on grounds unrelated to this matter of interpretation. Justice Powell made note of the relationship between federal retention of lands and less tax revenue,[55] and he then also recognized the agreements within Utah's Enabling Act and others like it "were solemn bilateral compacts between each State and the Federal Government."[56] Powell later in his opinion further describes the "bilateral" nature of the compact.[57] As he explained regarding the facts in *Andrus*: "Utah has selected land in satisfaction of grants made to support the public education of its citizens. Those grants are part of the bilateral compact under which Utah was admitted to the Union. They guarantee the State a specific quantity of the public lands within its borders."[58] And, Powell explained that, in return, the State agreed not to tax the federal lands and agreed to use the lands granted for public education purposes in perpetuity.[59] Both parties had corresponding rights and duties.

Moreover, in *Andrus*, the U.S. Supreme Court also

49 Utah Code Ann., Enabling Act, *available at* http://archives.utah.gov/research/exhibits/Statehood/1894text.htm.

50 *See* Utah Code Ann., 1953, Const.

51 Utah Code Ann., 1953, Const. Art. 3.

52 Utah Code Ann., Enabling Act.

53 *See, e.g.*, Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 176 (2009). The Court in *Office of Hawaiian Affairs* emphasized the importance of federal commitments made at entry into the Union and the inability for Congress after giving State title to act in a manner that clouds that title, explaining:

> "[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed." And that proposition applies a fortiori where virtually all of the State's public lands . . . are at stake.

Id.

54 Andrus v. Utah, 446 U.S. 500, 506 (1980).

55 *Id.* at 522-23 (Powell, J., dissenting).

56 *Id.* at 523.

57 *Id.* at 539.

58 *Id.*

59 *Id.*

recognized that these compacts anticipate remedies for breach – even against the federal government if it fails to perform duties arising under the compact.[60] Whereas in *Andrus* the Court found an explicit stipulation of the remedy within the compact,[61] under the *Andrus* logic and in terms of failing to perform a duty to dispose, the courts could presumably find that a remedy of some kind (explicitly or impliedly) must exist with the UEA's duty to dispose if it were to find such a duty; and a court would then presumably need to find the TPLA's choice of remedy for dealing with a non-performing federal government reasonable in light of the implicit or explicit provision for such a remedy.

The critical provisions of the UEA for review are in Section 3 and Section 9. The only appropriate way to read these provisions is in conjunction with each other and the whole agreement in the UEA.[62] The U.S Supreme Court has explained that it is a "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other."[63] Moreover, as the Court has also recognized, "For the purposes of construction, we must look to the whole instrument. The intention of the parties is to be ascertained by an examination of all they have said in their agreement, and not of a part only."[64]

So, we begin our analysis of the text of the UEA by looking at the relevant part of Section 3:

> 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*, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use;[65]

Section 3's "forever disclaim" language leads some to believe that Utah's case for upholding the TPLA is a dead letter. However, it must be read in context.[66] First, even within this section the language shows that the parties anticipate that title will at some point be extinguished (the "until the title thereto shall have been extinguished" language together with the discussion of "disposition", *i.e.* disposal). When opponents focus only on the "forever disclaim" segment of the UEA and say that this one sentence settles the case against the TPLA, they are looking at "a part only"[67] and "a single sentence"[68] – approaches expressly rejected under the rules of construction recognized in the courts and supported by U.S. Supreme Court precedents explaining

60 *Andrus*, 446 U.S. at 506. In Andrus, the Court was considering the compact provision where "[t]he United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry." *Id.*

61 *Id.* at 506-08.

62 E. Allan Farnsworth, Contracts §7.11, at 516 (1990) (explaining that courts favor an interpretation that "gives meaning to the entire agreement").

63 Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63 (1995).

64 Black v. U.S., 91 U.S. 267, 269 (1897).

65 Utah Code Ann., Enabling Act. §3 (emphasis added).

66 Some basic rules of contract interpretation include the following:

> A contract must be construed as a whole, and the intention of the parties is to be ascertained from the entire instrument. The contract's meaning must be gathered from the entire context, and not from particular words, phrases, or clauses, or from detached or isolated portions of the contract. All the words in a contract are to be considered in determining its meaning, and the entire contract in all of its parts should be read and treated together. The entire agreement is to be considered to determine the meaning of each part.

17A Am. Jur. 2d Contracts § 375 (Nov. 2012).

67 Black v. U.S., 91 U.S. 267, 269 (1897)

68 Miller v. Robertson, 266 U.S. 243, 251 (1924) (emphasis added). *See also* Secura Ins. v. Horizon Plumbing, Inc., 670 F.3d 857, 861 (8th Cir. 2012) ("The 'cardinal rule' for contract interpretation is to 'ascertain the intention of the parties and to give effect to that intention.' The parties' intent is presumptively expressed by the 'plain and ordinary meaning' of the policy's provisions, which are read 'in the context of the policy as a whole.'").

precisely such rules. The interpretation of any written instrument must be informed by surrounding words and all sections.

Moreover, this language is perfectly consistent with the ends to be achieved. The federal government needed clean title to lands so that it could dispose of these properties to *willing* buyers. There was a fear that potential buyers would be unwilling to purchase lands from either the federal government or the state government if the buyers could not be sure which one had superior title. The UEA resolved that and sent a signal to would-be buyers of the world that the uncertainty of title had been resolved. The State in return also gave a promise that added further certainty to the buyers – the State agreed it did not have the power to interfere with the process of disposal or with rights granted through disposal. The State as part of its obligation under the compact gave the federal government the clean title and agreed not to interfere with the federal disposition—which included not prejudicing the private recipients of title gained through disposal.

It was necessary to give the United States clean title and for the states to accept a duty of noninterference 1) so that the federal government could dispose of property with certainty of title which would be necessary to attract market purchasers; 2) so that in the first instance the United States could directly realize and control the gains from the disposals such that it could use the proceeds in accordance with its commitments made to the original states such as paying off Revolutionary War debts; and 3) so that, because the United States would be successful in disposing of property to willing buyers at full price (*i.e.*, not discounted by uncertainty), the United States could sell at the highest price possible which also benefited the state of Utah because they received a percentage of such sales elsewhere in the UEA, particularly Section 9.

Thus, the State had a selfish interest in wanting the federal government to have certain title because it increased the state's own gains under the agreement. Consider Section 9 of the UEA, which provides:

> SEC. 9. That *five per centum of the* ***proceeds of the sales*** *of public lands* lying within said State, ***which shall be sold*** by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, *shall be paid to the said State, to be used as a permanent fund*, the interest of which only shall be expended for the support of the common schools within said State.[69]

First, by its language Section 9 entitles the State to proceeds from disposals. This means that the State is invested in and *relying upon the existence of disposal*, which, in consideration for this percentage of the proceeds, the State agreed to help facilitate by disclaiming rights to the unappropriated lands so as to give the seller in the disposal market (the federal government) the valuable commodity of certain title attached to the property disposed of.

Basic rules of construction require harmonization of Section 3 with Section 9.[70] By reading the two together, one can see that they generate a "duty to dispose." If the federal government could retain the property, the State would never get any benefit from Section 9. It is impracticable to believe that the State intended to agree to disclaim rights in return for a cut of the sales of those lands (and in anticipation therefore that actual sales would occur so that there was a cut to be had) yet intended no corresponding obligation that the federal government actually dispose of such lands.[71]

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69 Utah Code Ann., Enabling Act. §9 (emphasis added).

70 *See, e.g.*, Southwestern Bell Telephone Co. v. Fitch, 801 F.Supp.2d 555, 566-67 (S.D. Texas 2011) (explaining that "'In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument,'" and "'To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.'"). *See also, e.g.*, Nicolson Pavement Co. v. Jenkins, 81 U.S. 452, 456 (1871) (in construing a contract, "effect, if possible, is to be given to every part of it, in order to ascertain the meaning of the parties to it.").

71 Mauran v. Bullus, 41 U.S. 528, 534 (1842) ("In the construction of all instruments, to ascertain the intention of the parties is the great object of the court"); Haynes v. Hunt, 85 P.2d 861, 864 (Utah 1939) ("'When language is found in the instrument making the grant, fitted to create the grant naturally to be desired by both parties, although not in the usual form of such a grant, it should be given its evidently intended force and

This interpretation is further strengthened by the words in Section 9 proclaiming that the lands ceded in Section 3 "*shall be sold.*"[72] This commanding language indicates that disposal was not only anticipated but demanded and expected as a condition of the agreement.[73] This mandatory language removes from the federal government the choice to never dispose and instead retain such lands as were ceded in the previous part of the UEA. The federal retention of these lands deprives the state of revenue which would come from, *inter alia*, (1) the State's receipt of a guaranteed percentage of the proceeds from disposal sales; and (2) the State's ability to tax property after it is disposed into private hands, whereas while the federal government retains those lands they are exempt from taxation.[74]

Some may claim that the "disclaim" language in Section 3 should be read as meaning that the federal government received the title free and clear of any encumbering duties and that it therefore can retain such public lands designated in the UEA. So long as the property is *unencumbered* then perhaps the statement that the government may retain or refrain from disposing holds true. However, the principle argument in favor of the TPLA is that it calls for the disposal of lands that by the very nature of their acquisition came with an encumbrance attached – a compact and promise made between two sovereigns where the federal government committed itself to disposal and promised that it would exercise its disposal obligations in a manner (and with an understanding that respects the expectation by the State that the federal government would dispose of such lands) so that both a percentage of the proceeds from the sales would be shared with the State and the State thereafter would have the capacity to tax such lands when disposed into private hands. Utah's claim seems more than reasonable in light of these promises in Section 9.[75]

effect.'"); Creason v. Peterson, 470 P.2d 403, 405 (Utah 1970) ("conveyances of property are to be construed in accordance with the intentions of the parties").

72 UTAH CODE ANN., ENABLING ACT. §9 (emphasis added).

73 The U.S. Supreme Court has repeatedly called such language "the mandatory 'shall.'" *See, e.g.*, Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 66-61 (2007) (describing Clean Water Act "shall approve" language as creating a mandatory obligation on EPA to approve a state program when listed statutory triggering criteria were met, citing Lopez v. Davis, 531 U.S. 230, 241 (2001) (noting Congress' "use of a mandatory 'shall' . . . to impose discretionless obligations"); Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"); Association of Civilian Technicians v. FLRA, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive"); BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) ("As used in statutes ... this word is generally imperative or mandatory")).

74 The CDC Case Statement explained that the disposal was anticipated in the Enabling Act and required if the State of Utah is to receive the "benefit of its bargain.":

> The required disposal of the public lands by the United States over time was a significant *benefit of the bargain* made by the State of Utah with the federal government at the time of statehood. In addition to the future expectation of taxable lands, Utah was also promised 5% of the proceeds from the sale of the public lands held by the federal government *"which shall be sold"* following statehood. . . .

CDC Nov. 2012 Case Statement, *supra* note 7, at 4.

75 Some analogies help demonstrate that demands of this type are not unprecedented in law. Beneficiaries of trusts, for example, have rights to demand an account from a trustee. GEORGE GLEASON BOGERT, LAW OF TRUSTS AND TRUSTEES §§963 *et seq.* (2d rev. ed. 1983 & Supp. 2009) (describing trustees' duties to render formal accounts for trust property and assets upon demand of beneficiary or others, including to "learn whether the trustee has performed his trust and what the current status of the trust is" and in some instances upon completion of the accounting to order transfers of property). In many ways the federal government has an obligation to both Utah and the original States who gave the Western lands to the federal government in trust that they would use them for limited purposes and ultimately dispose of them. The federal government has a fiduciary duty to dispose of the property and do so in a reasonable amount of time. Where their delay or refusal to dispose puts the beneficiary in a lesser position – far from the duty to seek to maximize the best interests of the beneficiary – it is violating its fiduciary duty.

Consider also the existence of "lapse" statutes in some states. Another interesting analogy to the Utah effort is the passage of "lapse" statutes in some states where legislation ends interests in certain mineral estates within split estates where the mineral estate holder fails to use the mineral estate for a certain period of years. With such statutes, ownership generally reverts to the owner out of which the lesser estate is carved. The statutes are intended to encourage the productive use of property. Particularly where

Utah would not be the first to advance this interpretation of the "consideration" included in such structuring of the provisions in an enabling act. In 1828, for example, Representative Joseph Duncan of Illinois delivered a Report to Congress from the Committee on Public Lands.[76] In that Report, Duncan contended that the states, by terms of the rather uniform enabling acts, expected disposal to occur. Duncan identified a duty to dispose of federally held lands in consideration for the state's having given up rights to such properties and for surrendering the rights to tax such properties and obtain revenue.[77] His statement argued, in part:

> If these lands are to be withheld, which is the effect of the present system, in vain may the People of these States expect the advantages of well settled neighborhoods, so essential to the education of youth . . . Those States will, for many generations, without some change, be retarded in endeavors to increase their comfort and wealth, by means of works of internal improvements, because they have not the power, incident to all sovereign States, of taxing the soil, to pay for the benefits conferred upon its owner by roads and canals. *When these States stipulated not to tax the lands of the United States until they were sold, they rested upon the implied engagement of Congress to cause them to be sold, within a reasonable time.* No just equivalent has been given those States for a surrender of an attribute of sovereignty so important to their welfare, and to an equal standing with the original States.[78]

This is a well-stated interpretation of these compacts, supporting reading Sections 3 and 9 together as part of a whole agreement that includes corresponding duties and considerations where both parties receive the benefit of their bargain.

As Farnsworth explains, courts should err on the side of an interpretation that ensures that each party receives the benefit of the bargain struck in the written instrument.[79] The State of Utah can be treated fairly under the UEA with some benefit of the bargain protected *only if it can impose a duty to dispose*, as explicitly included in Sections 3 or 9 or as implicitly mandated within a comprehensive reading of the whole of the UEA.[80] If the federal government does not dispose of the public lands then the State will not receive its anticipated percentage of the proceeds of sales and will be unable to realize taxation and productivity benefits from the private owners and their uses of the property.

There is also a strong argument that the intent and expectations of the State of Utah and the federal government at the time of the UEA were informed by the predominant ethic in favor of, and presumptions toward, the disposal of federally controlled public lands into private hands.[81] These expectations and

the surface estate holder, for example, expects royalties from the use of the dormant mineral estate, that surface owner's ability to receive profits from their own estate is impeded by the non-productive use of the mineral estate. Such lapse statutes have been seen as a way to more efficiently allocate valuable and scarce resources to those that can profit from them, and such statutes have been upheld as legitimate exercises of state power. *See, e.g.*, Texaco, Inc. v. Short, 454 U.S. 516 (1982).

76 *See, e.g.*, Public Lands Committee Report, 20th U.S. Congress, 1st Session, House of Reps., Rep. No. 125, *Graduate Price of Public Lands*, February 5, 1828.

77 *Id.*

78 *Id.* (emphasis added).

79 E. Allan Farnsworth, Contracts §7.11, at 517 (1990) (explaining a rule of construction that "the assumption is that the bargaining process results in a fair bargain, so that, between an interpretation that would yield such a bargain as a reasonable person would have made and one that would not, the former is preferred.").

80 *Cf.* Flood v. ClearOne Communications, Inc., 618 F.3d 1110, 1125 (10th Cir. 2010) ("The intention of the parties to a contract 'must be gleaned from a consideration of the whole instrument.' . . . And in seeking that intention, 'an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.'").

81 James R. Rasband & Megan E. Garrett, *A New Era in Public Land Policy? The Shift Toward Reacquisition of Land and Natural Resources*, 53 Rocky Mtn. Min. L. Inst. §11.02[1] (2007) ("Beginning in 1776 and continuing for most of the nineteenth and into the twentieth century, the primary goal of the United States was to dispose of as much public land as possible"); Touton, *supra* note 36, at 818 (explaining that "[d]uring most of our history, the national government pursued a policy of promoting settlement and private development of the public domain."). Touton explains that, "In admitting new states . .

circumstances must be considered in interpreting whether one can find a duty to dispose in the UEA.

The expectation of disposal dates back to the intentions at the Constitutional Convention and the promises made to the original states that the unappropriated lands would be disposed of. Consider the congressional resolution passed on October 10, 1780:

> Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, . . . shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states . . . That the said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled.[82]

Utah became a State during this disposal era in public lands law. The U.S. Supreme Court has explained that "The intention of the parties is to be gathered, not from [a] single sentence [], but from the whole instrument read *in the light of the circumstances existing at the time of negotiations leading up to its execution.*"[83] The UEA was entered into against a backdrop of an ethic of disposal. Consequently, this ethic informed the expectations of the parties and is relevant in interpretation.[84]

The disposal ethic constitutes a relevant "state of affairs" that must be considered a critical element in the interpretation of a compact like the UEA,[85] and it lends support to an interpretation, of the *whole* document, that mandates disposal. The pro-disposal climate that existed while the UEA and similar state agreements were reached supports the claim that the State of Utah reasonably believed that, by making other concessions in the UEA, it would later receive consideration for its disclaimed rights in the form of payments from Section 9. As Farnsworth explains in his treatise on contracts, "[i]t seems proper to regard one party's assent to the agreement with knowledge of the other party's general purposes as a ground for resolving doubts in favor of a meaning that will further those ends, rather than a meaning that will frustrate them."[86] Utah "assented" to the UEA with knowledge of the federal government's "general purposes" of disposal and finding a meaning in the UEA that includes a duty to dispose furthers the ends anticipated by the parties including the revenue stream from disposal considered in Section 9. Finding disclaimed rights by the State with no corresponding duty to dispose would be to adopt a meaning that frustrates the expectations of the parties to the UEA (principally the State of Utah and the federal government), and unjustly give the federal government

. Congress retained 'unappropriated lands' within their borders and *continued its policy of encouraging settlement and development.* Nearly all of the land in the Midwest and South was distributed in this manner." *Id.* (emphasis added).

82 18 JOURNALS OF THE CONTINENTAL CONGRESS 915-16 (1780) (congressional resolution of October 10, 1780).

83 Miller v. Robertson, 266 U.S. 243, 251 (1924) (emphasis added).

84 *See* E. ALLAN FARNSWORTH, CONTRACTS §7.10, at 511 (1990) ("The overarching principle of contract interpretation is that the court is free to look to all of the relevant circumstances surrounding the transaction."); Semi-Materials Co., Ltd. v. MEMC Electronic Materials, Inc., 655 F.3d 829, 833 (8th Cir. 2011) ("When interpreting a written contract under Texas law, the court is 'to ascertain the true intent of the parties as expressed in the instrument.' To make this determination, we 'examine all parts of the contract and the circumstances surrounding the formulation of the contract.'").

85 Chesapeake & Ohio Canal Co. v. Hill, 82 U.S. 94, 100, 103 (1872) (describing the rule that the court give a contract "a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements," and that such interpretation should "be in accordance with the substance of the agreement. It would carry out the intent of the parties as gathered from the whole instrument *and the state of affairs existing at the time it was made.*" (emphasis added)).

86 E. ALLAN FARNSWORTH, CONTRACTS §7.10, at 513 (1990). *See also* Wood v. Ashby, 253 P.2d 351, 353 (Utah 1952) ("It is also established in this state that a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed," and "the circumstances attending the transaction, the situation of the parties, and the object to be attained are also to be considered."); RESTATEMENT (SECOND) OF CONTRACTS §202(1) ("if the principal purpose of the parties is ascertainable it is given great weight.").

a greater benefit than that for which they bargained. Again, the parties' interests within the agreement require the existence of some duty to dispose on the part of the federal government.

The compact-based duty-to-dispose theory is, furthermore, supported by past statements of officials recognizing its logic and historical underpinnings. For example, President Andrew Jackson made an eloquent and persuasive defense of the compact-based duty to dispose in a pocket veto message to Congress where he refused to sign legislation passed by Congress that would have used proceeds from disposing of public lands for certain general federal purposes rather than complying with terms of disposal set out in compacts between the federal government and certain states.[87] Jackson believed that the legislation was based on improper assumptions of federal power vis-à-vis the lands subject to the bill and the bill failed to recognize the necessity of permanent disposals of federal public land holdings.[88]

Jackson's veto message stressed the need for a permanent resolution of public lands disposition and "the importance, as it respects both the harmony and union of the States, of making, as soon as circumstances will allow of it, a proper and final disposition of the whole subject of the public lands."[89] Jackson started his rather long statement with a history lesson on "the manner in which the public lands upon which it is intended to operate were acquired and the conditions upon which they are now held by the United States."[90] He explained that the original states were induced into ceding their land to the federal government by the promise that the federal government would eventually dispose of all of these lands. For example, the deed of cession from Virginia provided that the lands "*shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.*"[91]

Jackson described the commitment to dispose in agreements with the original states as "solemn compacts" where "[t]he States claiming those lands acceded to those views and transferred their claims to the United States upon certain specific conditions, and on those conditions the grants were accepted."[92] By vetoing the bill and articulating this interpretation of the federal duty to dispose, Jackson was looking out for the interests of "new States" and their interest in "the rapid settling and improvement of the waste lands within their limits."[93]

Jackson concluded his veto message with a strong statement that the agreements with the original states for cession of their rights to Western lands and the commitments made to new states could only be read as creating a duty to dispose and an obligation to "abandon" the property that the federal government cannot, or no longer has a financial need to, dispose of:

> I do not doubt that it is the real interest of each and all the States in the Union, and particularly of the new States, that the price of these lands shall be reduced and graduated, and that after they have been offered for a certain number of years the refuse remaining unsold shall be abandoned to the States and the machinery of our land system entirely withdrawn. *It can not be supposed the compacts intended that the United States should retain forever a title to lands within the States which are of no value,*

87 Andrew Jackson, Veto Message of December 4, 1833, reprinted in 3 Messages and Papers of the Presidents, 1789-1897, at 56-69 [hereinafter "Jackson 1833 Veto Message"]. For a copy of the veto message available on the internet, see http://www.presidency.ucsb.edu/ws/index.php?pid=67041.

88 *Id.*

89 *Id.* at 57.

90 *Id.*

91 *Id.* at 60.

92 *Id.* at 60-61. The binding nature of these compacts was further touched upon by Jackson:

> The Constitution of the United States did not delegate to Congress the power to abrogate these compacts. On the contrary, by declaring that nothing in it " *shall be so construed as to prejudice any claims of the United States or of any particular State,"* it virtually provides that these compacts and the rights they secure shall remain untouched by the legislative power, which shall only make all "needful rules and regulations" for carrying them into effect. All beyond this would seem to be an assumption of undelegated power.

Id. at 64.

93 *Id.* at 68 (emphasis added).

and no doubt is entertained that the general interest would be best promoted by surrendering such lands to the States.[94]

These statements by Jackson support a theory that the federal government must at some point "extinguish" their claims to title to the public lands obtained in the enabling acts.

Importantly, Jackson concludes that nothing in existing law precludes this interpretation of the duty to dispose – almost saying that in the absence of a barrier to this interpretation, and given that the interpretation makes sense, one should accept his interpretation. No law would be broken.[95] If nothing precludes the interpretation that the federal government must extinguish its rights to these public lands at issue, yet many general principles favor an interpretation that identifies a duty to dispose, Jackson counsels that the latter interpretation in favor of disposal should be chosen. That may be wise counsel for those vacillating on whether to embrace a duty to dispose.

The CDC's summary of its legal theory supporting the TPLA makes some of the arguments articulated and analyzed in the subsection above in this White Paper. The CDC's theory is based, in part, on an expectation of disposal within enabling acts, colored by a sense of fairness for the states like Utah where disposal has yet to occur (while others had the disposal commitment largely carried through).[96] The Report contends the following:

> Legal justification for the transfer of the public lands into State ownership is based on the history of federal land policy. From the inception of this Nation and through much of its history, it was the policy of the federal government to dispose of the public lands both to pay off federal debt and to encourage the settlement of western lands for the benefit of the states and the nation. Indeed, most of the states east of the Colorado-Kansas state line have very little federal public lands within their borders as a result of the historical implementation of this policy. This policy of disposal was very much a part of the various enabling acts that authorized new states to join the Union.[97]

Furthermore, the CDC Case Statement explained that the Enabling Act's "disclaimer of title was only intended to facilitate the disposal of the public lands so that, eventually such lands would contribute to the revenue bases of federal, State and local governments."[98] Once title passes into private hands from federal, that property becomes subject to state regulation.[99]

One problem with the legal analysis presented in this subsection from a "public relations"-type standpoint (if there is such a thing in law) lies in the following: 1) the courts have had occasion to discuss states' obligations under these compacts and in that process courts have even contended that these are *bilateral* contractual agreements – meaning the federal government has some duties too; but 2) the courts have had very little occasion to consider and discuss interpretations of the compacts which identify the duties imposed upon the other half of the *bi*-lateral agreement, the federal government. Thus, opponents to the TPLA invoke broad statements about federal power when the States overstep in relation to the compacts and call them "precedents" for the present case of the TPLA's legitimacy. These opponents highlight these broad statements even though the language used in those cases went beyond what was necessary to the holdings in those cases and are therefore of little to no precedential value.

But on the other side of the debate, advocates favoring the TPLA hold almost *no* directly-responsive "precedential" cards – real controlling precedent or even dicta pretending-to-be precedent – as there are almost no cases about the states' powers when the

94 *Id.* at 68-69.

95 *Id.* at 69 ("This plan for disposing of the public lands impairs no principle, violates no compact, and deranges no system.").

96 CDC Nov. 2012 Case Statement, *supra* note 7, at 3-4. While the CDC report presents its theory of legal validity it does not seem intended to be a detailed legal analysis.

97 *Id.*

98 *Id.* at 4.

99 Irvine v. Marshall, 61 U.S. 558, 567 (1857) ("(but that whenever, according to those laws, the title shall have passed, then the property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission, that the title passed and vested according to the laws of the United States.").

federal government oversteps its obligations or fails to fulfill its promises in these compacts. The advocates of laws like the TPLA must employ the power and skill of distinguishing cases and educate the courts and the public about when some seemingly precedential judicial statements are distinguishable or are actually dicta. The next subsection dissects some of the most often touted precedential obstacles to upholding the TPLA.

B. Distinguishing Cases and Identifying Dicta: The Limited Legal Commentary and Arguments Against the Validity of the TPLA

The major legal arguments against the TPLA rest on broad interpretations of the Property Clause in the U.S. Constitution Article IV, Section 3. This constitutional provision provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."[100] Setting aside the validity or invalidity of any of the arguments made by TPLA opponents in relation to other and separate measures taken by the State of Utah or others to realize state control of currently federally held lands, the primary arguments made against the TPLA miss their target and the authorities relied upon by TPLA opponents are almost entirely inapposite.

The Property Clause does indeed confer broad powers to Congress, but it is not without limitations. This section accomplishes two main goals. First, it deconstructs the lofty and overbroad language in several cases that opponents of the TPLA claim as dispositive precedent. This section will focus on distinguishing the seemingly broad interpretations of the Property Clause that are claimed to weigh in favor of finding the TPLA invalid or unconstitutional. This section does so by looking at the cherry-picked bits of language offered by opponents within the full context of the cases where the language appears. It will examine these bits of language in light of the limited holdings in the cases where such language appeared but was not necessary to resolve the cases. It also will identify many of these broad "interpretations" as nothing more than non-controlling dicta. Second, this section will reiterate the idea that the UEA and its duty to dispose act as *limitations* on the Property Clause power, the likes of which were never considered or discussed in any of the cases where broad Property Clause powers were heralded.

Much of what is being cited as "precedent" against the TPLA is not precedent at all. Instead, much of this claimed precedent resides in categories of excessive dicta. At times, courts say in a case opinion more than is necessary to resolve the case. They can be verbose and sometimes they overstate background principles. And sometimes in the process they use excess language that is susceptible to interpretations beyond what the judges would have meant to say had they been able to fully predict the misuse of their words. Critics of the TPLA have been focused on making largely conclusory statements that the TPLA is invalid,[101] and where they cite to cases, such critics have often relied on nothing more than distinguishable dicta.

Consider, for example, a research note attached to H.B. 148. On February 4, 2012, the Utah Office of

100 U.S. Const., Art. IV, Sec. 3.

101 Consider, for example, one of the only major national news articles to cover the TPLA that makes some bold statements about the law's chances of being upheld if challenged. *See* Johnson, *supra* note 3, at A9. Johnson's article reports on failures of past efforts by States to restrain federal power over Western lands in light of broad precedent in favor of the federal government's Property Clause powers. *Id.* He also then claims that "[m]any legal experts say they expect the same result this time." *Id.* Furthermore the article proceeds to claim that "Legal experts said the problem for the new state claims was that Congressional authority over federal land had been upheld over and over by the United States Supreme Court. If property rights are the issue being raised, many experts said, proponents of the new land drive are facing traditions and precedents that run deep in the law and culture." *Id.*

I do not doubt that many legal experts will rely on the breadth of dicta in sometimes seemingly relevant case precedent and find that Utah faces an uphill battle. However, opponents should not rely too much on the Johnson article for their claim of legal illegitimacy. That article proceeds to identify and quote only one expert, Professor Charles F. Wilkinson of the University of Colorado. *Id.* As there seem to be very few experts publicly weighing in on the issue so far in any manner, I think the "most experts" claim in the article is probably unsupported (although I make no claim to know how many legal academics will line up against the law should it start to receive more attention and therefore cause such legal commentators to form an opinion).

Legislative Research and General Counsel appended its "Legislative Review Note" to the introduced version of H.B. 148 "as required by legislative rules and practice."[102] Despite the near conclusive effect some opponents of the legislation have tried to give the Legislative Review Note, the authors specifically explain that the Note is designed to "provide information relevant to legislator's consideration of this bill" and not to "influenc[e] whether the bill should become law" and it is "not a substitute for the judgment of the judiciary" on the constitutionality of the TPLA.[103]

After citing the Property Clause, the Legislative Review Note relies on statements in *United States v. Gratiot*,[104] *Kleppe v. New Mexico*,[105] and *Gibson v. Chouteau*.[106] The Legislative Review Note concludes that, in light of these precedents and "[u]nder the *Gibson* case, that requirement [in H.B. 148 of the federal government to extinguish title] would interfere with Congress' power to dispose of public lands. Thus, that requirement, and any attempt by Utah in the future to enforce the requirement, have [sic] a high probability of being declared unconstitutional."[107]

A closer look at each of the cases cited in the Legislative Review Note reveals that they do not support that legal conclusion and prediction. The Note starts with this claim:

> The Supreme Court of the United States has held that "Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation . . ." *United States v. Gratiot*, 39 U.S. 526, 537 (1840). *See also Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Pursuant to its broad authority under the Property Clause, Congress may enact legislation to manage or sell federal land, and any legislation Congress enacts "necessarily overrides conflicting state laws under the Supremacy Clause." *Kleppe*, 426 U.S. at 543. *See* U.S. Const. art. VI, cl. 2.

These quotations from case law are valueless for the interpretation of the TPLA and certainly create no controlling precedent to be applied in any challenge to the TPLA.

Gratiot, for example, does little to inform an interpretation of the TPLA. Its holding was that the Property Clause "authorize[s] the leasing of the lead mines on the public lands, in the territories of the United States" the terms of which would be enforceable and it also stands for the proposition that property rights created prior to statehood could not be upset by a new state.[108] There is nothing in *Gratiot* that would require a determination that Congress has plenary power under the Property Clause so broad that it may ignore all other possible duties to states or others. This "without limitation" language is only dicta unnecessary to resolve the case. And as the facts have no similarity to the questions regarding the TPLA, the *Gratiot* case seems of little value in any legal controversy over the TPLA.

Similarly, *Kleppe* has limited value in any TPLA dispute and the Note's reliance on it is misplaced. *Kleppe* simply holds that a state law allowing the state to come onto federal land and rustle up and later auction burros is unconstitutional because it interferes with federal management policies while the federal government is an owner of public lands.[109] The holding says nothing either in favor of or against giving Congress a power to ignore other commitments to dispose of property like it made in the UEA.

The *Kleppe* holding simply maintains that *while* the federal government is an owner, states have a type of "duty of noninterference" with federally controlled lands (including refraining from passing laws that conflict with the federal policies while the federal government occupies such lands).[110] If a state passes a

102 Utah Office of Legislative Research and General Counsel, Legislative Review Note (Appended to H.B. 148 as Introduced. Feb. 4, 2012 [hereinafter "H.B. 148 Legislative Review Note"], available at http://le.utah.gov/~2012/bills/hbillint/hb0148.pdf.

103 *Id.*

104 39 U.S. 526, 537 (1840).

105 426 U.S. 529 (1976).

106 80 U.S. 92 (1872).

107 H.B. 148 Legislative Review Note, *supra* note 102.

108 *Gratiot*, 39 U.S. at 524.

109 *Kleppe*, 426 U.S. at 546.

110 *Id.* at 540-41. *See also* Touton, *supra* note 36, at 825 (discussing Kleppe and concluding with yet another argument

law that so interferes, then it will be subject to conflict or other preemption doctrines and the Supremacy Clause will indeed make the federal law control over the state one.[111] But again, there was no need to grant Congress some truly "unlimited" Property Clause power to reach this holding in *Kleppe*. In the *Kleppe* case, unlike in a challenge to the TPLA, there were no other relevant laws (comparable to, for example, the UEA) to consider other than the interfering municipal law that was invalidated.

It is true that with conflict preemption in the *Kleppe* case, the Supremacy Clause mandated that the federal law over burros win out against a state law over burros that was in conflict.[112] But that holding says nothing of whether the state can demand that the federal government honor its promises and perform its duties. And it says nothing about when and whether, if the state is the beneficiary of those promises, there can be an enforceable demand for adherence.

The Legislative Review Note also quoted at length from the U.S. Supreme Court's 1872 decision in *Gibson v. Choutou*:

> The Supreme Court of the United States has ruled that "[w]ith respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted to the Union, that such interference with the primary disposal of the soil of the United States shall never be made." *Gibson v. Chouteau*, 80 U.S. 92 (1872).[113]

The Legislative Review Note and most opponent arguments seem to focus on the claim in *Gibson* that "No State legislation can interfere with this [Property Clause] right or embarrass its exercise."[114] *Gibson* does not, however, resolve the issue of whether the TPLA violates the Property Clause.

Gibson only held that a state cannot interfere with a disposal and incident to what might be called a "duty of noninterference with disposal" on the part of the state that there is also a prohibition on the state "depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition."[115] The *Gibson* decision equates any measure a state takes to deprive the transferee of "the right to possess and enjoy the land," with "a denial of the power of disposal in Congress."[116] While *Gibson* demonstrates that a state may not interfere with U.S. ownership or interfere with disposal – such as by adversely affecting the buyers' market for government property by creating discriminatory or disadvantaging rules on purchasers of federal government disposed property[117] – it does not speak to whether a state may nonetheless demand that the federal government follow through on promises made to the state to eventually dispose in some manner or another the property it holds rather than to retain it.

Consider also another case, *Irvine v. Marshall,* not discussed in the Legislative Review Note but nonetheless could be claimed to support opponents of the TPLA.[118] While *Irvine* indicated broad authority for the federal government over its property in the Territories "to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem

that "[a]lthough the *Kleppe* decision was unanimous, its assertion that the property power is "without limitations" should not be accepted uncritically. The property power, like all other congressional powers, is circumscribed by external limitations found in the Bill of Rights and elsewhere in the Constitution.")

111 *Kleppe*, 426 U.S. at 539-40.

112 *Id.* at 546.

113 Legislative Review Note, *supra* note 102.

114 *Gibson*, 80 U.S. at 99.

115 *Id.* at 100.

116 *Id.*

117 *Id.*

118 61 U.S. 558 (1857).

most advantageous to the public fisc, or in other respects most politic,"[119] all of that language *still anticipates* disposal and merely constrains State power to interfere with the government *while it owns* the public lands or *in the legally effective transfer* of such lands. The focus in *Irvine* was on questions regarding "in what mode, and by what title, the public lands shall be conveyed" – the mechanics of effective disposal that should remain in the discretionary control of the federal government while it owns lands – but *Irvine* hints at nothing about the power to retain public lands (and especially those lands encumbered with a duty to dispose) indefinitely.

The holdings in all of these cases relied upon in the Legislative Review Note (or in those cases similar to these selected cases that may be used by opponents to the TPLA) state that, when the federal government acts as it is empowered to act, the states may not impede the federal powers to manage the public lands nor may they intervene to diminish the federal government's capacity to dispose. These holdings are about *not interfering* when the federal government has *discretion* to act and it is operating within that discretion; these holdings say nothing at all about whether the state may demand that the federal government comply with an affirmative duty to act.

A similar legislative review memorandum was written in the State of Wyoming designed to inform the Wyoming Legislature about the consequences of adopting legislation in that state similar to Utah's TPLA.[120] This is one of the few other legal analyses that this Author has found regarding the constitutional validity of the TPLA. It is a very short and conclusory analysis, relying (like the Utah Legislative Review Note) on overbroad and inapplicable dicta to make its point. The memorandum quotes *United States v. Gratiot* and it also relies upon broad Supremacy Clause language in *Kleppe* and *Gibson*.[121] The flaws in those analogies are described above.

But the Wyoming memo also uses a few cases not discussed in the Utah Legislative Review Note[122] – most important among these are *Shannon v. United States*,[123] *Utah Power & Light Co. v. United States*,[124] *United States v. Gardner*,[125] and *Light v. United States*.[126] In addition, the case cited in *Light – Camfield v. United States*[127] – must be discussed as it serves as the origin for one of the most often used claims of plenary retention power for Congress vis-à-vis the public lands.

Each of these cases, like the others discussed above, can be distinguished from any arguments related to the TPLA. *Shannon* had only a limiting holding not relevant to the facts of the TPLA. The appeals court there held that the State of Montana through its laws could not grant its citizens a right to pasture on federal public lands and in essence authorize a trespass.[128] So long as the government held the lands and had not yet disposed of the lands, it may maintain a trespass action against such individuals.[129] Before getting to that limited holding, the court in *Shannon* repeated some of the rhetoric on broad federal powers but it had neither the occasion nor the necessity to evaluate the limits of such powers in the face of separately identifiable constraints on the power.

Utah Power & Light only held that a state could not interfere with the federal government's use and enjoyment of its property while the federal government owned the property and therefore the state's attempt to exert the power of easement over federal lands was

119 *Id.* at 561-562.

120 Memorandum from Josh Anderson and Matt Obrecht, Wyoming Legislative Service Office Staff Attorneys, to Members of State of Wyoming Legislature Minerals Committee, *Utah Land Transfer of Public Lands Act, Utah 2012 HB 148*, October 9, 2012 (on file with Author) [hereinafter "Wyoming Legislative Memo"]("memorandum discusses likely conflicts with the United States Constitution and the Constitution of the State of Wyoming if a similar piece of legislation [to H.B. 148] were introduced and passed in Wyoming.").

121 *Id.*

122 *Id.* The memorandum also has some rather unsupportable points such as an argument that "shall" can be voluntary and not mandatory. *See id.*

123 *Id.* (citing 160 F. 870, 874 (9th Cir. 1908)).

124 *Id.* (citing 230 F. 328, 339 (8th Cir. 1915), *modified on other grounds*, 242 F. 924 (1917)).

125 107 F.3d 1314, 1318 (9th Cir. 1997).

126 220 U.S. 523, 536 (1911).

127 167 U.S. 524 (1897).

128 *Shannon*, 160 F. at 875.

129 *Id.*

invalid.[130]

Gardner was a case holding that "[t]he United States was not required to hold public lands it received in various treaties with foreign nations or sovereign tribes for the establishment of future states."[131] Although *Gardner* cited the language in *Light* regarding Congress's power to withhold property from sale, that language had no bearing on the holding in *Gardner*.[132]

In *Light* too, the Court there made a few seemingly broad statements about the reach of the Property Clause.[133] The following paragraph is the one from which *Gardner* quotes and the one most likely to be cited by TPLA critics:

> But 'the nation is an owner, and has made Congress the principal agent to dispose of its property. . . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.' *Butte City Water Co. v. Baker*, 196 U.S. 126, 49 L. ed. 412, 25 Sup. Ct. Rep. 211. 'The government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.' *Canfield v. United States*, 167 U.S. 524, 42 L. ed. 262, 17 Sup. Ct. Rep. 864.[134]

The *holding* in *Light*, however, is quite limited. The *Light* opinion used that broad rhetorical language only as dicta in reaching a far narrower and unexceptional holding that the federal government had the power – like any owner – to expel trespassers.[135] *Light* simply borrowed the broad language to reach its holding that the federal government "may . . . as an owner, object to its property being used for grazing purposes, for 'the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.'"[136]

Similarly, in *Camfield* where the Court first used the unnecessarily verbose language of "may sell or withhold them from sale,"[137] that case was also about trespassers on federal lands. The Court used the quoted language in a long paragraph discussing incidents of ownership, but leading to a holding that did not reach anywhere near the issue of whether the federal government has discretion to withhold lands from sale where it might otherwise have committed itself to dispose of such lands.[138] The *Camfield* holding can be summarized loosely as saying the following: The fact that the federal government has not yet sold (or, to phrase it differently, has currently withheld from sale) a parcel does not mean that a private individual can just step in and claim and put a fence around the property and call it his own simply on the defense that the federal government has not sold it.[139] That hardly amounts to a holding that creates a precedent for a sweeping and plenary power on the part of the federal government to withhold from sale any public lands it wishes to retain. And of even further importance, the *Camfield* Court had absolutely no occasion to consider the powers of the United States in light of independently existing duties or commitments to dispose like what the federal government entered into with the states like Utah.

Other Property Clause cases are similar to those discussed here – with almost nothing to say about a duty-to-dispose theory and instead focusing on what a state may do while the federal government is an owner.[140] There is a difference between interference with administration of federal holdings or interference with

130 *Utah Power & Light Co.*, 230 F. at 339.

131 Wyoming Legislative Memo, *supra* note 120.

132 *Gardner*, 107 F.3d at 1318.

133 *Light*, 220 U.S. at 536-37.

134 *Id.* at 536.

135 *Id.* at 537.

136 *Id.* at 536.

137 *Camfield*, 167 U.S. at 524.

138 *Id.* at 528.

139 *Id.* at 525-26.

140 *See, e.g.*, Wyoming v. United States, 279 F.3d 1214, 1227 (10th Cir. 2002) (applying *Kleppe* to determine Congress's legislative or management power over public lands is plenary); United States v. Utah Power & Light Co., 209 F. 554, 557 (8th Cir. 1913) (explaining that federal government can control public lands as part of its protection over property that it could dispose of and "'[h]aving the power of disposal and protection, Congress alone can deal with the title, and no state law, whether of limitations or otherwise, can defeat such title.'"

the disposition process and a quite distinct demand for *some* disposition by the federal government in adherence with its own promises.

Most of the cases decided across the years under the Property Clause have focused on the state's obligations and commitments under the compacts – such as the obligation not to intervene in Federal use or disrupt the sanctity of federal disposal agreements – but very little case law has examined the flip side of the compacts: the obligations and commitments agreed to by the federal government. A compact is not a one way street. Because the broad and lofty statements of federal powers regarding public lands have been made in cases analyzing whether states have interfered with federal prerogatives rather than whether the federal government has made a commitment that requires the federal government itself to take certain affirmative steps – that case law can be distinguished and at the very least should not be so over-stated as conclusive of the issues at play with the validity or constitutionality of the TPLA.

The statements by courts that states cannot interfere in federal affairs *while* the federal government owns property do not necessarily say anything about whether the federal government has a duty to dispose of that property in some manner and at some point in time. It is the latter duty that is embodied in the demand made by the State of Utah in the TPLA.

C. The Equal Footing Doctrine, Federalism, Pollard-Based Interpretation of the Property Clause Power and Other Legal Arguments

The State of Utah may have some additional theories to defend the TPLA beyond the compact-based duty to dispose. Primary among these theories would be those that rely on the Equal Footing Doctrine and general Federalism principles,[141] along with a narrow interpretation of the Property Clause power envisioned in language from the U.S. Supreme Court's 1845 decision in *Pollard v. Hagan*.[142]

The Equal Footing Doctrine and Federalism principles can serve two purposes for those advocating for the TPLA's validity. First, these principles could simply be employed as background principles that color an interpretation of the Enabling Act that finds the existence of a compact-based duty to dispose. These principles could help support efforts to resolve any ambiguities in the Enabling Act. These policies generally weigh in favor of greater state autonomy and can therefore be used to assist distinguishing the inapposite cases where broad federal powers were stated to exist (when litigating compact-based *duties of noninterference*) from a compact-based *duty to dispose*. That distinction is discussed in the previous subsection. Such a duty to dispose is designed, like these principles, to limit federal power. Importantly, these Equal Footing and Federalism doctrines may not be necessary to find a duty to dispose on a compact theory of the Enabling Act, but these principles could help tip that theory towards the State's position if there is some reluctance to accept an interpretation finding a compact-based duty to dispose.

Separately and independently, the Equal Footing Doctrine and/or basic tenets of Federalism might create independent duties for the federal government requiring it to dispose of public land holdings wholly apart from

141 For a summary of these doctrines, see generally Touton, *supra* note 36. Consider also the Northwest Ordinance, proclaiming that:

> to provide also for the establishment of States,... and for their admission to a share in the federal councils on an equal footing with the original States ... ... The legislatures of those ... new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers ..."

The Northwest Ordinance (1787), *reprinted in* 2 Documents of American History 130 (Henry Steele Commanger ed., 8th ed. 1968); *see also* Utah Code Ann., Enabling Act, *available at* http://archives.utah.gov/research/exhibits/Statehood/1894text.htm. ("AN ACT to enable the People of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States.").

142 44 U.S. (3 How.) 212 (1845) ("Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever.").

(and perhaps in addition to) a compact-based duty to dispose arising from the Enabling Act. There are strong arguments from the original understanding and purpose of the Equal Footing and Federalism Doctrines to support the State.[143] However, the State will need to distinguish the TPLA from the broad precedents that seem to reject a narrower reading of the Property Clause adopted in *Pollard* – in much the same way this White Paper has described they should be distinguished in relation to the compact-based duty to dispose. Moreover, they will need to overcome the limitations on the breadth of the Equal Footing doctrine recognized in some courts.[144]

This White Paper will not fully analyze the strengths and weakness of these additional theories, but the argument in favor of the TPLA from *Pollard* will be *briefly* introduced here nonetheless. *Pollard* involved a question of whether the United States had the power to grant title to certain tidelands in the Mobile Bay in Alabama.[145] The Court was required to evaluate the effect of Georgia's cession of the Alabama territory to the United States which was done in the first instance to help the United States satisfy Revolutionary War debts.[146] The Court's discussion of the issues lead to a very limited interpretation of the Property Clause – what one scholar has called "breathtaking in its scope" if it were to be controlling.[147] The Court reasoned that the federal government acted as a mere proprietor in relation to these lands, and it would have a duty to sell its holdings in Alabama if that state was to be on an equal footing with other states, and that the Property Clause merely "authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation."[148]

The *Pollard* opinion includes broad language that federal land holdings were always meant to be temporary and that the Property Clause gives no separate authority for the federal government to retain ceded Western lands.[149] The Court explained:

> [T]he United States never held any municipal sovereignty, jurisdiction or right of soil in and for the territory, of which Alabama or any of the new States were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana.[150]

As Rasband describes it, according to *Pollard*, the Property Clause:

> was not intended to give the United States authority to keep and regulate public lands. Instead, the Property Clause was something like temporary management authority pending the final sale and disposition of the public lands that would make Alabama a full sovereign. According to *Pollard*, the Constitution provided only one way for the United States to obtain complete authority over public land and that way was the Enclave Clause.[151]

However, many cases after *Pollard* have taken a broad view of the Property Clause that is contrary to

143 *See generally, e.g.*, Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 696 (1981); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 43 (1949) ("[The landholding relation] is one of the most basic foundations of our federalism, if, indeed, it is not the corner stone."); Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 254 (1976) ("Every expansion of the property clause increases the power of the federal government at the expense of the states' authority, and by the traditional jurisprudence of federalism that is cause for unease.").

144 *See, e.g.*, Nevada v. United States, 512 F.Supp. 166, 171-72 (D. Nev. 1981) (in suit challenging constitutionality of FLPMA provisions, court holds equal footing doctrine does not cover economic equality of states, different impacts in different states is acceptable under doctrine, broad language to the contrary in *Pollard* was dicta, and citing *Light* that it may sell or withhold from sale).

145 *Pollard*, 44 U.S. at 212.

146 *Id.*

147 RASBAND ET AL., *supra* note 12, at 99.

148 *Pollard*, 44 U.S. at 224.

149 *Id.*

150 *Id.*

151 RASBAND ET AL., *supra* note 12, at 98.

Pollard's language. Rasband contends in part correctly that courts "were so easily able to dismiss *Pollard*'s narrow view of federal power to retain and regulate land within the states [because] it was dicta."[152] Another argument, however, is that most courts even when taking a broad view of the Property Clause have not had to confront the issues of federal duties that exist to constrain its powers discussed in *Pollard* and instead those courts have only had to resolve issues of state interference with clear and non-duty-constrained federal powers. Any *Pollard*-based argument will need to distinguish those subsequent cases discussed in previous parts that call for a near-limitless Property Clause power.

There may be several ways to accomplish this task of differentiation and this White Paper leaves the bulk of that research to future projects. For now, consider just one example. A reasonable case for reconciling *Pollard* and cases like *Kleppe* can be made based on the following methodology:

> The inconsistency between *Pollard* and *Kleppe* may best be resolved by recognizing the equal footing doctrine as a continuing limitation on the exercise of the property power, not merely as a limit on Congress's power to impose conditions on the admission of states. *Pollard* clearly indicates that the federal government may not retain land when such retention gives it plenary power to displace state autonomy. Accordingly, Congress may not use the property power to infringe the municipal sovereignty of the Western states, because such infringement would be the direct result of federal usurpation of a prerogative of the original states: ownership of unappropriated lands.

Under this reasoning, *Pollard*'s broad language would still be operable even in a post-*Kleppe* world. The student-note author of this reconciliation theory continues:

> While courts have no power to force congressional disposal of lands, they should not allow Congress to use the property power in such a way as to destroy "the constitutional equality of the States . . . essential to the harmonious operation of the scheme upon which the Republic was organized." This view, while imposing definite limits on the property power, need not unduly hamper legitimate federal programs in the Western states. Congress can, of course, purchase land anywhere in the nation for governmental purposes and, under *Kleppe*, exercise broad powers over that land.[153]

This is one good starting point for researching these theories and developing arguments along these lines. As stated above, any such arguments will require further research and testing against the full breadth of

152 *Id.* at 99. Rasband et al. further summarize some of the hurdles of the Pollard-dependent argument as follows:

> In the end, invocations of *Pollard* and the equal footing doctrine must be understood in context. Sometimes the reference is to the well-established rule that the United States will be presumed to have held land under navigable water in trust for the future state unless it very plainly indicates a contrary intent. In other cases, talk of *Pollard* and the "equal footing doctrine" refers to its constitutional holding that new states must enter the Union on an equal sovereign footing. This is still basic constitutional law, although as subsequent courts have clarified, equal footing applies to political rights and sovereignty, not to economic or physical characteristics of the states." *United States v. Gardner*, 107 F.3d 1314, 1319 (9th Cir. 1997), cert. denied, 522 U.S. 907 (1997). *See also Coyle v. Smith*, 221 U.S. 559 (1911) . . . In still other cases, invocations of equal footing are an argument from *Pollard*'s dicta that the federal government should not be able to retain and regulate land within the states except under the Enclave Clause. It is this argument that forms the legal core of the Sagebrush Rebellion and wise use movement . . ."

Id. at 101.

153 Touton, *supra* note 36, at 837-38. Touton continues that such a theory would leave the federal government with substantial opportunities to still own and control land if it wishes:

> Congress, through exercise of its powers as landowner, still has substantial power over federal land held since statehood. . . . Even as to federal land uses not clearly supportable by any enumerated federal power, Congress can seek to acquire exclusive federal legislative jurisdiction under the federal enclave clause. The Western states have routinely consented to such jurisdiction over national parks and similar areas. It seems likely, therefore, that the proposed approach would have no practical effect on federal attempts to further legitimate national, governmental goals.

Id.

available case law.

Alternatively, the State (rather than distinguishing seemingly contrary case law from the wisdom of *Pollard*) may simply need to convince the courts to re-embrace the historical findings and dicta from *Pollard* that led to a narrow reading of the Property Clause in that case and lead the *Pollard* Court to describe a broad mandate for federal disposal of its land holdings; and, if that is the situation, the State will need to convince the court to reject some otherwise controlling precedents, if any, that embrace a broader Property Clause power. This approach, as well as a full assessment of its strength as a matter of law, would require a substantial amount of additional legal investigation and research beyond the scope of this White Paper.

Finally, even if it turns out that there is a strong historical or originalist argument favoring a duty arising under the doctrines of Equal Footing or Federalism, litigation success on such theories will undoubtedly be difficult. Given the relative breadth of the rhetoric (or perhaps precedent) on the broad Property Clause power theories – viewed together with a general increasing deference toward federal control and plenary federal power in our constitutional system – it may be difficult to predict a State victory on these power-curtailment theories in the courts. That reality again makes a compact-based duty to dispose a seemingly stronger argument for those seeking to uphold the TPLA.

D. A Few Thoughts on Justiciability Concerns

Aside from the arguments on the merits, should the Federal government fail to comply with Utah's demand in the TPLA and the State of Utah wishes to sue on the theories that support that demand, the State will need to evaluate potential justiciability hurdles that might preclude enforcement in the courts.[154] Further analysis of this issue would be necessary should such a lawsuit come to pass.

However, even if the TPLA's enforceability were determined non-justiciable, the inability to use the federal courts to enforce a duty does not eviscerate the existence of the duty itself. The federal government would still have an independent obligation to live up to its commitments, but it would require political will on the part of legislators and pressure applied and accountability demanded by the electorate. There are many obligations in our constitutional scheme that require self-enforcement by political actors out of their oath and constitutional duties, irrespective of whether a court order can compel the action.

Conclusion

Utah's Transfer of Public Lands Act presents fascinating issues for the areas of public lands, natural resources, and constitutional law. There are credible legal arguments supporting Utah's demand that the federal government extinguish certain public lands within the State. At the very least, it seems clear that the law is not "clearly" unconstitutional as some opponents contend.

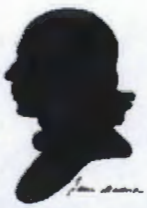
This White Paper has provided an overview of the legal arguments on both sides of the TPLA debate. In the end, there is a credible case that rules of construction favor an interpretation of the Utah Enabling Act that includes some form of a duty to dispose on the part of the federal government. Other theories may also

154 For example, the *Light* Court discusses enforcement of federal government trusts primarily through political accountability not the courts:

> 'All the public lands of the nation are held in trust for the people of the whole country.' United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.

Light, 220 U.S. at 537; *Kleppe*, 426 U.S. at 536 ("we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress."). Nevertheless, the courts have adjudicated disputes involving alleged state violations of compact terms and *Kleppe* does recognize that "courts must eventually pass upon" Property Clause disputes. Without further research and analysis, this White Paper takes no position on how the courts might or should deal with these justiciability issues.

support the TPLA demand. At a minimum, the legal arguments in favor of the TPLA are serious and, if taken seriously, the TPLA presents an opportunity for further clarification of public lands law and the relationship between the states and the federal government regarding those lands.



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