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Ownership and Control of Public Land

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

Based on an analysis of national constitutional law, the Office of Legislative Research and General Counsel (LRGC), a nonpartisan agency serving the Utah Legislature, advised the legislature that any attempt to enforce the TPLA ran a "high probability of being declared unconstitutional."[2] Despite that advice, the legislature passed the act, and the governor signed it.

Opponents of public lands have attempted to support the TPLA with their own legal opinions, which took quotes from non- relevant Supreme Court cases out of context and ignored the events in our national history that preceded and influenced the writing of the Constitution and its public land provisions. Since most citizens find it difficult to evaluate complex legal arguments, public opinion is now being driven by partisan political ideology - should the national government or the state control the public land within a state? Therefore, this paper begins with a review of colonial and early national history that is essential to understanding the Constitution's provisions related to public land policy. But first, here are three key provisions of the Constitution, the first two of which are often confused by the public and misused by opponents of our public lands:

Article I, § 8, Clause 17 - known as the Enclave Clause: This clause is actually not relevant to the TPLA controversy but is often cited, incorrectly, as requiring prior state approval before federal agencies may control any land within a state. Article I clearly states that its provisions apply only to congressional control over "the District of Columbia" and "to all Places purchased by the Consent of the Legislature of the State ... for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings."

Article IV, § 3, Clause 2 - known as the Property Clause: This is the clause that the Utah legislature ignored or disputed when it passed the TPLA. It states 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." The Supreme Court has consistently ruled that "Territory or other Property" means land that was ceded to the national government by the original 13 states under the Articles of Confederation; land subsequently obtained from foreign governments; portions of such land designated by Congress as specific Territories before new states were created from it; and all remaining public land within the borders of a new state not specifically granted to the state in a congressional enabling act.

Article VI, Clause 2 - known as the Supremacy Clause: This clause reinforces the above Property Clause by stating: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby..."

In two of its most frequently cited decisions regarding public land policy, the Supreme Court described and applied the Property Clause as follows:

> (1911, Light v. U.S.[3]) "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."
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> (1917, Utah Power & Light v. U.S.[4]) "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 congressional and state legislation, 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."

The Congressional Research Service (CRS), an agency responsible for providing members of the House and Senate and their committees with policy and legal analysis on a broad range of issues, is known for authoritative, objective, and nonpartisan reports. Its 2007 report, "Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention,"[5] stated: "The Property Clause grants Congress the authority to acquire, dispose of, and manage federal property," and the Supreme Court has described Congress' power to legislate under this Clause as "without limitation."

A review of early American history shows why the Founding Fathers gave this broad authority to Congress and provides essential background information to provisions of our Constitution.

Key Events in Colonial and early American History

The following three major historical events in early American history, summarized below in this paper, set the stage for the public land policy later written into the Constitution:

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

2. Twenty years later, the 1783 Treaty of Paris ended our War of Independence, recognized the United States as a new nation, and awarded to us the former French - then British - region between the Appalachian Mountains and the Mississippi River.

3. Disputes between some of the new U.S. states over their competing claims to western land delayed the formation of our first national government under the Articles of Confederation for several years. Eventual agreement by all states to cede their western claims to the new central government led directly to Article IV, § 3, Clause 2 in the 1787 Constitution.

The Land Beyond the Mountains

For purposes of this paper, it is sufficient to note that France and Great Britain were engaged in disputes over the land west of the Appalachian Mountains for a hundred years prior to the 1763 Treaty of Paris. Much of that dispute consisted of each country's effort to dominate the fur trade through relationships with native Indian tribes. The French fur traders developed the best trading relationships with tribes from the Great Lakes south to the Ohio River and west to the Mississippi River. The contest in that region became known in American history as the French and Indian War (1754-1763). It was part of France and Great Britain's Seven Years War in Europe.

That war did not have a major effect on the English colonies already established along the Atlantic coast. While some of their colonial charters had identified the Mississippi River as their western border, settlers from the Atlantic colonies had not yet crossed the Appalachians Mountains prior to our Revolutionary War, partially because of the mountains, but mostly because of the resistance of Indian tribes to colonial settlements. The native Indians wanted to maintain their independence and their mutually beneficial trading arrangements with the French, who were not interested in establishing their own settlements in the 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. At the end of that war, the British issued a Royal Proclamation[6] 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 their local governments, had already claimed land across the mountains, many colonial Americans considered access to those western lands as their prize for helping Great Britain win the war against France, and they 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 until treaties with individual 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 lands for settlement. However, other historians believe that resentment of the Proclamation contributed to the growing divide between the colonies and the mother country, and the Proclamation of 1763 did result in a specific but obtuse complaint against King George III in the 1776 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 seek financial and other help from potential allies. Two major obstacles 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. The second issue, the conflict over the western lands, would take several more years to resolve.

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 considered superior to state 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, it specifically said that "each state retains its sovereignty, freedom, and independence" and that the states had entered "into a firm league of friendship." The only "sole and exclusive" power given to the central government was to operate a Post Office and to regulate weights and measures. (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 favorably received. However, some states insisted that claims to western land had to be resolved before they would agree to a union. That issue was not settled until 1781.

The western land conflict:

The western border of some American colonies, as defined in their charters, was the Mississippi River or even the "South Sea" (the then common name for the Pacific Ocean), even though land beyond the Appalachian Mountains did not officially belong to Great Britain until 1763. Some of their poorly defined borders also overlapped neighboring colonies when projected far to the west. The major problem, however, was that most colonies were land-locked, with no legal claim to any western land. After declaring independence, those states feared that states with western land claims would grow without limit, thereby gaining economic and political control in the new union. They refused to approve the draft Articles of Confederation 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."[7]

However, the above plan to resolve boundary conflicts and westward expansion was not included in the final text of the Articles of Confederation submitted to the states for approval in late 1777. Article 9 contained 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."[8]

The language of Article 9 did not satisfy the land-locked states. Therefore, several years of debate and delay followed until all states with claims to western land finally agreed to cede their

claims to the proposed central government, with the understanding that new states would be created from that land. With that agreement, final ratification of the Articles of Confederation took place on March 1, 1781, and the formal state cessions of western land to the central government were mostly completed between 1783 and 1787.

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 in 1787. The extent of that initial 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 new 1787 Constitution.

The Northwest Ordinances

As the states ceded their western land claims to the central government, specific measures were needed to define the use of that land. 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 Northwest 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 national 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 the subsequent Congress with regard to ownership, control, and use of America's public domain lands. They established the precedent by which the national 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 resulted in haphazard and conflicted expansion by individual states with western land claims, each still defined as sovereign under the Articles of Confederation.

Implementation of 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 it authorized new states to be organized. While the new states were said to be politically equal to the older states, Congress did impose certain restrictions. For example, slavery was prohibited within the Northwest Territory and in all states formed from it.

These decisions by the Confederation Congress became the pattern for the disposition of all western land, whether ceded by states or obtained from foreign nations. For example, when new states were formed, neither the Articles of Confederation nor the subsequent U.S. Constitution required Congress to transfer any land directly to the states, although some was granted for specific government and education purposes. The bulk of the land was granted to war veterans in lieu of pay owed for service in the past war, sold to homesteaders to reduce the nation's war debts, granted to railroads to improve transportation for settlers into the region's interior, or reserved by the central government for future sale or national purposes.

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

The decisions of the Confederation Congress regarding the western land are not widely known or appreciated today because the government system built into the Articles of Confederation failed almost immediately. In September 1786, delegates from five central states met in Annapolis, Maryland, 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 versus a weak central government was already 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 assumed leadership of the new states and were content to remain at home to conduct state affairs. In any event, while waiting for delegates to arrive, James Madison of Virginia, a Federalist, and members of his delegation took the initiative to frame the subsequent discussion by drawing up a proposal that was placed before the convention. It 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 George Washington, the president of the Philadelphia convention, transmitted the text of the new Constitution to the Continental Congress, he shared his perspective concerning the political philosophy of the Constitution in contrast to the former 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."[9]

Washington's sentiment appears to have been widely shared by most Americans of that time. Although the states asked that a Bill of Rights be added to the Constitution, the full document was quickly ratified as presented. Article VI, clause 2, which boldly stated that, "This Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land," survived the subsequent debate between Federalists and Anti-Federalists intact, and Article IV, § 3, clause 2, which gave Congress broad authority over the western land, did not raise any noteworthy opposition. Clearly, Washington's perspective regarding the need to give up some individual liberty to secure the interest and safety of all, was in concert with the Founders' decision to place control over the nation's public lands in the hands of the central government.

> **Thus, twice in our nation's early history - in 1781 under the Articles of Confederation and in 1787 in our present Constitution - the Founding Fathers who created today's government decided it was in the best interests of the nation that the national 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 over the years to meet changing national needs and perspectives, as briefly summarized below and endorsed by the Supreme Court.**

The Post-Constitution Period

Neither the Articles of Confederation nor the Constitution required Congress to transfer any public land directly to new states when they were established. While specific grants of land were made for state government and education purposes, the Congress used its constitutional authority over the western land in ways it deemed appropriate for the benefit of the entire nation. To reduce the national debt, land was sold to homesteaders, granted to war veterans as payment owed for past service, and given to railroads to improve transportation into the nation's interior.

The congressional policy of selling land to homesteaders continued through most of the 19th century. Congress authorized land agents to advertise and sell federal land, and railroads enlisted their own agents to sell land that had been granted to them. Later, Congress passed laws that offered free land to settlers if they met certain conditions, such as actual settlement on the land. In this manner, most of the land we received through official agreements with foreign countries passed into the hands of settlers or private businesses.

However, the arid western plains and the mountainous regions were largely bypassed by the waves of settlers seeking homesteads. At the same time, the Congress and U.S. presidents became concerned that the forests, soil, plants, and animals in areas of the west were being rapidly depleted or destructively used. Congress responded by cutting back programs for the sale of public land and instead set aside large portions of the region as national reserves.

The establishment of Yellowstone National Park in 1872 led the way in preserving land for conservation and recreation under the National Park Organic Act and the National Park System. In 1891, the President was authorized to protect public land by establishing forest reserves, which led to the creation of the National Forest System. In 1903, President Theodore Roosevelt began the practice of setting aside public land for the protection of wildlife, which led to the National Wildlife Refuge System. And 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 the land, as had occurred in England before its Enclosure Act. The Taylor Grazing 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.

When these changes in public land policy were challenged, the Supreme Court consistently confirmed congressional authority for those actions, each time with reference to the Property Clause of the Constitution. Examples of these judicial rulings will be shown later.

The impact of these simultaneous changes in homesteading decisions and public policy can be seen in maps color coded to identify different types of land ownership. In Colorado, the division between private and public land appears as if eastern and western portions of that state were divided by an invisible and arbitrary line drawn from north to south, splitting that state in two. However, that division is consistent with an organic line that reflects the limits beyond which 19th century homesteads were impractical due to a combination of elevation, inadequate rainfall, and other conditions that made farming without irrigation unlikely or impossible. Thus, the 19th century conversion of public land to private homesteads stopped along natural borders, and much of the land to the west of those borders remained under control of the Congress.

Today, many western states, including Colorado, Wyoming, Utah and Nevada, where large portions of land were retained under congressional control, receive annual Payments in Lieu of Taxes (PILT) to compensate for the lack of tax revenue from that land. PILT payments are often adjusted by Congress, most recently in 2015.

Challenges to Federal Ownership of Land within States

Challenges to national control of land within a state have generally revolved around two claims: (1) that federal control of large areas 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.[10]

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 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 journal entries of the Constitutional Convention:

> 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.

Despite the above action by the Constitutional Convention, the CRS cites judicial rulings during the 19th and 20th centuries that established the concept of state equality. Based on those later judicial rulings, the CRS provided this current definition of state 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.
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> Thus defined, the doctrine of equality does not prevent Congress from retaining public 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 the national land.

The Method of "disposing of" Public Land

The Constitution is silent as to the specific methods or even the necessity of disposing of property of the United States. In the Supreme Court case of U.S. v. Gratiot (1846), the Court held that "disposal must be left to the discretion of Congress."[11] Drawing from a number of similar judicial rulings regarding "disposing" of public land, the CRS summarized the issue as follows:

> 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.
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> ... The (Property Clause) 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.

After the Court's ruling in the above Gratiot case, that "disposal must be left to the discretion of Congress," the Court issued several additional rulings in which it elaborated on congressional discretion. Selected quotes from those rulings follow. It should be noted that The Utah Office of Legislative Research and General Counsel considered these and other court cases in its analysis of the 2012 Transfer of Public Lands Act and Related Study, and thus advised the legislature that any attempt to enforce TPLA ran a "high probability of being declared unconstitutional."

Selected Supreme Court and Circuit Court Decisions

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

According to the judicial record, the defendant in this case, 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 stated: "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 reservoirs, diversion dams, 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." ... 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

The Court's summary stated: "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 by the Office of Legislative Research and General Counsel, Legislative Review Note, 2-14-12, was added to H.B. 148: "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. Light v. U.S., 1911. https://www.law.cornell.edu/supremecourt/text/220/523

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

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

6. 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."

7. Merrill Jensen, *The Articles of Confederation*, The University of Wisconsin Press, 1963, p. 258.

8. Ibid, p. 266.

9. 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.

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

11. The word “dispose” has been used by opponents of national control of public land in a “narrow constructionist” manner, by implying that the Constitution’s specific language, “the Congress shall have power to dispose of ...” means that the national government has a duty or requirement to “rid itself of” - to “divest itself entirely of” - the territory acquired from other nations. However, the Supreme Court has consistently held that the word “dispose” does not mandate a duty but instead delegates a “power,” and that delegated powers involve “choice,” which includes the ability to exercise discretion in the application of that power.

Samuel Johnson’s Dictionary of the English Language from 1768 adds further clarification to the word “dispose.” That definition of “dispose” includes placing someone or something in a particular position or place. (See https://books.google.com/books?id=bXsCAAAAQAAJ&pg=PT7#v=onepage&q&f=false.)

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