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Ownership and Control of Public Land

The ownership and control of federal public land, especially in the western United States, has been discussed and debated for many years. The debate has grown more intense since 2012 when the Utah legislature passed the Transfer of Public Lands Act and Related Study (TPLA)[1], also referred to as House Bill 148, which demanded that most of the federal land within Utah's borders be transferred to the state.

Based on a careful and thorough analysis of state and federal constitutional law, the Utah Office of Legislative Research and General Counsel (LRGC) advised the legislature that any attempt by the state to enforce the act ran a "high probability of being declared unconstitutional."[2] Despite that advice, the legislature passed the TLPA, and the governor signed it in March 2012.

Since then, numerous lawyers have issued their own opinions, often citing Supreme Court cases that are not relevant to the TLPA. Since most citizens find it difficult to evaluate complex and competing legal claims, public opinion is now being primarily driven by partisan political ideology - should the federal government or the state own and control public land within a state?

Missing in this maze of legal arguments has been any effort to understand the nation's key historical events and decisions that preceded and influenced the writing of the Constitution and its public land provisions. History, forgotten or just ignored in the current legal debate, did bring us to our present land policy. Therefore, this paper begins not with more legal arguments and confusing judicial rulings, but rather with a review of our colonial and early national history that is essential to a rational understanding of where we are today. We will begin that review with two key Articles of the Constitution, which unfortunately are often confused:

> **Article I, § 8, Clause 17 - known as the Enclave Clause:** The Enclave Clause is actually not relevant to the issues addressed by the Utah legislature but is mentioned here because it is often cited, incorrectly, as requiring state approval for all federal land located within a state. Article I applies only to congressional control "over such District as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings."
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> **Article IV, § 3, Clause 2 - known as the Property Clause:** Today's federal public land holdings are subject to Clause 2 of Article IV, which says "Congress shall have Power to dispose of[3] and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This clause applies to land ceded to the federal government or obtained through other means from foreign governments; to portions of such federal land later designated as official "territories;" to land set aside by Congress for "reserves;" and to unsold or unreserved territory within a state not specifically granted to the state in congressional enabling acts at the time of statehood.

In two of its most frequently cited decisions on public land policy, the Supreme Court applied and extended earlier rulings related to Clause 2 of Article IV as follows:

> (1911) "All the public lands of the nation are held in trust for the people of the whole country. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The nation is an owner, and has made Congress the principal agent to dispose of its property. [It] has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. (Light v. U.S.)[4]

> (1917) "Not only does the Constitution commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired." (Utah Power & Light v. U.S.)[5]

These two decisions of 1911 and 1917 will be addressed in more detail later in this paper. The Congressional Research Service (CRS), a federal agency responsible for providing members of the House and Senate and their committees with policy and legal analysis on a broad range of questions, is known for its authoritative, objective, and nonpartisan reports. Its 2007 report, "Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention,"[6] said, "The Property Clause grants Congress the authority to acquire, dispose of, and manage federal property." The CRS also said that the Supreme Court has described Congress' power to legislate under this Clause as 'without limitation.'"

The CRS did not explain why the Founding Fathers gave this broad authority to Congress. However, a review of early American history provides the answer and the relevant background.

Key Events in Colonial and early American History

Three historical events, listed here in outline form, set the stage for the creation of America's federal public land and will be addressed in this paper:

1. The 1763 Treaty of Paris that ended the French and Indian War in America stripped France of her possessions in North America, and gave Great Britain the previously contested region between the Appalachian Mountains and the Mississippi River.

2. The 1783 Treaty of Paris ended our War of Independence, recognized the United States as a nation, and formally awarded us the former French - then British - land between the Appalachian Mountains and the Mississippi River.

3. Disputes between some of the states over their claims to land beyond the Appalachian Mountains delayed from 1776 to 1781 the formation of our first national government under the Articles of Confederation. Eventual agreement by those states to cede their claims to the new government would directly lead to Article IV, § 3, Clause 2 in the 1787 Constitution.

The Land Beyond the Mountains

For purposes of this paper, it is sufficient to say that France and Great Britain were engaged in disputes over land in America for a hundred years prior to1763. Much of the contest revolved around each country's effort to dominate the fur trade via arrangements with native Indian tribes. Over time, the British came to dominate the northeastern coastal region, while French fur traders were able to develop good trading relationships with tribes from the Great Lakes to the Ohio River and west to the Mississippi River. The French and Britain clashes in the region west of the Appalachian Mountains became known as the French and Indian War (1754-1763), an extension of the Seven Years War in Europe. That war did not have a major effect on the established English colonies along the Atlantic coast, although some of their colonial charters had identified the Mississippi River as their western borders. Settlers from the eastern colonies had not crossed the Appalachians Mountains prior to the Revolutionary War, partially because of the mountains, but mostly because of the resistance of Indian tribes to colonial settlement. The Indians wanted to maintain their tribal independence and their mutually beneficial trading arrangements with the French. France was not interested in establishing its own settlements in that region.

The 1763 Treaty of Paris ended the French and Indian War and awarded Great Britain the territory between the Appalachian Mountains and the Mississippi River. The British king then issued a Royal Proclamation[7] that reserved the region for native Indians and forbade American colonists from settling there or engaging in land speculation. Since some colonial speculators, supported by local colonial governments, had already claimed land across the mountains before the1763 treaty, many colonial Americans considered access to the land as their prize for helping Great Britain win the war against France and objected to the new restrictions.

It was not England's intent to permanently exclude colonists from the area but rather to avoid conflicts with Native Americans, who had enjoyed a long relationship with France, until treaties with native tribes could be arranged. Some historians have argued that the Royal Proclamation of 1763 ceased to be a major source of tension between England and American colonists because treaties soon opened up extensive lands for settlement. However, other historians believe that resentment of the Proclamation contributed to the growing divide between the colonies and the mother country. In either case, the Proclamation did result in a specific but obtuse complaint against King George III in the Declaration of Independence, which read, "He has [raised] the conditions of Appropriations of Lands."

The Articles of Confederation - Our First Government

Following the issuance of our Declaration of Independence in 1776, the Continental Congress was faced with the challenge of forming a unity government between thirteen independent states to coordinate the war of independence and obtain financial and other help from potential allies. Two major challenges to that unity had to be addressed before a government could be formed. The first issue, the official relationship between states and the central government, was quickly resolved, but the conflict over the western lands would take several more years.

State versus central authority:

Historians of that era describe this issue as a contest between "radical" and "conservative" ideology. The "radicals," driven by the spirit of the Declaration of Independence, insisted on a loose union of independent states and rejected any form of central government that could be superior to their local legislatures. In contrast, "conservatives" argued that too much emphasis on the rights of states would lead to political, economic, and even social chaos. Because "radicals" controlled the committee that drafted the Articles of Confederation, the only "sole and exclusive" power given to the central government was to operate a Post Office and to regulate weights and measures. The Articles specifically stated that "each state retains its sovereignty, freedom, and independence" and that the states had only entered "into a firm league of friendship." (In contrast, the later 1787 Constitution does not refer to the states as either independent or sovereign.)

Draft Articles were sent to the states in 1777 and were favorably received in general. However, some states insisted that conflicting claims to western land had to be resolved before they would agree to a union. Resolution of that issue was not reached until 1781.

The western land conflict:

The borders of some states, as described in their colonial charters and projected across the Appalachian Mountains to the Mississippi River (or, in some instances, beyond to the South Sea, the historical name for the Pacific Ocean), conflicted with the claimed borders of other states. At the same time, some states were land-locked and had no claim to land in the west. Those states feared that the "landed" states would grow without limit, thereby gaining economic and political control in the new union. They refused to approve the draft Articles until their concerns were resolved.

There was some attempt to address this border problem in an early draft of the Articles of Confederation. The so-called Dickenson Draft, recorded on July 12, 1776, stated in Article XVIII:

> "The United States assembled shall have the sole and exclusive Right and Power ... for settling all Disputes and Differences ... between two or more Colonies concerning Boundaries, Jurisdictions [and] Limiting the Bounds of those Colonies, which by Charter or Proclamation, or under any Pretence [sic], are said to extend to the South Sea, and ascertaining those Bounds of any other Colony that appear to be indeterminate - Assigning Territories for new Colonies, either in Lands to be thus separated from Colonies and heretofore purchased or obtained by the Crown of Great-Britain from the Indians, or hereafter to be purchased or obtained from them - Disposing of all such Lands for the general Benefit of all the Colonies."[8]

However, such details regarding boundary conflicts or westward expansion do not appear in the final text of the Articles, recorded on November 15,1777, and submitted to the states. Article 9 thereof contains only the following short reference to this problem:

> "The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more

states concerning boundary, jurisdiction or any other cause whatever."[9]

After several years of debate and delay, all states with claims to western land finally agreed in 1781 to cede those claims to the proposed central government, with the understanding that new states would be created from it. The formal state cessions of land to the central government were mostly completed between 1783 and 1787. These were not entirely selfless decisions since the central government agreed, in return, to assume most of the states' war debts.

In this manner, the Confederation Congress became the official owner of a western "public domain" several years before the new U.S. Constitution was written and ratified by the states. The extent of that public domain would later be augmented by land obtained by purchase, treaty, or conquest from France, Spain, Mexico, Great Britain, and Russia. As each piece of new land was added to the United States, it automatically came under the control of the Congress by virtue of Article IV, § 3, Clause 2 of the U.S. Constitution.

The Northwest Ordinances

As the states ceded their western land claims to the central government, specific measures were needed to define their use. The initial decisions by the Confederation Congress affected an area that became known as the Northwest Territory (land south of the Great Lakes, north of the Ohio River, and between the Appalachian Mountains and the Mississippi River). The Ordinance of 1784 divided the territory into districts. The Ordinance of 1785 provided for its scientific survey and division into a rectangular grid system of townships, which set an orderly pattern for the sale and settlement of land and an ongoing source of federal government revenue. Finally, the Ordinance of 1787 determined the process whereby future states would be created.

These ordinances are arguably the most important legislation passed by the Confederation Congress, and they certainly rank with the legislative decisions of our subsequent Congress with regard to ownership, control, and use of America's public domain lands. They established the precedent by which the Federal government would control our nation's westward expansion by establishing specific territories governed by congressional appointed governors, followed by the eventual admission of new states.

Any alternative to that pattern of controlled growth directed by Congress would certainly have been characterized by haphazard and conflicted expansion by individual states having western land claims, each still defined as sovereign under the Articles of Confederation.

The Northwest Ordinance of 1787 anticipated and required the strong central government that was simultaneously being written into the new U.S. Constitution of 1787. As the western land began to be settled, Congress appointed territorial governors and judges until new states were organized. The new states were politically equal to the older states, although Congress did impose certain restrictions. For example, slavery was prohibited within the Northwest Territory and in all states formed from it.

When new states were formed, neither the Articles of Confederation nor the subsequent U.S. Constitution required Congress to transfer any land directly to them, although some was granted for specific government and education purposes. Instead, Congress retained control of the land to meet its own national purposes. Some was granted to war veterans in lieu of pay owed for service in the past war. Land also was sold to homesteaders or held for future sale to reduce the nation's

war debts and granted to railroads to improve transportation for settlers into the region's interior.

These decisions by the Confederation Congress became the pattern for the disposition of additional western land that would be ceded by other states or purchased from foreign nations, beginning with the Louisiana Territory.

Public Land Provisions in the U.S. Constitution of 1787

The above decisions of the Confederation Congress regarding the western land are not widely known today because the government system built into the Articles of Confederation failed almost immediately. Therefore, delegates from five states met in Annapolis in September 1786 and asked the Continental Congress to invite all states to send delegates to a convention in Philadelphia the following May to revise the Articles.

In contrast to the men who wrote the Articles of Confederation, most of the delegates sent to the 1787 Constitutional Convention in Philadelphia were "Federalists," men to whom the problem of state sovereignty over a weak central government was evident. Historians attribute the difference in the composition of the convention's delegates to the fact that the "radicals" of a decade earlier had largely moved into the leadership of the new states and were content to remain at home conducting their affairs at that level. In any event, while waiting for a quorum of delegates to assemble, James Madison of Virginia, a Federalist, and other members of the Virginia delegation took the initiative to frame the subsequent discussion by drawing up a proposal that was placed before the convention. That proposal went far beyond tinkering with the Articles of Confederation and broadened the debate to facilitate fundamental revisions to the structure and powers of the national government. While some delegates thought this action exceeded their mandate, their concerns were quickly put aside.

When the completed Constitution was submitted to the states, most ratified it fairly quickly, despite vigorous debate between Federalists and Anti-Federalists over provisions that gave more power to the central government. For example, Article VI boldly stated, "This Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."

While most of the states ratified the Constitution with the condition that a Bill of Rights be added, Article IV, § 3, clause 2, which gave Congress full authority over the western lands, did not become a point of contention between the Federalists and Anti-Federalists of that time.

In his transmittal of the proposed Constitution to the Continental Congress, George Washington, the convention's president, shared his perspective concerning the political philosophy of the new Constitution versus the Articles of Confederation:

> "It is obviously impracticable in the government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest."[10]

Washington's perspective regarding the need to give up a share of liberty to secure the interest and safety of all, certainly applies to the convention's decision to place sole control over the nation's public land in the hands of the federal government, namely Congress.

Thus, twice in our nation's early history - in 1781 under the Articles of Confederation and in 1787 in our present Constitution - the men who created today's system of government decided it was in the best interests of the nation that Congress have sole control over the land ceded by the original states or later obtained from other countries. Within that broad authority, Congress has taken a variety of actions regarding the use of federal land to meet changing national requirements.

The Post-Constitution Period

When in the late 19th century, Congress became concerned that the forests, soil, plants, and animals on the public land were being destructively used or rapidly depleted, especially in the more arid western region obtained from France and Mexico, it began to set aside increasing portions of the land as reserves for the benefit of the entire nation.

Some of the major conservation laws passed by the Congress at that time were the National Forest Reservation Act of 1891, the Reclamation Act of 1902, and the National Park Service Act of 1916. In 1934, Congress passed the Taylor Grazing Act to prevent overgrazing of public land. Until then, grazing had been unregulated, and no one was responsible for what happened to it, just as had occurred in England before the Enclosure Act. The Taylor Act established grazing districts controlled by the Bureau of Land Management (BLM), which set rules to govern how land leased from the government could be used.

As the priority for conservation and other reserves increased in importance to the Congress, less public land was made available for private homesteads. As a result, more land within the newest western states remained under federal control, with its governance delegated by Congress to executive agencies. The Supreme Court consistently confirmed congressional authority for these actions, each time with reference to the Property Clause of the Constitution. Examples of these judicial rulings will be shown later.

Today, "public domain states" such as Utah, where large portions of land within the states were retained by the Congress, receive annual federal Payments in Lieu of Taxes (PILT) to compensate for the lack of revenue from federal land. While states may dispute the adequacy of PILT payments, the amounts can be adjusted by Congress. Precisely that was done by Congress in appropriation bills of late 2015.

Two Challenges to Federal Ownership of Land within States

Challenges to federal ownership and control of land within states have generally revolved around two claims: (1) that federal control of large areas of land within a state violates what is known as the Equal Footing Doctrine by undermining the "sovereignty" or "equality" of a state as compared to other states; and (2) that that the provisions of Article IV apply only to land outside of established states. In its extensive report on provisions of Article IV of the Constitution, the Congressional Research Service shows that both claims have been rejected by federal courts.[11] Excerpts from that report are shown here.

The Doctrine of the Equality of States

‘‘Equality of constitutional right and power is the condition of all the States of the Union, old and new.’’ That quote from an 1883 court ruling is now a truism of constitutional law, but it is not explicitly stated as such in the Constitution. Article IV, § 3, clause 1, often cited as the source of the doctrine, says only that “New States may be admitted by the Congress into this Union.” It does not say anything about equality or equal rank. The CRS has provided the following background to that decision, based on the convention’s journal entries:

> The Committee on Detail recommended that ‘‘new States shall be admitted on the same terms with the original States. But the Legislature [Congress] may make conditions with the new States concerning the public debt which shall be subsisting.’’Opposing this action, Madison insisted that ‘‘the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States.’’ Nonetheless, after further expressions of opinion pro and con, the Convention voted nine States to two to delete the requirement of equality proposed by the Committee on Detail.

The CRS report on this subject goes on to cite judicial rulings during the 19th and 20th centuries that did establish the concept of state equality despite its deletion at the Constitutional Convention. However, based on those same judicial rulings, the CRS provided this definition of equality:

> States must be admitted on an equal footing in the sense that Congress may not exact conditions solely as a tribute for admission, but it may, in the enabling or admitting acts or subsequently impose requirements that would be or are valid and effectual if the subject of congressional legislation after admission. Thus, Congress may embrace in an admitting act a regulation of commerce among the States or with Indian tribes or rules for the care and disposition of the public lands or reservations within a State. In every such case, such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

Thus defined, the doctrine of equality does not prevent Congress from retaining federal land within a state, because Article IV, § 3, clause 2 explicitly gives Congress the “Power to dispose of and make all needful Rules and Regulations” respecting federal land.

The Method of “disposing of” Public Land

The Constitution is silent as to the methods of disposing of property of the United States. However, the CRS report cites the case of U.S. v. Gratiot (1846), among others, in which the contention was made that ‘disposal’ is not letting or leasing, and that Congress has no power to give or authorize leases. The Court, however, held that “the disposal must be left to the discretion

of Congress." Drawing from a number of similar judicial rulings regarding "disposing" of public land, the CRS summarized:

> The comprehensive authority of Congress over public lands includes the power to prescribe the times, conditions, and mode of transfer thereof and to designate the persons to whom the transfer shall be made, to withdraw land from settlement and to prohibit grazing thereon, to prevent unlawful occupation of public property and to declare what are nuisances, as affecting such property, and provide for their abatement. Congress may limit the disposition of the public domain to a manner consistent with its views of public policy.
>
> Unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands, the Court restated the applicable principles governing Congress' power under this clause. It empowers Congress to act as both proprietor and legislature over the public domain; Congress has complete power to make those "needful rules" which in its discretion it determines are necessary. When Congress acts with respect to those lands covered by the clause, its legislation overrides conflicting state laws. No State can ... interfere with the power of Congress under this clause or embarrass its exercise.

Selected Supreme Court and Circuit Court Decisions

1911: U.S. Supreme Court, Light v. U.S.

According to the judicial record, the defendant, Fred Light, owned a herd of 500 cattle on a ranch of 540 acres located a few miles from a forest reserve established by the Secretary of Agriculture. The defendant knew his cattle would go to the reserve where the grazing conditions were better. However, he took no action to prevent them from trespassing and openly voiced his intent to disregard the regulations and allow his cattle to graze there without a permit. He said that the creation of a reserve by the Secretary of Agriculture without the consent of the State of Colorado was unconstitutional and that Congress cannot withdraw large bodies of land from settlement without the consent of the state where it is located.

The court ruled: "The government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and prosecute trespassers. It may withhold from sale and settlement, object to its property being used for grazing purposes, and protect the public domain from trespass and unlawful appropriation." The court stated that in accordance with Article IV, courts cannot compel the government "to set aside lands for settlement, or suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, it establishes a reserve for what it decides to be national and public purposes. ... 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."

1917: U.S. Supreme Court, Utah Power & Light v. U.S.

The Court explained: "We are concerned here with three suits by the United States to enjoin the continued occupancy and use, without its permission, of certain of its lands in forest reservations

in Utah as sites for works employed in generating and distributing electric power, and to secure compensation for such occupancy and use in the past. ... Almost all the lands therein belong to the United States, and before the reservations were created, were public lands subject to disposal and acquisition under the general land laws. The works in question consist of diversion dams, reservoirs, pipe lines, power houses, transmission lines, and some subsidiary structures."

"The first position taken by the defendants is that their claims must be tested by the laws of the state in which the lands are situate rather than by the legislation of Congress, and in support of this position they say that lands of the United States within a state, when not used or needed for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers, and laws of the state in the same way and to the same extent as are similar lands of others. To this we cannot assent."

"Not only does the Constitution (art. 4, 3, cl. 2) commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired. We are of opinion that the inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them."

1976: U.S. Supreme Court, Kleppe v. New Mexico

The Court defined this case as follows: "The Wild Free-roaming Horses and Burros Act (Act) was enacted to protect 'all un-branded and un-claimed horses and burros on public lands of the United States' from 'capture, branding, harassment, or death,' to accomplish which 'they are to be considered in the area where presently found as an integral part of the natural system of the public lands.' The Act provides that all such animals on the public lands ... are committed to the jurisdiction of the respective [federal agencies] who are 'directed to protect and manage [the animals] as components of the public lands ... in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands,' and if the animals stray from those lands onto privately owned land, the private landowners may inform federal officials, who shall arrange to have the animals removed."

The Court held: "As applied to this case, the Act is a constitutional exercise of congressional power under the Property Clause of the Constitution, which provides that 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."

"(a) The Clause, in broad terms, empowers Congress to determine what are 'needful' rules 'respecting' the public lands, and there is no merit to appellees' narrow reading that the provision grants Congress power only to dispose of, to make incidental rules regarding the use of, and to protect federal property. The Clause must be given an expansive reading, for the power over the public lands thus entrusted to Congress is without limitations, and Congress' complete authority over the public lands includes the power to regulate and protect the wildlife living there."

"(b) In arguing that the Act encroaches upon state sovereignty and that Congress can obtain exclusive legislative jurisdiction over public lands in a State only by state consent, ... appellees

have confused Congress' derivative legislative power from a State pursuant to the Enclave Clause, Article I, § 8, clause 17, with its powers under the Property Clause, Article IV, §3, clause 2. Federal legislation under that Clause overrides conflicting state laws."

1997: U.S. vs. Gardner, 9th Circuit Court of Appeals

Court Summary: "Gardners claim that the state of Nevada, not the United States, is the rightful owner of the public lands within Nevada. The district court granted the United States' request for an injunction against Gardners' unauthorized grazing of livestock upon federal forest land, and also ordered Gardners to pay a fee for the unauthorized grazing. We affirm."

"In 1988, the Forest Service issued a ten-year grazing permit to Gardners, which allowed a portion of Gardners' cattle to graze on certain allotments of the Humboldt National Forest subject to the terms and conditions of the permit. In August of 1992, a fire burned over 2,000 acres [and] the Forest Service and the Nevada Department of Wildlife reseeded the majority of the burned area. Accordingly, the Forest Service advised Gardners that the burned area would be closed to grazing during 1993 and 1994. On May 18, 1994, the Forest Service observed Gardners' livestock grazing on the burned area. On May 19, 1994, the Forest Service hand-delivered a letter to Gardners advising that they were violating the terms and conditions of the permit by grazing cattle in the burned area, and requiring that the livestock be removed from the burned area by May 22,1994. Gardners did not remove the livestock."

"Gardners do not contest that they grazed livestock on forest land without a permit or other authorization from the Forest Service. Instead, Gardners assert that the unappropriated lands in the state of Nevada ... are not territory or other property belonging to the United States, and that therefore the Forest Service does not have jurisdiction to regulate use of the forest land or to levy fees for unauthorized activities within it. Gardners contend that, while the United States may have received the land in question from Mexico in the Treaty of Guadalupe Hidalgo in 1848, the United States was entitled only to hold the land in trust for the creation of future states, and was not authorized to retain the land for its own purposes. After Nevada became a state, Gardners argue, all of the public lands within the state boundaries reverted to the state of Nevada."

"As the United States has held title to the unappropriated public lands in Nevada since Mexico ceded the land to the United States in 1848, the land is the property of the United States. The United States Constitution provides in the Property Clause that Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The Supreme Court has consistently recognized the expansiveness of this power, stating that 'the power over the public land thus entrusted to Congress is without limitations.' Moreover, the Supreme Court has noted that Congress 'may deal with [its] lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale.'"

"The United States, then, was not required to hold the public lands in Nevada in trust for the establishment of future states. Rather, under the Property Clause, the United States can administer its federal lands any way it chooses, including the establishment of a national forest reserve."

"Gardners argue that, under the Equal Footing Doctrine, a new state must possess the same powers of sovereignty and jurisdiction as did the original thirteen states upon admission to the Union. Because the federal government owns over eighty percent of the land in the state of

Nevada, Gardners argue, Nevada is not on an equal footing with the original thirteen states. Gardners claim that Nevada must have 'paramount title and eminent domain of all lands within its boundaries' to satisfy the Equal Footing Doctrine."

"The Supreme Court has long held that the Equal Footing Doctrine refers to 'those attributes essential to [a state's] equality in dignity and power with other States.' The Court has noted that a new state enters the Union 'in full equality with all the others,' and that this equality may forbid a compact between a new state and the United States 'limiting or qualifying political rights and obligations.' However, 'a mere agreement in reference to property involves no question of equality of status.' The Court has observed that some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. While these disparities may cause economic differences between the states, the purpose of the Equal Footing Doctrine is not to eradicate all diversity among states but rather to establish equality among the states with regards to political standing and sovereignty. The Equal Footing Doctrine, then, applies to political rights and sovereignty, not to economic or physical characteristics of the states."

Endnotes

1. http://le.utah.gov/~2012/bills/hbillint/hb0148.htm

2. http://le.utah.gov/~2012/bills/hbillint/hb0148.htm
(The following legislative review was added to H.B. 148, below the text of the TPLA.)

Office of Legislative Research and General Counsel, Legislative Review Note, 2-14-12:

This bill enacts the Transfer of Public Lands Act, which requires the United States to extinguish title to public lands and transfer title to public lands to the state on or before December 31, 2014. This bill raises questions of who has the right to dispose of and possess the land held by the United States.

The 'Property Clause' of the Constitution of the United States authorizes Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. Const. art. IV, sec. 3, cl. 2. 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.

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).

The Transfer of Public Lands Act requires that the United States extinguish title to public lands and transfer title to those public lands to Utah by a date certain. Under the Gibson case, that requirement

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 a high probability of being declared unconstitutional.

3.Samuel Johnson's Dictionary of the English Language from 1768
https://books.google.com/books?id=bXsCAAAAQAAJ&pg=PT7#v=onepage&q&f=false.

Definition of 'dispose' = to put (someone or something) in a particular position or place.

4. Light v. U.S., 1911. https://www.law.cornell.edu/supremecourt/text/220/523

5. Utah Power & Light Co. v. U.S., 242 U.S. 389 (1917)

6. http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL34267_12032007.pdf
'Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention'

7. The Proclamation of 1763, given in the name of King George III:
"Whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida. or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments; also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them."

8. The Articles of Confederation, by Merrill Jensen, The University of Wisconsin Press, 1963, p. 258.

9. Ibid, p. 266.

10. http://avalon.law.yale.edu/18th_century/translet.asp.
Letter of the President of the Federal Convention, September 17, 1787, to the President of Congress.

We have now the honor to submit to the consideration of the United States in Congress assembled, that Constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired, that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually vested in the general government of the Union: But the impropriety of delegating such extensive trust to one body of men is evident. Hence results the necessity of a different organization. It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all: Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference

among the several states as to their situation, extent, habits, and particular interests.

In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the Convention to be less rigid on points of inferior magnitude, than might have been otherwise expected; and thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indefensible.

That it will meet the full and entire approbation of every state is not perhaps to be expected; but each will doubtless consider, that had her interest been alone consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish.

With great respect, We have the honor to be, Sir,

Your Excellency's most obedient and humble servants, GEORGE WASHINGTON, President.

11. https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-8-5.pdf-20