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Andrea Collins

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ESSAY

TO TRANSFER OR NOT TO TRANSFER, THAT IS THE QUESTION: AN ANALYSIS OF PUBLIC LANDS TITLE IN THE WEST

Andrea Collins*

I. INTRODUCTION

The United States of America, its fifty states, districts, and island territories, is comprised of approximately 3.8 million square miles or 2.4 billion acres of land and water areas.¹ The federal government acquired title to its land in a variety of ways, through various transactions. Today, approximately 28% of the U.S., roughly 635–640 million acres, is under federal ownership; much of the acreage is found in the West.²

Four federal agencies manage the majority of federal land: the Bureau of Land Management (BLM), the National Park Service (NPS), and the Fish and Wildlife Service (FWS), all under the Department of Interior (DOI); and the Forest Service (USFS) under the Department of Agriculture (USDA).³ Each agency has its own ethos and distinct purpose for land man-

* Andrea Collins graduated from the University of Montana School of Law in May 2015 with a Juris Doctor degree and a Certificate in Environmental and Natural Resource Law. I wish to thank those closest to me; especially my mother who provided unwavering support throughout the past three years, and to whom I will forever owe a debt of gratitude, and my vizsla Arrow for always “encouraging” me to better explore our public lands. I also wish to thank the editors and staff at the *Montana Law Review* who provided insightful comments and invaluable assistance on this article.

1. U.S. Census Bureau, *State Area Measurements and Internal Point Coordinates* (<http://perma.cc/S87C-5RFT> (<http://www.census.gov/geo/reference/state-area.html>) (last revised Dec. 5, 2012)).

2. Ross W. Gorte et al., *Federal Land Ownership: Overview and Data* 1, 3 (Cong. Research Serv. R42346, Feb. 8, 2012) (available at <http://perma.cc/X3BP-8TDZ> (<https://fas.org/sgp/crs/misc/R42346.pdf>)).

3. *Id.* at 1.

agement. A mandate for the multiple use and sustained yield of products extracted from the land governs the BLM's and the USFS's actions and activities. In contrast, the conservation mandate of the FWS strives to protect plant and animal species, and the preservation mandate of the NPS maintains areas for public use and enjoyment.⁴ Predictably, the production, conservation, and preservation directives cause the agencies' land management techniques to differ greatly.

Beginning in 1789, the U.S. has undergone three distinct periods of approach toward public land ownership: acquisition, disposition, and retention.⁵ In this article I provide a brief analysis of the constitutional basis underlying federal land ownership and the relevant history of public land ownership, including the three different eras of ownership. Next, I describe the recently revitalized movement among western states to transfer federal public lands title to the states and the different legal approaches taken by the states since the 1970s. I then highlight the recent passage of the Utah state legislature's Transfer of Public Lands Act (TPLA), which placed a deadline of December 31, 2014 on the federal government to "extinguish title" to certain federal lands located within the state's borders. Finally, I analyze the momentum in Montana to follow in Utah's footsteps and how the transfer of federal land to Montana's control would affect public land in the state.

II. CONSTITUTIONAL BASIS FOR FEDERAL LAND OWNERSHIP

There are three primary constitutional clauses upon which both the supporters and the opponents of federal land ownership rely: the Property, Enclave, and Supremacy Clauses.⁶ The broadly worded Property Clause is the grounding basis for federal ownership of public land. The Property Clause states the federal government has the power to "dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States."⁷ The seminal property-ownership case *Pollard v. Hagan*⁸ held that under the equal footing doctrine all states that enter statehood hold title to the land underlying navigable waters up to the high water mark.⁹ However, the Supreme Court has held that dry land unassociated

4. *Id.* at 8–10.

5. Kristina Alexander & Ross W. Gorte, *Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention* 1–9 (Cong. Research Serv. RL34267, Dec. 3, 2007) (available at <http://perma.cc/7TM5-MNPP> (http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL34267_12032007.pdf)).

6. U.S. Const. art. IV, § 3, cl. 2; U.S. Const. art. I, § 8, cl. 17; U.S. Const. art. VI, cl. 2.

7. U.S. Const. art. IV, § 3, cl. 2.

8. 44 U.S. 212 (1845).

9. *Id.* at 221.

with navigable waters remains in federal ownership unless Congress has legislated otherwise.¹⁰

The Enclave Clause is another source of federal property ownership. The Enclave Clause differs from the Property Clause in that it allows the federal government to acquire partial or exclusive jurisdiction of land within states if, and only if, a state cedes its jurisdiction. The Clause states, “To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States and the Acceptance of Congress, become the Seat of the Government of the United States[.]”¹¹ The term “exclusive Legislation” has always been interpreted to mean “exclusive jurisdiction.” The purpose of the Enclave Clause has always been for the federal government to acquire property from a state for specific essential government uses, such as for the construction of military bases, post offices, or sometimes even for national parks.¹² The notable aspect of the Enclave Clause is that the state must affirmatively own title to the land and then, for whatever specific reason articulated, cede some measure of control back to the federal government. However, only a small fraction of federal land is held pursuant to the Enclave Clause.¹³

If state and federal laws on public lands conflict, the Supremacy Clause specifies which law reigns supreme:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹⁴

The constitutional supremacy doctrine arises more commonly in contexts other than property law. However, as the courts have interpreted Congress’ Property Clause power to “make all needful Rules and Regulations” regarding federal property, the Supremacy Clause has found its place in the discussion of federal public land.¹⁵

10. See e.g. *U.S. v. Or.*, 295 U.S. 1, 27 (1935); *Scott v. Lattig*, 227 U.S. 229, 239 (1913).

11. U.S. Const. art. I, § 8, cl. 17; George C. Coggins et al., *Federal Public Land and Resources Law* 132 (7th ed., Found. Press 2014).

12. Coggins et al., *supra* n. 11, at 132; Spencer Driscoll, Student Author, *Utah’s Enabling Act and Congress’s Enclave Clause Authority: Federalism Implications of a Renewed State Sovereignty Movement*, 2012 BYU L. Rev. 999, 1000 (2012).

13. George Cameron Coggins & Robert L. Glicksman, *Evolution of Federal Public Land and Resources Law*, 46B Rocky Mt. Mineral L. Found. Spec. Inst., ch. 1, pt. II(A) (Nov. 1997).

14. U.S. Const. art. VI, cl. 2.

15. U.S. Const. art IV, § 3, cl. 2; see e.g. *Kleppe v. N.M.*, 426 U.S. 529, 543 (1976).

III. HISTORY OF FEDERAL PUBLIC LAND OWNERSHIP

The history of how the U.S. acquired title plays an important and subtle role in the debate over its management and ownership. For the purposes of this article I do not address or debate the validity of how or from whom the federal government acquired title. Instead, the article focuses on the point at which the states entered statehood and the evolution of national attitudes about the land's use and the underlying national policies over who should own it.

A. *Eras of Land Acquisition and Disposition: 1789–1976*

At the time of the formation of the U.S., the original thirteen states ceded over 230 million acres of land to the federal government, principally to repay debts accumulated during the Revolutionary War.¹⁶ The federal government acquired the remaining lands either by purchase or by treaty, the largest of which was the purchase of nearly 525 million acres from Napoleon of France, known as the Louisiana Purchase.¹⁷ By 1867, the federal government had acquired more than one billion additional acres of land lying west of the Mississippi, not including Texas.¹⁸

Throughout the period of acquisition settlers continued to move west. The federal government adapted its policies to encourage settlement of its now vast, undeveloped western area.¹⁹ In 1862, Congress enacted the Homestead Act, which gave a free land grant of 160 acres to anyone who would settle and develop the land for five years.²⁰ After the five-year period, the homesteader would then gain fee title to the land. Also in 1862, Congress approved grants of land to the railroads in order to encourage and facilitate settlement of the West.²¹ These acts signaled a shift in the federal government's land policies from acquisition toward disposition.

Significantly, as the federal government continued to encourage westerly movement those who embarked on the journey, typically in search of mining or other riches, grew in numbers, settled in communal areas, and eventually established territorial governments. As the western territories' populations continued to grow, the territorial citizens began to establish more permanent roots and desired political representation and access to fed-

16. Paul W. Gates & Pub. Land L. Rev. Comm'n, *History of Public Land Law Development* 75 (Wm. W. Gaunt & Sons, Inc. 1968); Coggins, *supra* n. 11, at 47.

17. Gates & Pub. Land L. Rev. Comm'n, *supra* n.16, at 75–86.

18. Coggins & Glicksman, *supra* n. 13, at ch. 1, pt. III.

19. Paul W. Gates, *Public Land Issues in the United States*, 2 W. Historical Q. 363, 365 (1971).

20. *Id.* at 368.

21. *Id.*

eral benefits.²² Referenda were passed in favor of, and the federal government was petitioned for, statehood.²³ While the exact process differed from state to state, Congress, which has the exclusive authority to negotiate the terms and conditions of statehood,²⁴ passed agreements conferring statehood commonly referred to as Enabling Acts.²⁵ In many instances, more than one state was given statehood in an Enabling Act.²⁶

The beginning of the 20th century saw another shift in national attitude. While the goal to settle the West remained, a new goal favoring the acquisition of land for forest and recreation purposes emerged.²⁷ However, economic use of the land remained an important priority. Specifically, the federal government gave ranchers free access beyond their 160-acre homestead to public lands for grazing to support their cattle operations.²⁸ Unfortunately, this use of the land proved detrimental to the land itself.²⁹ In response to the destructive use of the land, which included overgrazing and its subsequent effects, drought, falling cattle prices, and conflict between grazing rangeland and homesteading, Congress enacted the Taylor Grazing Act in 1934.³⁰ The Act instituted a permitting system to be issued by the federal government for all public rangeland, where for the first time in federal land management history fees could be charged in exchange for grazing rights.³¹ To administer these grazing permits Congress created the Grazing Service, which would eventually merge with the General Land Office to become the BLM and operate under the DOI.³² By the time Congress enacted the Taylor Grazing Act the federal government had either sold or given away in excess of one billion acres of land.³³ The passage of the Act effectively signaled the end of homesteading and the era of nearly unrestricted land disposition.

22. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 Am. J. Legal Hist. 119, 132–135 (2004); see generally Kenneth N. Owens, *The Prizes of Statehood*, 37 Mont.: The Magazine of W. History 2 (1987).

23. Biber, *supra* n. 22, at 128–130.

24. U.S. Const. art. VI, § 3, cl. 2.

25. Biber, *supra* n. 22, at 126–128.

26. See e.g. Enabling Act, § 1, 25 Stat. 676, 676 (1889) (providing for the division of land into North Dakota, South Dakota, Montana, and Washington).

27. Gates & Pub. Land L. Rev. Comm'n, *supra* n.16, at 599.

28. Valarie Weeks Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 Mont. L. Rev. 155, 159 (1966).

29. Gates & Pub. Land L. Rev. Comm'n, *supra* n.16, at 607.

30. *Id.*; 43 U.S.C. § 315 (2012).

31. Gates & Pub. Land L. Rev. Comm'n, *supra* n.16, at 611; Coggins et al., *supra* n. 11, at 128.

32. Gates & Pub. Land L. Rev. Comm'n, *supra* n.16, at 611; Coggins et al., *supra* n. 11, at 128.

33. Coggins & Glicksman, *supra* n. 13, at ch 1, pt. IV.

B. Era of Land Retention: 1976–Present

A little over forty years after the enactment of the Taylor Grazing Act, the federal government dealt the final deathblow to the federal land disposition era when Congress passed the Federal Land Policy and Management Act (FLPMA) in 1976.³⁴ FLPMA officially announced the federal government's policy to retain ownership of certain federal lands that "serve the national interest."³⁵ While these lands could still be utilized for productive purposes (i.e. mining, timber harvest, and the like) the freewheeling era of disposition was now officially over.³⁶

The western states balked at FLPMA's enactment and the federal government agencies' land management policies. FLPMA was generally viewed as a substantial overhaul of decades-old public land management policies.³⁷ Public land users who availed themselves of Acts like the Taylor Grazing Act now had to comply with new environmental restrictions and compete for use with recreationalists and environmentalists.³⁸ Further complicating the issue was the Supreme Court's holding in the well-known Property Clause case: *Kleppe v. New Mexico*, issued four months before FLPMA's enactment.³⁹

In *Kleppe*, New Mexico disputed the constitutionality of a federal law designed to protect free-roaming horses and burros on federal lands, even in the event the animals wandered off of federal land and onto state or private property.⁴⁰ New Mexico argued the federal government was permitted to control only the animals found on federal land, otherwise the animals fell under state estray laws if not found on federal land—even though the federal law explicitly stated if an animal strays from federal land a federal official must be notified to arrange for its removal.⁴¹ The Court held the Property Clause must be read expansively and is sufficiently broad to authorize Congress to enact law with respect to federal land when Congress decides a rule is "needful."⁴² Moreover, the law can regulate activity beyond the bounds of the federal land if the subject of the law involves a sufficiently federal concern—as in this case the protection of the declining population of wild horses and burros.⁴³ Notably, the Court stated that while

34. 43 U.S.C. § 1701; Coggins, *supra* n. 11, at 128.

35. 43 U.S.C. § 1701(a)(1).

36. *Id.* at § 1701; Alexander & Gorte, *supra* n. 5, at 8.

37. Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. Colo. L. Rev. 123, 159–160 (2011).

38. *Id.* at 160.

39. 426 U.S. 529 (1976).

40. *Id.* at 529.

41. *Id.*

42. *Id.* at 539.

43. *Id.* at 540–541.

federal law supersedes conflicting state law, concurrent jurisdiction on public land can and should exist up until the point the laws conflict.⁴⁴ In addition to the Court's expansive reading of the Property Clause, *Kleppe* highlighted the importance of the Supremacy Clause in federal and state property disputes. Ultimately, *Kleppe* stands for the proposition that the federal government has near complete power over federal land and its contents, save the few explicit exceptions.⁴⁵

Kleppe, immediately followed by FLPMA's enactment, set the stage for the movement known as the Sagebrush Rebellion.⁴⁶ At the forefront of the rebellion was the western states' desire to take ownership of federal land. This desire arose from the belief that the states lost control over the use of the lands under FLPMA's strict requirements, and the view among many that the federal government too often arbitrarily and unreasonably regulated and managed public land.⁴⁷ It was additionally exacerbated by *Kleppe*'s mandate that federal law could trump state law even beyond the boundaries of the public land.⁴⁸ Also complicating the issue, despite FLPMA's directive to compensate states for the loss of land tax revenue, federal land is generally not subject to state management or law, including zoning, water, and other state issues.⁴⁹ Proponents of the transfer believed poor management and poor ownership were one-in-the-same and argued that the states were better equipped to manage the lands within their borders rather than be forced to succumb to the whims of national politicians who knew little about the West.⁵⁰

Moreover, *Kleppe* did not occur in a vacuum. Several western states, including Nevada, Idaho, and Wyoming, saw the issue as a great concern and each filed amicus briefs.⁵¹ In reaction to the *Kleppe*-FLPMA environment, some western states' legislatures pursued legislation to declare that federal land is subject to state not federal control.⁵² In 1979, Nevada's legislature enacted a law that declared all public lands in Nevada property of the state and subject to the state's jurisdiction and control.⁵³ The legislature went further to grant the state the authority to lease, sell, and dispose of

44. *Id.* at 542–543.

45. *Pollard*, 44 U.S. 221 (Holding the states maintain ownership of the bed and banks of navigable waters).

46. Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 *Envtl. L.* 847, 848 (1982); Fischman & Williamson, *supra* n. 37, at 161.

47. Babbitt, *supra* n. 46, at 851; Fischman & Williamson, *supra* n. 37, at 163.

48. Babbitt, *supra* n. 46, at 853; *Kleppe*, 426 U.S. at 540–541; Fischman & Williamson, *supra* n. 37, at 164.

49. 43 U.S.C. § 1701; Babbitt, *supra* n. 46, at 853.

50. Fischman & Williamson, *supra* n. 37, at 163–164.

51. *Id.* at 163.

52. *Id.* at 158–159.

53. Nev. Rev. Stat. § 321.5973 (2013).

federal lands—in direct contravention of *Kleppe*, FLPMA, and more importantly, the Property Clause.⁵⁴ Although both Nevada statutes are unenforceable as determined by the federal law, without repeal they remain on the books and give the impression of valid state law.

The Nevada legislature was not alone in its defiance of federal land management policies; several western states followed suit and enacted statutes that mirrored Nevada's objectives.⁵⁵ Despite the fervent sentiment behind the statutes, these types of declarations were largely symbolic.⁵⁶ At most, these statutes could influence policy and management decisions at a federal agency level.⁵⁷ If the states had been more willing to collaborate and coordinate with federal land managers, they may have been able to achieve their desired on-the-ground results. Instead, the states often pitted themselves against the federal government—a challenge that still continues today in state-federal land management.⁵⁸

Additionally, despite the Court's ruling in *Kleppe*, in 1981 Nevada attempted to challenge FLPMA on constitutional grounds.⁵⁹ Nevada argued FLPMA's moratorium on public land disposal violated Nevada's rights under the Tenth Amendment and the equal footing doctrine.⁶⁰ The court held because Nevada was admitted to the Union under an agreement to relinquish its public land upon admission and Congress may properly regulate land held in the public trust, the equal footing doctrine is not implicated.⁶¹ The federal district court dismissed the case for failure to state a claim upon which relief could be granted, and the Ninth Circuit affirmed.⁶² Thus, as *Kleppe* and Nevada's FLPMA challenge made clear, Congress has the final say in the realm of federal public land management.⁶³

However, thirteen years later Nevada tried again to exert its authority over—and ownership of—federal lands in the sparsely-populated county of Nye.⁶⁴ In 1994, Nye County attempted to avail itself of the 1979 Nevada

54. *Id.* at § 321.598. *Kleppe* held the Property Clause allows the federal government to make needful rules pertaining to federal property, of which FLPMA explicitly placed a moratorium on the sale of federal lands. *Kleppe*, 426 U.S. at 539.

55. Fischman & Williamson, *supra* n. 37, at 166.

56. *Id.* at 167.

57. *Id.*

58. See Michelle Bryan, *Learning Both Directions: How Better Federal-Local Land Use Collaboration Can Quiet the Call for Federal Lands Transfers*, 76 Mont. L. Rev. 147 (2015).

59. *Nev. ex rel. Nev. St. Bd. of Agric. v. U.S.*, 512 F. Supp. 166 (D. Nev. 1981), *aff'd*, 699 F.2d 483 (9th Cir. 1983).

60. *Id.* at 170.

61. *Id.* at 171.

62. *Nev. ex rel. Nev. St. Bd. of Agric.*, 699 F.2d at 488.

63. *Nev. ex rel. Nev. St. Bd. of Agric.*, 512 F. Supp. at 170–172; *Kleppe*, 426 U.S. at 540–543.

64. *U.S. v. Nye Co.*, 920 F. Supp. 1108 (D. Nev. 1996). A further distinguishing feature of the *Nye County* case was the fact that through its resolutions Nye County claimed greater ownership of federal lands than described in the statute. *Id.* at 1111. As an aside, the sparsely populated Nye County may

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state statutes that gave ownership, control, and jurisdiction of all public lands to the state.⁶⁵ Nye County enacted two resolutions that declared Nevada owns all public lands and all rights of way across public lands in Nye County.⁶⁶ Following various disputes among Nye County officials, USFS, and BLM employees, the federal government filed suit in federal district court seeking a declaration that it both owns and has the authority to manage public lands in Nye County.⁶⁷ Once again a court held it is the federal government, not the state, that holds title to federal lands.⁶⁸

IV. STATES' CALL FOR THE TRANSFER OF FEDERAL PUBLIC LANDS TO THE STATES

Although the call to transfer title quieted after *Nye County*, the movement recently resurfaced. Within the last two years movements in many western states have sought to transfer federal public lands to state control, or at minimum initiate a formal study of the transfer.⁶⁹ Currently, Utah stands alone as the sole state that has passed and signed into law the demand to transfer federal land to the state.⁷⁰ Arizona's legislation passed successfully through the legislature but was vetoed by the governor.⁷¹ Colorado's legislation failed in committee, and New Mexico's legislation otherwise failed to pass.⁷² The state legislatures in Wyoming, Idaho, Nevada (for a third bite at the proverbial apple), and Montana all formally initiated a process for a state study of the issue.⁷³ The issue has found further support beyond the West. In 2013, South Carolina's state legislature passed a resolution that conveyed its support for the transfer of federal lands to the west-

have been able to exert actual control over local land use policies had it not so aggressively and destructively disobeyed USFS and BLM management policies.

65. *Id.*

66. *Id.*

67. *Id.* at 1111–1113.

68. *Id.* at 1117. “[T]he Court stated [in *Kleppe*] that ‘while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that “[t]he power over the public land thus entrusted to Congress is without limitations.’” (citations omitted). Given this interpretation, the court must conclude that such a broad power to regulate land owned by the United States necessarily includes the power to own the regulated public lands.” *Nye Co.*, 920 F. Supp. at 1117.

69. Donald J. Kochan, *Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148—The Transfer of Public Lands Act*, 2013 BYU L. Rev. 1133, 1139–1141 (2013). These states include: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, and Wyoming. *Id.* at 1140.

70. *Id.* at 1141.

71. *Id.* at 1139 n. 23.

72. *Id.* at 1139–1140 nn. 24, 28.

73. *Id.* at 1139–1141, 1140 nn. 25–27, 29.

ern states, which is unusual as South Carolina has scant federal lands and will not be advantaged by the movement's success.⁷⁴

A. *Basis in Law for the Transfer of Federal Public Lands to the States*

The modern debate over federal land ownership differs from the Sagebrush Rebellion in the way western states, spearheaded by Utah, now make their claims. Specifically, the 1979 Nevada statutes, later clarified by *Nye County*, purported to claim *outright ownership* to the title of the federal land. Today, the states claim they do not yet own fee title to the land, but the federal government *promised state ownership* when each state was given statehood—a promise upon which they would now like the federal government to fulfill.⁷⁵

Two central constitutional arguments are used to support the transfer of lands to the western states. First, supporters of transferring federal lands to the states focus on the term “dispose” found in the Property Clause. They argue that “dispose” indicates the intent to transfer all acquired land directly to the states.⁷⁶ Specifically, if the Framers of the Constitution envisioned the federal government would retain land, they would not have used “dispose” to describe Congress’ powers in the Property Clause.⁷⁷ However, as described in section III above, long-standing Property Clause jurisprudence supports the constitutionality of FLPMA and Congress’ ability to enact rules and regulations as it sees fit in regard to public lands.

The second argument ties the Enclave Clause and its purpose to the language of the states’ Enabling Acts.⁷⁸ At first blush, the Enclave Clause sets forth the specific circumstances in which the federal government may acquire land for its purposes.⁷⁹ Proponents argue the Enclave Clause is redundant if the Property Clause allows the federal government to retain any needed land; therefore the Enclave Clause should control how the federal government acquires land and the Property Clause should control how the federal government disposes of land. However, history shows this argument does not pass muster. The federal government has infrequently used the Enclave Clause to obtain land, whereas the Property Clause, which has been expanded upon immensely, is the basis for federal land ownership.⁸⁰

74. Kochan, *supra* n. 69, at 1141, n. 30.

75. *Id.* at 1148.

76. Coggins & Glicksman, *supra* n. 13, at ch 1, pt. II(B).

77. *Id.*; Kochan, *supra* n. 69, at 1150–1151.

78. Driscoll, *supra* n. 12, at 1001.

79. U.S. Const. art. I, § 8, cl. 17. (“To exercise exclusive Legislation . . . by Cession of particular States, and the Acceptance of Congress . . .”).

80. Coggins & Glicksman, *supra* n. 13, at ch. 1, pt. II(A)–(B).

It is how the Enclave Clause is read in conjunction with the language often found in western states' Enabling Acts that gives the proponents' Enclave Clause argument greater traction. As a requirement for statehood western states relinquished their title to public lands to the federal government, which was written into the states' Enabling Acts.⁸¹ Then, if the federal government sold any public land in the state, the Acts required the federal government to give 5% of the sale back to the states.⁸² Enabling Acts have been likened to contracts between the federal government and the states.⁸³ Advocates point to the terms setting forth the "sale requirements" as a direct mandate to sell public lands and transfer a portion back to the states.⁸⁴

B. The Transfer Movement in Utah: The Transfer of Public Lands Act

Although similar to the federal land holdings in other western states, federal land ownership in Utah falls on the higher end of the spectrum at nearly 67% of all land within the state.⁸⁵ Surpassed only by Nevada at 81% federal land, Utah only marginally bests Idaho and Alaska both in the 60% range of federal land, which are followed by Oregon, Wyoming, California, and Arizona, each in the 40% – 50% range of federal land.⁸⁶ While the preceding percentages account for the total federal land ownership, the mix of federal agencies that manage land within a state differs from state to state. In Utah, the majority of federal land—over 65%—is managed by the BLM.⁸⁷

Despite Nevada's failed challenges to federal public land control in the 1970s and 1990s, Utah recently revitalized its demand to control the public land within its borders. In 2012, Utah passed, and the governor signed into law, the Transfer of Public Lands Act.⁸⁸ The TPLA required the federal

81. Driscoll, *supra* n. 12, at 1001; *see e.g.* Enabling Act, 25 Stat. at 676; Utah Enabling Act, § 3, 28 Stat. 107, 108 (1894).

82. Enabling Act, 25 Stat. at 680; Utah Enabling Act, 28 Stat. at 110.

83. *See Andrus v. Utah*, 446 U.S. 500, 507 (1980).

84. Driscoll, *supra* n. 12, at 1010.

85. Gorte et al., *supra* n. 2, at 5.

86. *Id.* at 4–5. To compare to Midwestern and Eastern states, 21.6% of the District of Columbia is federally owned, followed by 13.5% federal ownership in New Hampshire, 13.1% federal ownership in Florida, 10% federal ownership in Michigan, and all the remaining states fall in the single digits of federal ownership.

87. *Id.* at 5, 12. While the BLM plays many roles in land management, it pursues its multiple use and sustained yield mandate with both mineral and grazing lease programs. *See BLM, Energy, New Energy for America*, <http://perma.cc/Q3JZ-TKW2> (<http://www.blm.gov/wo/st/en/prog/energy.html>) (last updated Oct. 15, 2014) [hereinafter *New Energy*]; *BLM, Grazing, Fact Sheet on BLM's Management of Livestock Grazing*, <http://perma.cc/U5JE-8L5R> (<http://www.blm.gov/wo/st/en/prog/grazing.html>) (last updated Feb. 18, 2014) [hereinafter *Livestock Grazing*].

88. Utah H. 148, 59th Utah Legis., Gen. Sess. (Feb. 14, 2012); Utah Code §§ 63L–6–101 to 63L–6–105 (2014); Kochan, *supra* n. 69, at 1135.

government to transfer 20–30 million acres of federal land in Utah to the state by December 31, 2014.⁸⁹ Supporters of the TPLA use the constitutional arguments outlined in the previous section, as well as loss of revenue and lack of access to natural resources, as justifications for the TPLA.⁹⁰ Because the federal government failed to act on the state’s demand for the transfer of public land, Utah has indicated it will likely request a judicial determination and sue the federal government—the state has already set aside two million dollars for potential future litigation.⁹¹ After the transfer deadline passed without federal action, the Utah senate passed a bill in the 2015 general legislative session that would require Utah to file suit to compel the land transfer by June 30, 2016.⁹² Despite general opposition to the TPLA by Utah senate democrats (including the bill’s sponsor), all of the senate democrats signed on in support of the bill in order to seek a judicial determination one way or another.⁹³ The bill underwent several revisions and after a favorable recommendation in the house, it ultimately did not pass and was returned to the senate at the end of the general session.⁹⁴ To date, what action Utah will take to carry out the TPLA’s demands remains unknown.

The TPLA definition of “public lands” is careful to carve out federal land that was specially designated by acts of Congress. It specifically excludes national parks and other lands managed by the National Parks Service, federally designated national monuments, federally designated wilderness areas, and other specific federal holdings—the last of which is a specific nod to Utah’s support of the Enclave Clause.⁹⁵ The TPLA also

89. Kochan, *supra* n. 69, at 1135 (citing U.S. Dep’t of Interior, Bureau of Land Mgmt., Public Land Statistics 2011, at 24 (2012), (available at <http://perma.cc/KF5Z-DXRU> (http://www.blm.gov/public_land_statistics/pls11/pls2011.pdf (Table 1-4))); David DeMille, *Study: Utah Could Profit from Public Lands Transfer*, *The Standard* (Dec. 1, 2014) (available at <http://perma.cc/LM7W-WJXV> (<http://www.thespectrum.com/story/news/local/2014/12/01/study-utah-profit-public-lands-transfer/19760379/>)); Brian Calvert, *The Push Is on to “Take Back” Public Lands*, *High Country News* (Oct. 30, 2014) (available at <http://perma.cc/9C9V-VWT9> (<https://www.hcn.org/articles/the-push-is-on-to-take-back-public-lands/>)).

90. Kochan, *supra* n. 69, at 1135–1136; Calvert, *supra* n. 89.

91. Mori Kessler, *Deadline for Public Lands Transfer Passes, State Considers Litigation*, *St. George News* (Jan. 3, 2015) (available at <http://perma.cc/2FT9-N3VG> (<http://www.stgeorgeutah.com/news/archive/2015/01/03/mgk-deadline-public-lands-transfer-passes-state-considers-litigation/#.VOWPKi7lxBg>)).

92. Utah S. 105, 61st Utah Legis., Gen. Sess. (Mar. 12, 2015).

93. Brian Maffly, *Senate Passes Bill that Sets Deadline for Land Transfer Suit*, *The Salt Lake Tribune* (Feb. 24, 2015) (available at <http://perma.cc/RH5C-JMCS> (<http://www.sltrib.com/news/2216327-155/senate-passes-bill-that-sets-deadline>)); Brian Maffly, *Officials Say Economic Outlook Good for Public Land Transfer, but Keep Study under Wraps*, *The Salt Lake Tribune* (Nov. 19, 2014) (available at <http://perma.cc/U9SU-QK3Z> (<http://www.sltrib.com/news/1847306-155/state-public-lands-utah-transfer-federal>)).

94. Utah S. 105, 61st Utah Legis., Gen. Sess. (Mar. 12, 2015).

95. Utah Code § 63L–6–102(3).

requires the state to follow the school trust payment terms found in Utah's Enabling Act, mimicking the federal government's obligation to pay into the state's school trust should it sell public land.⁹⁶

Proponents have found additional support for their argument in the language found in correspondence between Utah's pre-statehood representatives and the President.⁹⁷ The most compelling provision makes reference to a historical understanding that the federal government would allow Utah to access its resources on the same terms as other states.⁹⁸ The reliance on this correspondence, however, is problematic. First, Utah argues for contract-like interpretation of its Enabling Act, but at the same time wishes to insert extrinsic documents for context.⁹⁹ Second, while such correspondence may relay an understanding on the part of Utah that the federal government would dispose of the federal land years after statehood was conferred,¹⁰⁰ the explicit language of the Enabling Act wherein Utah agreed to disclaim title to unappropriated public land and the federal government agreed to grant certain land parcels back to the state along with conferring statehood cannot be avoided.¹⁰¹

Utah also commissioned an economic study to assess the financial impact associated with the transfer of title.¹⁰² The state gave the analysts until November 2014 to gather and process data, prior to formally presenting the results to a legislative committee.¹⁰³ Remarkably, the economic perspective joined the conversation only one month prior to the TPLA's December 31, 2014, transfer deadline.¹⁰⁴ Previously, proponents have discussed the economics vaguely, only to state they expect to see favorable study results.¹⁰⁵

96. Kochan, *supra* n. 69, at 1144 (quoting Utah Code § 63L-6-103); Utah Code § 63L-6-101.

97. Kochan, *supra* n. 69, at 1146.

98. *Id.* (quoting 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), as reprinted in Const. Def. Council, *Report on Utah's Transfer of Public Lands Act: H.B. 148*, at 17 (2012) (available at <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148.pdf>)).

99. *Id.*; *Id.* at 1147.

100. The correspondence at issue between Utah and the President occurred in 1915, nearly twenty years after Utah became a state. See 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), as reprinted in Const. Def. Council, *Report on Utah's Transfer of Public Lands Act: H.B. 148*, at 17 (2012) (available at <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148.pdf>).

101. Utah Enabling Act, §§ 3, 7, 12, 28 Stat. 107.

102. Utah H. 142, 60th Utah Legis., Gen. Sess. (Feb. 13, 2013).

103. Amy Joi O'Donoghue, *Utah Analyzing Costs, Benefits of Taking Land from the Feds*, Deseret News (Aug. 12, 2013) (available at <http://perma.cc/A3VQ-SF9W> (<http://www.deseretnews.com/article/865584535/Utah-analyzing-costs-benefits-of-taking-land-from-the-feds.html?pg=all>)).

104. Utah Code § 63L-6-103.

105. Calvert, *supra* n. 89 (quoting Jessica Goad, advocacy director at the Center for Western Priorities); Amy Joi O'Donoghue, *Legal Analysis Says Public Lands Effort Is Flawed; Proponents Undeter-*

On December 1, 2014, Utah's Public Lands Policy Coordinating Office, which operates under the governor, released a 784-page economic study drafted by economists from Utah, Utah State, and Weber State universities.¹⁰⁶ Not surprisingly, the study predicts Utah could manage its federal lands at a net profit for the state.¹⁰⁷ However, the study assumes stable, high oil and gas market prices and an increase in oil and gas royalties to the state in order to return a profit. Even with high market prices, without a 100% royalty share the state would likely operate at a loss for two years after the actual title transfer.¹⁰⁸ Further, the study noted wildfire suppression would be a significant issue for the state.¹⁰⁹ Once the federal government no longer owns or manages the land, Utah would pay all wildfire suppression costs—an annual expense likely to be more unpredictable than oil and gas prices.¹¹⁰

C. *The Transfer Movement in Montana*

Similar to Utah, a significant portion of Montana is federally owned. Nearly 30% of the state is under federal ownership.¹¹¹ Also akin to Utah, one agency dominates federal land management in Montana. Unlike Utah, the primary agency is the USFS, which manages over 63% of Montana's federal public land.¹¹² While the BLM and the USFS share multiple use and sustained yield mandates, the BLM issues more leases than the USFS, both grazing and mineral permits.¹¹³ The USFS fulfills much of its sustained yield mandate through timber harvesting, and allows 35% of total national forested land to be available for harvest.¹¹⁴ Despite the management differ-

red, Deseret News (Oct. 30, 2014) (available at <http://perma.cc/3H3W-B5D6> (<http://www.deseretnews.com/article/865614321/Legal-analysis-says-public-lands-effort-is-flawed-proponents-undeterred.html?pg=all>)); Maffly, *supra* n. 93.

106. Utah's Pub. Lands Policy Coordinating Off., *Transfer of Public Lands Act and Study*, <http://perma.cc/L8T7-FR9Y> (<http://publiclands.utah.gov/current-projects/transfer-of-public-lands-act/>) (accessed Nov. 28, 2014); U. of Utah, Bureau of Econ. & Bus. Research et al., *An Analysis of a Transfer of Federal Lands to the State of Utah* (Pub. Lands Policy Coordination Off. Nov. 2014) [hereinafter *Federal Lands Transfer Analysis*].

107. Pub. Lands Policy Coordinating Off., *Pathway to a Balanced Public Lands Policy* 15, 27 (Nov. 28, 2014) (available at <http://perma.cc/K94S-YP9Z> (http://publiclands.utah.gov/wp-content/uploads/2014/12/Summary-20141128_FINAL.pdf)).

108. *Federal Lands Transfer Analysis*, *supra* n. 106, at xxviii).

109. *Id.* at 491.

110. *Id.*

111. Gorte et al., *supra* n. 2, at 4.

112. *Id.* at 4, 12.

113. *New Energy*, *supra* n. 87; *Livestock Grazing*, *supra* n. 87; USFS, *News Release: Forest Service and BLM Announce 2015 Grazing Fee*, <http://perma.cc/Z6F6-9QBv> (<http://www.fs.fed.us/news/releases/forest-service-and-blm-announce-2015-grazing-fee>) (Jan. 30, 2015).

114. USFS, *Forest Service Manual 2000: National Forest Resource Management*, 2411.02, <http://perma.cc/7JW3-XRDQ> (http://www.fs.fed.us/im/directives/dughtml/fsm_2000.html) (last modified Mar.

ences between the two states, the transfer movement is alive and well in Montana.

After Utah reignited the debate over control of its public land ownership in 2012, the Montana legislature passed a law requiring a study of the issue.¹¹⁵ The result was a report that largely outlined the history of public land management for the state and set the stage for a legislative discussion on land management issues.¹¹⁶ The report was a far cry from a directive to transfer public land to the state.

The Montana Republican Party currently supports the transfer of title in its party platform and Montana State Senator Jennifer Fielder is a co-organizer of various state legislative summits on the issue, along with Utah Representative and American National Lands Council champion Ken Ivory.¹¹⁷ In line with Utah's legislation, Fielder introduced three primary senate bills on federal land transfer in the 2015 Montana legislative session, which sparked contentious debate.¹¹⁸ The bills included a transfer act as well as an official economic study requirement, which mirrors Utah's legislation. To assuage fears the state would sell the land when it inevitably faces management budgetary issues, Fielder introduced legislation to prohibit the sale of public land to private interests.¹¹⁹ However, as noted by the director of the Montana Department of Natural Resources and Conservation, a land-sale prohibition could hamper the state's ability to engage in necessary land transactions.¹²⁰ Unlike Utah, where the governor has supported the state legislature's efforts, Montana Governor Steve Bullock has publicly stated he does not support transfer legislation,¹²¹ the passage of

17, 1999); USFS, *Forest Management: Today*, <http://perma.cc/A6JP-X897> (<http://www.fs.fed.us/forestmanagement/aboutus/today.shtml>) (last modified May 12, 2014).

115. Mont. Sen. Jt. Res. 15, 63d Legis., 2013 Reg. Sess. (Feb. 13, 2013).

116. Joe Kolman, *SJ15 Public Land Management Study: History and Issues* (Mont. Leg. Servs. Div. 2013) (available at <http://perma.cc/GF9P-DPVW> (<http://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2013/SJ15-primer.pdf>)).

117. Mont. Republican Party, *Platform-Natural-Resources*, <http://perma.cc/7LDK-JL2P> (<http://www.mtgop.org/index.php/about/party-platform/214-platform-natural-resources.html>) (accessed Dec. 14, 2014); Kristen Moulton, *Western Lawmakers Gather in Utah to Talk Federal Land Takeover*, Salt Lake Trib. (Apr. 19, 2014) (available at <http://perma.cc/5RDU-ED4A> (<http://www.mtgop.org/index.php/about/party-platform/214-platform-natural-resources.html>)).

118. Mont. S. 215, 64th Mont. Legis., Gen. Sess. (Feb. 27, 2015); Mont. S. 274, 64th Mont. Legis., Gen. Sess. (Feb. 27, 2015); Mont. S. 298 64th Mont. Legis., Gen. Sess. (Apr. 28, 2015); Mike Dennison, *Contentious Hearing on First of Several Federal Land Transfer Bills Proposed by GOP's Sen. Jennifer Fielder*, Helena Indep. Rec., (Feb. 9, 2015) (available at <http://perma.cc/2V25-QYD3> (http://helenair.com/lifestyles/outdoors/contentious-hearing-on-first-of-several-federal-land-transfer-bills/article_325a586d-2562-5756-9e18-049eb29fb6af.html)).

119. Mont. S. 215, 64th Mont. Legis., Gen. Sess. (Feb. 27, 2015); Dennison, *supra* n. 118.

120. Dennison, *supra* n. 118.

121. Tom Kuglin, *Public Lands Rally Packs Capitol Rotunda*, Helena Indep. Rec. (Feb. 16, 2015) (available at <http://perma.cc/6JH2-BEMV> (http://helenair.com/news/local/updated-public-lands-rally-packs-capitol-rotunda/article_11c542e8-fc0a-5f02-b9cb-268a28f446af.html)).

which Montana could not afford and would only be detrimental to Montana's public land.¹²² Of the land transfer legislation introduced in the 2015 session, the only bill to become law is a bill that requires the state attorney general to enforce the five-percent-sale term of Montana's Enabling Act upon the sale of any federal land since Montana's 1889 statehood.¹²³

V. CONCLUSION

Despite decades of discussion, the status of the transfer movement in Utah and other western states remains relatively unchanged. Regardless of the states' rights aspect of the argument, the dispute is largely over economics; because while not perfected, land management policy has come a long way since the 1970s.¹²⁴ Advocates believe states' natural resources are being mismanaged and feel each state deserves a larger piece of the pie.¹²⁵ The recent release of Utah's economic study presents a cost-benefit analysis with potential long-term benefits for Utah.¹²⁶ However, Utah could end up managing its lands at a loss for two years, and profit would occur only with both a complete share of royalties and high oil and gas prices, which in the recent months have continued to fall.¹²⁷ According to opponents of the transfer, Utah could fall \$35–\$69 million short of management costs each year, leaving taxpayers to absorb the deficit.¹²⁸ Opponents argue a beneficial economic analysis is “a pie-in-the-sky scenario” where success is inextricably intertwined with the existence of a favorable oil and gas market and low management costs.¹²⁹ Further, while proponents cite lost tax and natural resource revenue to the federal government, the states do not go uncompensated and instead receive a share of all natural resource profits and other federal programmatic compensation.¹³⁰

Of course any future profit gained by Utah or any other state is predicated on the actual transfer of federal public land and its management to the state. The federal government has never indicated it will comply with TPLA. In fact, shortly after TPLA's enactment, DOI Secretary Ken Salazar

122. Lisa Baumann, *Montana Governor Vetoes Utah-Influenced Public Land Bill*, Standard Examiner, (May 5, 2015) (available at <http://perma.cc/8N4R-WWVP> (<http://www.standard.net/Government/2015/05/05/Montana-governor-vetoes-public-land-task-force-bill>)).

123. Mont. S. 298, 64th Mont. Legis., Gen. Sess. (Apr. 28, 2015).

124. See generally Bryan, *supra* n. 58.

125. Moulton, *supra* n. 117.

126. *Federal Lands Transfer Analysis*, *supra* n. 106, at xxxii.

127. *Id.*; Mori Kessler, *Economic Study: Utah Could Benefit from Managing Public Lands*, St. George News (Dec. 8, 2014) (available at <http://perma.cc/JMV4-LHG9> (http://www.stgeorgeutah.com/news/archive/2014/12/08/mgk-economic-study-utah-public-lands-transfer/#.VQ3COfnF_X0)).

128. Kessler, *supra* n. 127.

129. *Id.*

130. Kolman, *supra* n. 116, at 11–12.

called the law the type of “political rhetoric you see in an election year” that “defies common sense.”¹³¹

Whether the federal government will in any way acknowledge Utah’s December 31, 2014 transfer deadline remains to be seen; the date passed without transfer. Now, Utah’s Congressional delegates must try to either lobby for the transfer in Washington, D.C. or the state must sue the federal government to force transfer. Moreover, and left seemingly unaddressed by the proponents of the movement, the federal government has historically retained mineral rights of known minerals on title transfers. By retaining mineral rights, the federal government would frustrate the point of any transfer to Utah, because Utah’s plan relies on mineral profits.¹³²

Further, a key component in the discussion is the overwhelming cost of fire suppression for all the western states.¹³³ Timber and other national forest activity receipts do not come close to covering states’ fire suppression liability¹³⁴—a significant consideration for Montana.¹³⁵ Utah, despite having less forested acreage than other western states, still points to wildfire suppression as a significant drawback in assuming ownership of its public lands, the management of which could quickly eat away any profits gained by oil and gas production.¹³⁶ Furthermore, the entire federal budget—not each state on its own—absorbs the unpredictable cost of wildfire suppression on federal lands.¹³⁷ In 2012 approximately 9.3 million acres of land burned due to wildfire, and 75% of the burned acreage was on federal land.¹³⁸ Even viewed in the most favorable light, Utah’s economic analysis does not reflect the true fiscal impact of land transfer across all western

131. Matt Canham, *Salazar: Utah Just Playing Politics in Land Fight*, Salt Lake Trib. (April 25, 2012) (available at <http://perma.cc/47XR-S7W3> (<http://www.sltrib.com/sltrib/politics/53980576-90-salazar-utah-lands-energy.html.csp>)).

132. Calvert, *supra* n. 89.

133. Katie Hoover & Kelsi Bracmort, *Wildlife Management: Federal Funding and Related Statistics* 1 (Cong. Research Serv. Feb. 4, 2015).

134. Kolman, *supra* n. 116, at 35; Hoover & Bracmort, *supra* n. 133, at 1.

135. For example, the single large-scale Canyon Ferry Complex fire, which occurred in 2000 and was started in the Helena National Forest, burned nearly 44,000 acres and cost \$9.5 million in suppression alone, and another \$8 million in rehabilitation costs. The total timber receipts in Montana for 2000 were just less than \$17.5 million. Further, timber receipts have been on a steady path of decline for the past decade. The 2013 Montana timber receipt total was approximately \$4.2 million. Western Forestry Leadership Coalition, *The True Cost of Wildfire in the Western U.S.* 5–6 (updated April 2010); Headwaters Economics, *National Forest Gross Receipts from Commercial Activities, FY 1986–2013* (available at <http://perma.cc/P5DE-3T8W> (<http://headwaterseconomics.org/interactive/national-forests-gross-receipts>)).

136. *Federal Lands Transfer Analysis*, *supra* n. 106, at 497.

137. Hoover & Bracmort, *supra* n. 133, at 1; Kelsi Bracmort, *Federal Assistance for Wildfire Response and Recovery* 2 (Cong. Research Serv. Dec. 9, 2013).

138. Hoover & Bracmort, *supra* n. 133, at 2–3.

states, especially Montana,¹³⁹ with its greater need for wildfire management.

Finally, and likely most significantly, advocates face an uphill battle in regard to the constitutionality of the demand to transfer any federally owned land to state ownership. As outlined above, the courts have repeatedly held that the Property Clause gives Congress absolute power to legislate in the arena of federal public lands. Furthermore, Nevada's attempts to break free from a perceived oppression of federal land management should serve as a clear indication of how the courts would view other western states' attempts to secure public land title in court. Despite Utah's effort to distinguish its argument from Nevada's efforts, the end result will likely remain the same: unless Congress legislates the disposal of federal public lands, federal lands will remain federal, regardless of which state makes the demand.

139. In 2012 Montana was the third highest state in total acreage lost to wildfire at over 1.2 million acres. National Oceanic and Atmospheric Administration, *Wildfires – Annual 2012* (updated Jan. 7, 2013) (available at <http://perma.cc/BVJ8-CDN7> (<https://www.ncdc.noaa.gov/sotc/fire/201213>)).