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2014

**Public Lands and the Federal Government's  
Compact-Based "Duty to Dispose": A Case Study  
of Utah's H.B. 148 – The Transfer of Public Lands  
Act**

Donald J. Kochan



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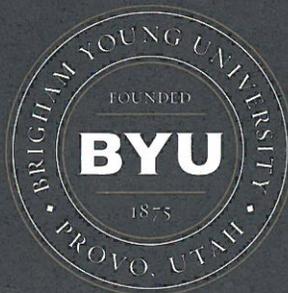
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"Duty to Dispose": A Case Study of Utah's H.B. 148—  
The Transfer of Public Lands Act

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## Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148—The Transfer of Public Lands Act

Donald J. Kochan\*

### ABSTRACT

*Recent legislation passed in March 2012 in the State of Utah—the "Transfer of Public Lands Act and Related Study," ("TPLA") also commonly referred to as House Bill 148 ("H.B. 148")—has demanded that the federal government, by December 31, 2014, "extinguish title" to certain public lands that the federal government currently holds (totaling an estimated more than 20 million acres). It also calls for the transfer of such acreage to the State and establishes procedures for the development of a management regime for this increased state portfolio of land holdings resulting from the transfer.*

*The State of Utah claims that the federal government made promises to it (at statehood when the federal government obtained the lands) that the federal ownership would be of limited duration and that the bulk of those lands would be timely disposed of by the federal government into private ownership or otherwise returned to the State. Longstanding precedents support the theory that Utah's Enabling Act is a bilateral compact between the State and the federal government that should be treated like it is, and interpreted as, a binding contractual agreement.*

*Utah's TPLA presents fascinating issues for the areas of public lands, natural resources, federalism, contracts, and constitutional law. It represents a new chapter in the long book of wrangling between states in the West and the federal government over natural resources and public lands ownership, control, and management. The impact is potentially considerable—thirty-one percent of*

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\*Professor of Law, Chapman University School of Law; J.D., Cornell Law School, 1998; B.A., Western Michigan University, 1995. This article is adapted from an online "White Paper" titled "*A Legal Overview of Utah's H.B. 148 – The Transfer of Public Lands Act*," prepared for the Federalist Society for Law & Public Policy Studies, available at <http://www.fed-soc.org/publications/detail/a-legal-overview-of-utahs-hb-148> [hereinafter Kochan White Paper]. I thank the Federalist Society for its support in this research project and for the permission to reprint in substantial part portions of that White Paper herein. I am grateful for the support and comments of Jennifer Spinella in the completion of this project.

*our nation's lands are owned by the federal government, and 63.9% of the lands in Utah are owned by the federal government.*

*This Article provides an overview of the legal arguments on both sides of the TPLA debate. In the end, there is a credible case that rules of construction favor an interpretation of the Utah Enabling Act that includes some form of a duty to dispose on the part of the federal government. At a minimum, the legal arguments in favor of the TPLA are serious and, if taken seriously, the TPLA presents an opportunity for further clarification of public lands law and the relationship between the states and the federal government regarding those lands. Moreover, other states are exploring similar avenues to assert their claims vis-à-vis the federal government and are in various stages of developing land transfer strategies that will model or learn from the TPLA. That fact further underscores the need for a renewed serious and informed legal discussion on the issues related to disposal obligations of the federal government. This Article takes a first step into that discussion.*

## I. INTRODUCTION

“Now a promise made is a debt unpaid.”<sup>1</sup> Just as the poet Robert Service penned it, the western states might wish to adopt this adage in an emerging area of contention with the federal government over proper ownership of public lands. Some states are waiting for the federal government to honor its promise to dispose of certain lands and thereby relieve itself of a debt it has owed to these states since their entry into the Union.

Who does or should own public lands in the Western United States has long been the source of contention, controversy, and sometimes confusion. While many believe that some of the primary legal battles have long been settled, this Article looks anew at some relatively under-analyzed theories on the federal government's obligations to dispose of certain property holdings it has in the Western United States. By examining state enabling acts and promises made at statehood in Utah and other states, this Article

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1. ROBERT W. SERVICE, *The Cremation of Sam McGee*, in *THE SPELL OF THE YUKON AND OTHER POEMS* 64, 64 (Dover Publications 2012) (1916). In Service's poem set in the Yukon, a friend makes a promise to Sam McGee to cremate his remains so that he might live on in the afterlife warm. Although difficult and costly to the friend in terms of time and effort, this friend goes to great pains to fulfill his promise and discusses in the poem the honor involved in fulfilling the promise, while speaking of the fact that “the trail has its own stern code”—an obliging custom—which requires fidelity and diligence to fulfilling one's promise once made. *Id.*

posits that the government may have a duty to dispose of certain public lands under a theory of a contractual obligation created by these compacts of statehood.

Recent legislation passed in the State of Utah has demanded that the federal government extinguish title to certain public lands that the federal government currently holds.<sup>2</sup> Sponsors of the legislation claim that the federal government made promises to the State of Utah (at statehood when the federal government obtained the lands) that the federal ownership would be of limited duration and that the bulk of those lands would be timely disposed of by the federal government into private ownership or otherwise returned to the State.<sup>3</sup> This Article provides a legal overview of these claims.

On March 23, 2012, Governor Gary Herbert of the State of Utah signed into Utah law the "Transfer of Public Lands Act and Related Study" ("TPLA"),<sup>4</sup> also commonly referred to House Bill 148 ("H.B. 148").<sup>5</sup> This legislation demands that the federal government "extinguish" its title to an estimated more than 20 million<sup>6</sup> (or by some reports even more than 30 million<sup>7</sup>) acres of federal public lands in the State of Utah by December 31, 2014.<sup>8</sup> It also calls for the transfer of such acreage to the State and establishes procedures for the development of a management regime for this increased state portfolio of land holdings resulting from the transfer.<sup>9</sup>

Advocates for the TPLA claim that the current federal retention of these public lands deprives the state of revenue that would come from, *inter alia*, (1) the State's receipt of a guaranteed percentage of the proceeds from disposal sales it has expected the federal

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2. UTAH CODE ANN. § 63L-6-101 *et seq.* (West 2012).

3. *See, e.g.*, Kirk Johnson, *Utah Asks U.S. to Return 20 Million Acres of Land*, N.Y. TIMES, Mar. 24, 2012, at A9 (discussing rationale and history articulated by bill sponsors).

4. *Id.*; Mori Kessler, *Gov. Herbert Signs Public Lands Transfer Act*, ST. GEORGE NEWS (Mar. 23, 2012), <http://www.stgeorgeutah.com/news/archive/2012/03/23/gov-herbert-signs-public-lands-transfer-act/>.

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

6. *See, e.g.*, Johnson, *supra* note 3; *see also* U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 2011, at 24 (2012), *available at* [http://www.blm.gov/public\\_land\\_statistics/pls11/pls2011.pdf](http://www.blm.gov/public_land_statistics/pls11/pls2011.pdf) (Table 1-4).

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

8. UTAH CODE ANN. §§ 63L-6-102, 103 (West 2012).

9. UTAH CODE ANN. § 63L-6-101 *et seq.*

government to conduct; and (2) the State's ability to tax property after it is disposed into private hands, whereas while the federal government retains those lands they are exempt from taxation.<sup>10</sup> Moreover, the State has a variety of other arguments it offers for transferring ownership into State hands, including claims that the federal government is a poor manager of the lands and that it has an unwise concept of multiple use, among other things.<sup>11</sup> This Article makes no attempt to resolve whether H.B. 148 is good policy in these areas or even whether it will result in an increase in revenue. Instead, it is concerned with conducting an overview of the legal arguments surrounding the legislation and its validity.

Whether the State has the authority to demand that the federal government extinguish rights depends, in large part, on the proper interpretation of the Property Clause in the Constitution. Article IV, Section 3 of the U.S. Constitution provides that: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular state."<sup>12</sup> This Article will consider some of the implications of different theories of the Property Clause on the determination of the TPLA's validity.

H.B. 148, whose chief sponsor was Utah Representative Ken Ivory,<sup>13</sup> represents a new chapter in the long book of wrangling between states in the west and the federal government over natural resources and public lands ownership, control, and management.<sup>14</sup>

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10. See CONSTITUTIONAL DEF. COUNCIL, TOWARD A BALANCED PUBLIC LANDS POLICY: A CASE STATEMENT FOR THE H.B. 148: UTAH'S TRANSFER OF PUBLIC LANDS ACT 4 (2012) [hereinafter CDC Nov. 2012 Case Statement], available at <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148SummaryInteractive.pdf>.

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

12. U.S. CONST. art. IV, § 3.

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

14. As one report explained:

"Private land ownership has been the cornerstone for freedom in this country and economic opportunity. It's one of the blessings we've had as a country when we came here and had for the first time in a universal way the ability to own our own land,"

Thirty-one percent of our nation's lands are owned by the federal government, and 63.9% of the lands in Utah are owned by the federal government.<sup>15</sup> Of these federal holdings, "[t]he BLM manages nearly 22.9 million acres of public lands in Utah, representing about 42 percent of the state," according to the U.S. Department of Interior ("DOI") Bureau of Land Management ("BLM") Utah State Office website.<sup>16</sup>

Utah's H.B. 148 is a controversial, bold demand made against the federal government and has expectedly raised eyebrows in the political and legal discourse.<sup>17</sup> This Article is designed to describe the TPLA and to provide a summary of some of the legal questions related to the enforceability of the State of Utah's demands. While the politics of the demand, the prudence of reallocating ownership, and the practicalities of public lands reforms implicated by H.B. 148 are certainly topics worth analyzing and pursuing, this Article will not engage in those fields of discussion.

As Governor Herbert has noted, the legal case for H.B. 148 may not be a "slam dunk,"<sup>18</sup> but there are legitimate arguments to support the law, and certainly critics of the law overstate their legal case against the Act.<sup>19</sup> At the very least, there are open legal questions involved in the TPLA that have never received definitive resolution in the courts.<sup>20</sup> As such, critics cannot make a cut and dry

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[Governor] Herbert said prior to signing the legislation. "And loss of that ownership in fact takes away freedom and liberty to the public and the people. Federal control of our public lands has put us at a distinct disadvantage compared to other states."

Charles Geraci, *Governor Signs Bill That Challenges Feds Over Land Control*, HERALD JOURNAL (Logan, Utah), (Mar. 23, 2012), [http://news.hjnews.com/news/article\\_50a20c9e-7555-11e1-b1ad-001871e3ce6c.html](http://news.hjnews.com/news/article_50a20c9e-7555-11e1-b1ad-001871e3ce6c.html).

15. JAMES RASBAND ET AL., NATURAL RESOURCES LAW & POLICY 141 (2d ed. 2009).

16. *Utah*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. (Aug. 23, 2013), <http://www.blm.gov/ut/st/en.html>.

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

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

19. Despite the claims by some that there is universal agreement that the TPLA is unconstitutional, with greater education and further debate, there is a growing awareness that such claims overstate the case against the TPLA and similar legislation. *See, e.g.*, Jim Kalvelage, *Takeover of Fed Lands Could Be Costly, Profitable*, RUIDOSO NEWS (Ruidoso, N.M.), Feb. 26, 2013 (stating that while the "New Mexico Office of the Courts contended the measure would face constitutional challenges from the feds," nonetheless "[t]he office noted that some legal experts however feel that the demand and the legislation supporting the effort may be constitutional").

20. Utah's Constitutional Defense Council makes this point, stating, "The question of

case against the law. In fact, if anything, opposition statements made so far regarding the law may reflect an over-confidence in its unconstitutionality and an overstatement of the strength of precedent. To prevail, Utah's legal case will need to, in part, distinguish some past court decisions. And, in some situations where precedent might seem to weigh against validity of the TPLA demand, Utah may need to make a case for revisiting such interpretations if necessary.

The TPLA has, to date, received a strikingly low level of press coverage and public attention (even inside Utah). Perhaps part of the reason for a low level of news coverage or serious analysis of the TPLA is that people have not taken it seriously. For example, in April 2012, the Secretary of the U.S. Department of Interior is quoted as saying that Utah's law is "nothing more than a political stunt."<sup>21</sup> Despite this perception that some hold, the research leading to this Article supports a finding that there are indeed serious legal questions to consider with the TPLA. The legal case for it should not be quickly dismissed.<sup>22</sup>

Part II of this Article provides the basic statutory text and background of Utah's TPLA. Part III very briefly explores some of the

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whether the Property or Supremacy Clauses of the United States Constitution permit this unilateral reversal in federal land policy or repudiation of the terms of the State's enabling act is not resolved, because no federal appellate court has directly addressed this issue." CDC Nov. 2012 Case Statement, *supra* note 10.

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

21. Matt Canham, *Salazar: Utah Just Playing Politics in Land Fight*, SALT LAKE CITY TRIB. (Apr. 24, 2012), <http://www.sltrib.com/sltrib/politics/53980576-90/salazar-utah-lands-energy.html.csp> (claiming "Salazar sees it all as nothing but show," and quoting Salazar as saying the Act is only "political rhetoric you see in an election year").

22. A recent student note underscored the seriousness of the matter. See Note, *No Laughing Matter: Utah's Fight to Reclaim Federal Lands*, MICH. J. ENV'T'L & ADMIN. L. ONLINE (Feb. 26, 2013), <http://students.law.umich.edu/mjeal/2013/02/no-laughing-matter-utah%E2%80%99s-fight-to-reclaim-federal-lands/>. Discussing the Kochan White Paper and related law, that author concluded that critics of the TPLA have too quickly dismissed the constitutional validity of the TPLA. *Id.* The author noted that "broad precedential statements cited by critics of TPLA are much broader than the holdings themselves require, and none of the precedent addresses the specific question of whether the federal government is obligated in contract to extinguish title to land received from the state in consideration for admission to the Union." *Id.*

historical antecedents to the TPLA. However, given that the history of land disputes between the federal and state governments is long and detailed in Utah as it is in all of the West, this Part aims only to introduce just enough of the climate surrounding the TPLA and its related land dispute to get a sense of the atmosphere rather than attempting to provide a comprehensive survey of the decades of disputes.

The heart of this Article's analysis lies in Part IV, which provides a legal analysis of the TPLA. The principal section presents the case for a defense of the TPLA based on a compact-based duty on the federal government to dispose of public lands, pursuant to promises made in Utah's Enabling Act. The second subsection looks at some of the cases proffered as disabling to the legal validity of the TPLA. That subsection posits that most of the case law directed at invalidating the TPLA is inapposite and most of the court statements bandied about against the TPLA are mere dicta having no precedential effect. For the most part, courts should be operating on a clean slate when analyzing the validity of the TPLA.

The next section of Part IV introduces, only briefly, additional arguments to support the TPLA based in Federalism, Equal Footing, and other constitutional concerns. The final section of legal analysis flags for future attention the hurdles of justiciability that may interfere with Utah seeking a court determination of its rights under the TPLA. The Article concludes contending that there are serious arguments favoring the validity and constitutionality of the TPLA.

Since 2012 and particularly after the passage of H.B. 148, a number of Western states—including Arizona,<sup>23</sup> Colorado,<sup>24</sup>

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23. In March and April 2012, the Arizona House and Senate respectively passed legislation (S.B. 1332) very similar to Utah's H.B. 148, but it was vetoed by the Governor on May 14, 2012. *See* S.B. 1332, 15th Leg., 2d Reg. Sess. (Ariz. 2012), *available at* [http://www.azleg.gov/DocumentsForBill.asp?Session\\_ID=107&Bill\\_Number=SB1332](http://www.azleg.gov/DocumentsForBill.asp?Session_ID=107&Bill_Number=SB1332). Some movement has again occurred in 2013 to revive efforts in Arizona. Jim Seckler, *Board Wants Federal Land Transferred to State*, MOHAVE VALLEY DAILY NEWS (Bullhead City, Ariz.), June 17, 2013 (reporting on county board discussions regarding resolutions supporting transfers of federal public lands to the state in Arizona).

24. A bill was introduced in Colorado, S.B. 13-142, that would "require[] the United States to cede or extinguish title to all agricultural public lands and transfer title to the state." S.B. 13-142, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013), *available at* [http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont/3BC575329E0E94BB87257A8E0073C714?Open&file=142\\_01.pdf](http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont/3BC575329E0E94BB87257A8E0073C714?Open&file=142_01.pdf) (bill text). That bill died in committee. *See* Bill Summary for S.B. 13-142, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013), *available at* <http://www.leg.state.co.us/clics/clics2013a/commsumm.nsf/b4a3962433b52fa787256e5f00670>

Idaho,<sup>25</sup> Montana,<sup>26</sup> Nevada,<sup>27</sup> New Mexico,<sup>28</sup> and Wyoming<sup>29</sup>—

a71/bf63b03814032aa587257b0f0072a00e?OpenDocument (bill history and status).

25. In Idaho, H.C.R. 21—a concurrent resolution—after passing the House in March 2013 was finalized with passage in the Senate in April 2013 “[s]tating findings of the Legislature and authorizing the Legislative Council to appoint a study committee to ascertain the process for the State of Idaho to acquire title to and control of public lands controlled by the federal government in the State of Idaho.” H.C.R. 21, 62d Leg., 1st Reg. Sess. (Idaho 2013), *available at* <http://www.legislature.idaho.gov/legislation/2013/HCR021.htm>. A companion concurrent resolution—H.C.R. 22—also passed the Idaho House in March and the Idaho Senate in April that stated, *inter alia*, “the Legislature of the State of Idaho demands that the federal government imminently transfer title to all of the public lands within Idaho’s borders directly to the State of Idaho,” and “the Legislature of the State of Idaho urges the United States Congress in the most strenuous terms to engage in good faith communication, cooperation, coordination and consultation with the State of Idaho regarding the transfer of public lands directly to the State of Idaho.” H.C.R. 22, 62d Leg., 1st Reg. Sess. (Idaho 2013), *available at* <http://www.legislature.idaho.gov/legislation/2013/HCR022.htm>. Furthermore, the resolution states that “the Legislature calls for the creation of an Interim Public Lands Study Committee” to examine the issues related to the management and transfer of such lands. *Id.* That committee began work in the summer of 2013, and this Author testified before it on August 9, 2013 by invitation of the committee. *See* State of Idaho Legislature Federal Lands Interim Committee Meeting, Aug. 9, 2013, *available at* <http://www.legislature.idaho.gov/sessioninfo/2013/interim/lands0809.pdf>. For news reporting and analysis on Idaho’s recent legislative efforts, see Rocky Barker, *Idaho Lawmakers Examine Federal Lands Transfer*, IDAHO STATESMAN (Aug. 10, 2013), <http://www.idahostatesman.com/2013/08/10/2698487/lawmakers-examine-federal-lands.html> (briefly discussing August 9 meeting of the Federal Lands Interim Committee); William L. Spence, *Do States Have a “Duty to Dispose” of Public Lands?*, LEWISTON MORNING TRIB. (Lewiston, Idaho) (Mar. 3, 2013), [http://lmtribune.com/northwest/article\\_e1dd3f69-3ad6-5597-8912-6fd7f3c808ab.html?mode=jqm](http://lmtribune.com/northwest/article_e1dd3f69-3ad6-5597-8912-6fd7f3c808ab.html?mode=jqm) (providing a background of the TPLA debate and Idaho’s consideration of similar legislation, including discussing the legal arguments advanced in the Kochan White Paper and policy arguments against the effort); *see also* William L. Spence, *Land Transfer Bill Unlikely This Year*, LEWISTON MORNING TRIB. (Lewiston, Idaho) (Feb. 27, 2013), [http://lmtribune.com/northwest/article\\_bb479f27-afba-5c34-8b4f-1acda29c5f4b.html](http://lmtribune.com/northwest/article_bb479f27-afba-5c34-8b4f-1acda29c5f4b.html) (discussing Idaho draft bill similar to Utah’s TPLA and explaining it is unlikely to be introduced until after an interim study committee reviews the matter and drafts a bill); Dan Popkey, *Bedke Backs Idaho Management of Federal Lands*, IDAHO STATESMAN (Boise) (Jan. 12, 2013), <http://www.idahostatesman.com/2013/01/12/2409500/bedke-backs-idaho-management-of.html> (discussing initial efforts by Governor and legislators in Idaho to consider legislation modeled after Utah’s TPLA).

26. In Montana, Joint Resolution 15 passed in April 2013 calling for a study of the issue of managing public lands within which it the state may arguably evaluate the issue of transferring federal public lands to state ownership. S.J. 15, 63rd Leg. (Mont. 2013), *available at* [http://laws.leg.mt.gov/legprd/LAW0210W\\$BSIV.ActionQuery?P\\_BILL\\_NO1=15&P\\_BLTP\\_BILL\\_TYP\\_CD=SJ&Z\\_ACTION=Find&P\\_SESS=20131](http://laws.leg.mt.gov/legprd/LAW0210W$BSIV.ActionQuery?P_BILL_NO1=15&P_BLTP_BILL_TYP_CD=SJ&Z_ACTION=Find&P_SESS=20131) (“A joint resolution of the senate and the house of representatives of the state of Montana requesting an interim study evaluating the management of certain federal lands, assessing risks, and identifying solutions.”).

27. On June 1, 2013, the Governor of Nevada signed into law A.B. 227 which creates “the Nevada Land Management Task Force to conduct a study addressing the transfer of certain public lands in this State.” A.B. 227, 77th Leg. (Nev. 2013), *available at* <http://www.leg.state.nv.us/Session/77th2013/Reports/history.cfm?billname=AB227> (bill text

have started the process of considering legislation similar to or modeled after the TPLA—whether by drafting bills, passing resolutions, introducing bills, or committing to study the issue through special committees or task forces. In 2013, one state without substantial federal land holdings, South Carolina, even passed a resolution expressing solidarity with these Western states.<sup>30</sup> None of these states has yet passed legislation with as strong a demand as in Utah's TPLA, but the possibility of such additional state legislation remains. Because many of these states have enabling acts with legislation similar to Utah as well as substantial federal landholdings within each state, much of the analysis in this Article may prove useful for analyzing the legal

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and history).

28. In New Mexico, H.B. 292, a bill very similar to Utah's H.B. 148, was introduced in the state House in January 2013 but it did not pass into law. *See* H.B. 292, 51st Leg., 1st Sess. (N.M. 2013), available at <http://www.nmlegis.gov/Sessions/13%20Regular/bills/house/HB0292.pdf>. For news commentary on New Mexico's 2013 legislative efforts, see Paul Gessing, *Time For Control of Most Federal Lands*, LOS ALAMOS MONITOR (Los Alamos, N.M.), June 13, 2013 (discussing New Mexico's House Bill 292, indicating that "[a]lthough it failed to pass, it began the discussion about who is best able to manage New Mexico's public lands"); *see also* Stella Davis, *Bill Would Move New Mexico's Federal Lands Into State Custody*, CARLSBAD CURRENT-ARGUS (Carlsbad, N.M.) (Feb. 7, 2013), [http://www.currentargus.com/ci\\_22539422/bill-would-move-new-mexicos-federal-lands-into](http://www.currentargus.com/ci_22539422/bill-would-move-new-mexicos-federal-lands-into) (describing arguments by proponents of legislation for the transfer of public lands in New Mexico that such transfer is necessary due to the disparate treatment regarding federal land holdings between New Mexico and Texas and generally between the current Western states and other states east of the Mississippi); Jim Kalvelage, *NM Legislation to Take Federal Lands*, RUIDOSO NEWS (Ruidoso, N.M.), Jan. 31, 2013 (discussing transfer of public lands and related task force bill introduced in New Mexico legislature in 2013 sponsored by Representative Yvette Herrell and Senator Richard C. Martinez); *Village Backs Federal Land Transfer Legislation*, RUIDOSO NEWS (Ruidoso, N.M.) (Jan. 31, 2013), [http://www.ruidosonews.com/ci\\_22492604/village-backs-federal-land-transfer-legislation](http://www.ruidosonews.com/ci_22492604/village-backs-federal-land-transfer-legislation) (discussing resolution passed by Ruidoso village councilors "supporting legislation to create a mechanism for the transfer of public land from the federal government to the state").

29. On March 14, 2013, the Governor of Wyoming signed into law H.B. 228, which creates a task force on the transfer of public lands. *See* H.B. 228, 62d Leg. (Wyo. 2013), available at <http://legisweb.state.wy.us/2013/Bills/HB0228.pdf> (text of the bill). It states in part that it is "[a]n Act relating to public lands; creating the task force on the transfer of federal lands; requiring a report from the attorney general on possible legal recourses available to compel the federal government to relinquish ownership and management of specified federal lands in Wyoming; requiring a study and report by the task force." *Id.*; *see also* H.B. 228 Transfer of Federal Lands-Study, 62nd Sess. (Wyo. 2013), available at <http://legisweb.state.wy.us/2013/Digest/HB0228.htm> (bill history and status).

30. On February 27, 2013, the South Carolina House of Representatives passed a resolution with a statement of supporting the transfer of federal lands to the Western states. *See* H. 3552, 120th Sess. (S.C. 2013), available at [http://www.scstatehouse.gov/sess120\\_2013-2014/bills/3552.htm](http://www.scstatehouse.gov/sess120_2013-2014/bills/3552.htm).

situation in each of those states. Any effort at adaptation and application of this Article's analysis to those state situations would require some additional research that is beyond the scope of this Article. Nonetheless, much of the legal analysis will be relevant to, and should inform, the legal discussions of transfer of public land act legislation in each of those other states.

The fact that other states are exploring similar avenues to assert their claims vis-à-vis the federal government and are in various stages of developing land transfer strategies that will model or learn from H.B. 148<sup>31</sup> further underscores the need for a serious and informed legal discussion on the issues related to disposal obligations of the federal government. This Article takes a first step into that discussion.

## II. BACKGROUND ON UTAH'S TRANSFER OF PUBLIC LANDS ACT—H.B. 148

The legislation originally known and proposed as H.B. 148, and as enacted known as the Transfer of Public Lands Act and Related Study, has three basic parts codified in Utah Code sections 63L-6-101 through 104.<sup>32</sup> These three main parts can be loosely described as the following: (1) the *scope* part explaining the breadth of the TPLA by defining terms and identifying exceptions;<sup>33</sup> (2) the *demand* part;<sup>34</sup> and (3) the pre- and post-extinguishment *planning and management* part, which describes the entities that will govern and prepare for a transition of ownership into State hands.<sup>35</sup>

The "definitions" set out in Utah Code section 63L-6-101, the most significant part of the first portion of the Act, establish the TPLA's scope by defining what is not included in the demand. It states that "'Public lands' means lands within the exterior boundaries of [Utah] *except*," to one degree or another: private lands, Indian lands, lands held in trust for the state, lands reserved for state

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31. Dianne Stallings, *County Pushes for Interstate Forest Management Plan*, RUIDOSO NEWS (Ruidoso, N.M.) (Aug. 14, 2012), [http://www.ruidosonews.com/ci\\_21311888/county-pushes-interstate-forest-management-plan](http://www.ruidosonews.com/ci_21311888/county-pushes-interstate-forest-management-plan) ("Bills patterned after Utah's [H.B. 148] are being prepared for filing next year in Colorado, Idaho, Montana, and New Mexico, according to reports."); Johnson, *supra* note 3.

32. UTAH CODE ANN. § 63L-6-101 *et seq.* (West 2012).

33. *Id.* § 63L-6-102.

34. *Id.* § 63L-6-103.

35. *Id.*; H.B. 148, 2012 Gen. Sess. (Utah 2012).

institutions, a few other lands with distinct ownership characteristics, and finally, and most significantly, certain identified federally controlled areas of the State including the National Parks, National Monuments, Wilderness, and several other special-designation federal holdings.<sup>36</sup> Thus, especially as a result of this

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36. UTAH CODE ANN. § 63L-6-102 (emphasis added). The TPLA provides:

§ 63L-6-102. Definitions.

As used in this chapter:

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

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

The heart of the TPLA is in the “demand” part. Utah Code section 63L-6-103(1) states: “*On or before December 31, 2014, the United States shall: (a) extinguish title to public lands; and (b) transfer title to public lands to the state.*”<sup>37</sup>

Within the last substantive parts dealing with planning and managing the transfer of lands, the first major provision in Utah Code section 63L-6-103(2) requires that:

If the state transfers title to any public lands with respect to which the state receives title under Subsection (1)(b), the state shall: (a) retain 5% of the net proceeds the state receives from the transfer of title; and (b) pay 95% of the net proceeds the state receives from the transfer of title to the United States.<sup>38</sup>

Thus, if after the State gets the lands back it decides to sell that property to private owners, the division of the proceeds will replicate the same division and school trust commitment that would exist according to the terms of the Utah Enabling Act<sup>39</sup> had (and as if) the United States sold the property itself.

The final portion of the Act dealing with management is in the uncodified section 5 of H.B. 148, which calls for the creation of a Utah Constitutional Defense Council (“CDC”) study to evaluate

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

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

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

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

*Id.*

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

38. *Id.* § 63L-6-103(2).

39. UTAH ENABLING ACT (1894), available at <http://archives.utah.gov/research/exhibits/Statehood/1894text.htm>.

implementation strategies and develop legislation to plan for the State management of its soon to be acquired lands.<sup>40</sup> As part of this requirement, the CDC published both a “case statement”<sup>41</sup> and a separate “report”<sup>42</sup> in November 2012.

In 2013, the Utah legislature continued to express its commitment to the TPLA. Passed by the Utah House and Senate in March 2013, Utah’s Senate Joint Resolution 13 “strongly urges the federal government to transfer title to the public lands within the boundaries of the State of Utah to the State, and strongly urges the governor and Utah’s congressional delegation to work to obtain from the federal government the transfer of these lands to this state.”<sup>43</sup> Moreover, signed April 1, 2013, Utah’s H.B. 142 “requires the Public Lands Policy Coordinating Office to conduct a study and economic analysis of the transfer of certain federal lands to state ownership.”<sup>44</sup> Several political subdivisions within Utah also continue to consider resolutions supporting the TPLA, and several have passed such statements of approval and support.<sup>45</sup>

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

### III. HISTORICAL ANTECEDENTS TO UTAH’S TPLA/H.B. 148

The long history of conflict over control of lands in the Western states and disputes over the proper level of federal control dates back

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40. Utah H.B. 148 § 5. These management and implementation portions of the Act, including the division and commitment of proceeds and the CDC report and proposed legislation, are beyond the scope of this Article.

41. See CDC Nov. 2012 Case Statement, *supra* note 10.

42. CONSTITUTIONAL DEF. COUNCIL, REPORT ON UTAH’S TRANSFER OF PUBLIC LANDS ACT: H.B. 148, (2012) [hereinafter CDC NOV. 2012 REPORT], available at <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148.pdf>.

43. See S.J. Res. 13, 2013 Gen. Sess. (Utah 2013).

44. See H.B. 142, 2013 Gen. Sess. (Utah 2013).

45. See, e.g., *County and City Support Land Transfer*, SPECTRUM (St. George, Utah), Mar. 6, 2013, at A4 (discussing Iron County Commission and Cedar City Council approval of resolutions supporting the TPLA); *Council Approves HB 148 Resolution*, SPECTRUM (St. George, Utah), Jan. 17, 2013, at A1 (discussing Enoch City Council unanimous approval of a resolution supporting the TPLA).

to the very formation of the new states across the decades after the Revolutionary War.<sup>46</sup> In some ways, the TPLA/H.B. 148 is yet another—although arguably distinguishable—chapter in federal-state tensions and battle for control of the public lands.<sup>47</sup> A few examples of the historical antecedents to the TPLA are provided below as a sampling of the efforts in Utah and other states that have attempted to wrest ownership, control, and management of lands away from the federal government across the years.

Consider, for example, a 1915 “memorialization” resolution from the Utah Senate to the President, the U.S. Senate, and the U.S. House of Representatives exclaiming Utah’s understanding that the federal government had made a promise to dispose of the public lands it acquired when Utah became a state.<sup>48</sup> That statement, titled Senate Joint Memorial Number Four reads, in part:

In harmony with the spirit and letter of the land grants to the national government, in perpetuation of a policy that has done more to promote the general welfare than any other policy in our national life and in conformity with the terms of our Enabling Act, we, the members of the Legislature of the State of Utah, memorialize the President and the Congress of the United States for the speedy return to the former liberal National attitude toward the public domain, and we call attention to the fact that the burden of State and local government in Utah is borne by the taxation of less than one-third the lands of the State, which alone is vested in private or corporate ownership, and we hereby earnestly urge a policy that will afford an opportunity to settle our lands and make use of our resources on terms of equality with the older states, to the benefit and upbuilding [sic] of the State and to the strength of the nation.<sup>49</sup>

Several similar resolutions have issued across the years from other states with arguments based on their compacts and agreements with the federal government where the states believed the federal government has a fiduciary or contractual duty to dispose

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46. See generally PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (photo. reprint 1979) (1968).

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

48. S.J. Mem’l 4 (Utah 1915), as reprinted in CDC NOV. 2012 REPORT, *supra* note 42, at 17.

49. *Id.*

of its land ownership.<sup>50</sup> As the Utah CDC Report from November 2012 explains, many other efforts stand in the same company as the 1915 resolution:

When the federal government began to move more toward policies of reservation and conservation in the early 1900's, Utah registered its objections by urging the return to active disposal. At various points throughout the 20th century, Utah restated these objections, particularly upon the passage of [the Federal Land Policy and Management Act of 1976], wherein the policy shift to one of land retention and preservation became express federal law. For various reasons, mostly political, these prior Utah efforts to restore the benefits contemplated by the Enabling Act have been unsuccessful.<sup>51</sup>

In their claims, many states asserted that the original and longstanding policies of the United States were dedicated to the disposition (not retention) of federal lands,<sup>52</sup> and these states have been concerned when paradigmatic shifts toward retention (and against disposal) seemed to begin.

Across the twentieth century, there were increasing legislative and regulatory movements toward federal retention of public lands, in many ways critically culminating in the Federal Land Policy and Management Act of 1976 ("FLPMA"), which ultimately provided that "Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest."<sup>53</sup> As Rasband notes regarding the gradual shift in public lands policy, "The move toward reservation of public lands . . . was a substantial change in public lands policy. Nevertheless, these reservations can still be understood as exceptions to the still-

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

51. CDC NOV. 2012 REPORT, *supra* note 42, at 6.

52. Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 818 (1980) (explaining that "[d]uring most of our history, the national government pursued a policy of promoting settlement and private development of the public domain."); see also GATES, *supra* note 46, at 57 (asserting that "the use of the public lands was to be a vital nationalizing factor in American development").

53. Federal Land Policy and Management Act (FLPMA) of 1976, § 102(a)(1), 43 U.S.C. § 1701(a)(1) (statutory numbering omitted).

prevailing idea that the public lands were largely intended for disposition to private owners.”<sup>54</sup>

In the years immediately before and after the passage of FLPMA, states and their state and federal representatives became increasingly vocal and present with their concerns over federal ownership, management, and control—they became increasingly bold in their efforts to assert rights or powers over lands within their respective states and assertive in arguing that such claims were superior to federal claims. Due to the volume and seriousness of the political and legal efforts during this period in the late 1960s and 1970s, that era became known (for better or worse) as the “Sagebrush Rebellion.”<sup>55</sup> A variety of legal maneuvers were tried by states and others during this period to diminish federal control over public lands, although none looked exactly like the TPLA. For example, while Nevada passed a law declaring ownership of certain federal lands, and while that law was invalidated by a federal district court,<sup>56</sup> the TPLA does not “declare” that Utah owns land, and makes no effort to *take* land away from the federal government. Instead, the TPLA merely articulates the federal government’s duty to dispose and demands that it comply.

The TPLA is sufficiently distinct that it can, as here, be studied effectively in isolation apart from the relatively dense history of land disputes in the State of Utah and elsewhere in the West.<sup>57</sup> Although some have called the TPLA a “new Sagebrush Rebellion,”<sup>58</sup> the

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54. RASBAND ET AL., *supra* note 15, at 139.

55. For a summary of some of the major state and federal initiatives to limit federal ownership or control of lands in the West in what has become known as the “Sagebrush Rebellion,” see RASBAND ET AL., *supra* note 15, at 156–58; see also CDC NOV. 2012 REPORT, *supra* note 42, at 20–23 (describing the major efforts that occurred at the federal and state level during the Sagebrush Rebellion).

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

57. To fully understand the current state of affairs in Utah, much more of the history of land disputes would be extremely helpful, and readers are encouraged to explore other sources in this area. To keep this Article relatively focused, however, any more detailed history will be left to those other avenues of research.

58. See, e.g., Robert Gehrke, *Senate Approves Utah’s New Sagebrush Rebellion*, SALT LAKE CITY TRIB. (Mar. 7, 2012), <http://www.sltrib.com/sltrib/politics/53668812-90/utah-federal-lands->

nature of the TPLA is different from measures that have come before it, and the new law involves some very unique legal concerns.<sup>59</sup> The next Part deals with a selection of these unique legal issues.

#### IV. A LEGAL ANALYSIS OF UTAH'S TRANSFER OF PUBLIC LANDS ACT

Interest groups from a variety of both supportive and opposition positions are debating the enforceability and, quite separately, the wisdom of H.B. 148.<sup>60</sup> In light of the fact that there has not yet been much independent legal analysis published on the TPLA,<sup>61</sup> this Article provides a summary of the legal arguments at issue and presents an initial legal assessment of some of those arguments.<sup>62</sup>

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state.html.csp.

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

60. One of the chief advocacy groups in favor of H.B. 148 is the American Lands Council, led by the chief sponsor of the legislation, Utah Representative Ken Ivory. The American Lands Council provides several key primary documents along with resources designed to support the legislation on their website. See *Resources*, AM. LANDS COUNCIL, <http://www.americanlandscouncil.org/resources.html> (last visited Aug. 31, 2013); see also ARE WE NOT A STATE?, <http://www.arenotastate.com/index.html> (last visited Aug. 31, 2013).

One of the primary organizations advocating against H.B. 148 is the Southern Utah Wilderness Alliance (“SUWA”) which makes some resources and commentary available on its website as well. See David Garbett, *The Facts About HB 148: Unconstitutional, Bad Public Policy and Won't Help Utah Schools*, S. UTAH WILDERNESS ALLIANCE (Mar. 23, 2012, 1:18 PM), <http://www.suwa.org/2012/03/23/>. This Author and David Garbett, staff attorney for the SUWA, debated H.B. 148 on January 17, 2013 in a recorded Federalist Society Teleforum. A podcast of that debate (posted Feb. 7, 2013) titled “The Future of Public Lands,” is available at <http://www.fed-soc.org/publications/detail/the-future-of-publicly-owned-lands-podcast>.

61. Other than the Kochan White Paper from which this article is adapted, and to a limited extent the CDC reports, the legal analysis published to date has been very limited. One of the closest things to a legal summary of the arguments on both sides comes from a twelve page, June 2013, Utah Foundation Research Report summarizing some of the arguments for and against the TPLA (which cites the Kochan White Paper extensively as one of its sources). The Utah Foundation identifies itself as an independent research organization. See MORGAN LYON COTTI, UTAH FOUNDATION RESEARCH REPORT NO. 714, SAGEBRUSH REBELLION PART II: ANALYSIS OF THE PUBLIC LANDS DEBATE IN UTAH (2013), available at <http://www.utahfoundation.org/img/pdfs/rr714.pdf>. The Utah Foundation report is, at best, a backgrounder of the general public lands debate with an emphasis on the TPLA, with *one page* devoted to attempting to outline the legal arguments for and against the TPLA. *Id.* at 9. Despite even that outline not being very detailed or even comprehensive in outline form, the Utah Foundation Report has some utility in providing background (and is one of the only printed sources attempting to outline the legal arguments against the TPLA). See generally *id.*

62. This Article provides only an introductory legal analysis. It does not claim to be comprehensive of all of the available legal arguments for or against the validity of the TPLA. Furthermore, as previously stated, this Article does not intend to explore the policy reasons for

Much of the narrative of Utah's legal case is set forth in documents supporting the legislation. Included in those documents is what amounts to an outline of the State's legal theories best seen in the "whereas" clauses in Utah's House Joint Resolution 3 of March 16, 2012, passed concurrently with H.B. 148.<sup>63</sup> Many of these legal arguments were reiterated in Utah's Senate Joint Resolution 13, passed in March 2013, and that new resolution noticeably also adds substantial language regarding the "expectations" of the State of Utah when entering into the Utah Enabling Act consistent with the contract-based elements of a legal duty to dispose discussed herein (and as articulated in the January 2013 Kochan White Paper).<sup>64</sup>

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

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

A contract-based theory—including a compact-based duty to dispose—is one of the strongest arguments that proponents of the TPLA make to support the validity of Utah's demand.<sup>65</sup> The

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or against the legislation. It also passes no judgment on any other legislation or initiatives designed to adjust the relative positions of the State of Utah and the federal government vis-à-vis the public lands (such as roads lawsuits, eminent domain legislation, and other unrelated (or related but independent) actions).

63. H.R.J. RES. 3, 2012 Gen. Sess. (Utah 2012).

64. See Utah S.J. RES. 13.

65. A *New York Times* article—one of the only major, national newspaper articles even touching on any coverage of H.B. 148—summarized the proponents' argument as follows:

The federal government, Mr. Ivory and other proponents said, reneged on Congressional promises going back to the 1800s, which held that Washington's control of tens of millions of acres in the West in national forests, rangelands and parks was only temporary. That pledge, they say, was written into contractual obligations in the founding documents of many states, and was followed through in

argument includes claims that the TPLA simply enforces a promise made when Utah became a state that the federal government has heretofore seemed unwilling to completely honor and fulfill.<sup>66</sup> One can argue that the State of Utah has relied on that promise and that the TPLA is simply calling in the debt created by the same.<sup>67</sup>

Utah's Enabling Act ("UEA") establishing its statehood was approved July 16, 1894.<sup>68</sup> Utah ratified its new constitution on November 5, 1895.<sup>69</sup> Where required by the UEA, the Utah Constitution codified certain parts of the UEA, including relevant portions of UEA Section 3.<sup>70</sup> This sub-section of this Article will focus on whether the Utah Enabling Act<sup>71</sup> and its surrounding circumstances created a duty to dispose of public lands on the part of the federal government as part of its compact with the State of Utah memorialized in the UEA.

The questions become (1) whether, inherent in the original compact, the federal government accepted a duty to dispose of the public lands it acquired in the UEA; and separately (2) whether the State of Utah can enforce such a duty by demanding that the federal government live up to its obligation to dispose of such property into private hands. Such a duty would include disposal in a manner that

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some places but not others. The Midwest and Plains states, for example, are now almost entirely private lands, but hop a meridian or two west and the picture changes completely.

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

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

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

Geraci, *supra* note 14.

67. All respect and reference due again here to Service's poem. See SERVICE, *supra* note 1.

68. UTAH ENABLING ACT (1894), available at <http://archives.utah.gov/research/exhibits/Statehood/1894text.htm>.

69. See UTAH CONST.

70. UTAH CONST. art. III.

71. Utah Enabling Act, available at <http://archives.utah.gov/research/exhibits/Statehood/1894text.htm>.

would allow the state to timely obtain, receive, or enjoy the benefits of tax revenues and other contributions after the land is unlocked from the limitations on the imposition of taxes against the lands while under federal ownership.<sup>72</sup> Upon disposal, the state can also otherwise obtain the benefits that generally flow to the state from private ownership and investment, which are precluded while public lands are retained in federal control.<sup>73</sup>

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

Agreements matter; the parties to them should faithfully and diligently adhere to their promises. This is true whether such agreements are between private parties, a private party and the government, or two governments.<sup>74</sup> Long-standing precedents support the theory that the UEA is a bilateral compact that should be treated as if it is, and should be interpreted as, a binding contractual agreement. For one thing, the United States Supreme Court has consistently held that federal commitments made to the

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72. UTAH CODE ANN. § 63L-6-103 (West 2012).

73. *Id.* The importance of a state's ability to tax lands as a rationale against federal ownership has been appreciated since the Founding. See C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 68 (1949) ("It was never anticipated that the Federal Government would continue to own lands indefinitely like a monarch, but that its lands would be cut into states and distributed to bona fide settlers, thereby becoming subject to state taxation without doubt.").

74. This Article will focus on the bilateral compact in the nature of a contract. There may be a separate line of inquiry analogizing promises in an enabling act to promises made in a treaty. After all, "Treaties are an exchange of promises between nations . . ." Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 579 (2007). They are often complied with as a matter of comity between sovereigns, and importantly they are often considered binding even in the absence of explicit terms for their enforceability in courts. *Id.* The intent for enforceability is often not in the terms of the treaty because the implication that compliance is demanded is so evident and the expectation of enforceability is presumed. *Id.* Nonetheless, this Article does not pursue this avenue of analysis, but it may be interesting and worthwhile in future work to look further at the law of treaty commitments as an independent source of law regarding enforceability of the promises made in the UEA and other enabling acts.

sovereign states at their time of entry into the Union are serious and enforceable.<sup>75</sup>

Furthermore, as the Supreme Court explained in *Andrus v. Utah*, promises in enabling acts are “solemn agreement[s]’ which in some ways may be analogized to a contract between private parties.”<sup>76</sup> That statement from the *Andrus* majority was also reflected in Justice Powell’s dissent, which was based on grounds unrelated to this matter of interpretation. Justice Powell made note of the relationship between federal retention of lands and decreased tax revenue,<sup>77</sup> and he also recognized the agreements within Utah’s Enabling Act and others like it “were solemn bilateral compacts between each State and the Federal Government.”<sup>78</sup> Powell later in his opinion further describes the “bilateral” nature of the compact.<sup>79</sup> As he explained regarding the facts in *Andrus*: “Utah has selected land in satisfaction of grants made to support the public education of its citizens. Those grants are part of the bilateral compact under which Utah was admitted to the Union. They guarantee the State a specific quantity of the public lands within its borders.”<sup>80</sup> And, Powell explained, in return, the State agreed not to tax the federal lands and agreed to use the lands granted for public education purposes in perpetuity.<sup>81</sup> Both parties had corresponding rights and duties.

Moreover, in *Andrus*, the U.S. Supreme Court recognized that these compacts anticipate remedies for breach—even against the federal government if it fails to perform duties arising under the

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

“[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events [acts of Congress] somehow can diminish what has already been bestowed.” [(quoting *Idaho v. United States*, 533 U.S. 262, 284 (2001) (Rehnquist, C.J., dissenting))] And that proposition applies *a fortiori* [with even greater force] where virtually all of the State’s public lands . . . are at stake.

*Id.*

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

77. *Id.* at 522–23 (Powell, J., dissenting).

78. *Id.* at 523.

79. *Id.* at 539.

80. *Id.*

81. *Id.*

compact.<sup>82</sup> Whereas in *Andrus* the Court found an explicit stipulation of the remedy within the compact,<sup>83</sup> under the *Andrus* logic and in terms of failing to perform a duty to dispose, the courts could presumably find that a remedy of some kind (explicitly or impliedly) must exist with the UEA's duty to dispose if they were to find such a duty. A court would then presumably need to find the TPLA's choice of remedy for dealing with a non-performing federal government reasonable in light of the implicit or explicit provision for such a remedy.

The critical provisions of the UEA for review are in Section 3 and Section 9. The only appropriate way to read these provisions is in conjunction with each other and the whole agreement in the UEA.<sup>84</sup> The U.S. Supreme Court has explained that it is a "cardinal principle of contract construction that a document should be read to give effect to all its provisions and to render them consistent with each other."<sup>85</sup> Moreover, as the Court has also recognized, "[f]or the purposes of construction, we must look to the whole instrument. The intention of the parties is to be ascertained by an examination of all they have said in their agreement, and not of a part only."<sup>86</sup>

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

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that *until the title thereto shall have been extinguished* by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . that no taxes shall be imposed by the State on

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82. *Id.* at 506. In *Andrus*, the Court was considering the compact provision where "[t]he United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry." *Id.* at 507.

83. *Id.* at 506–08.

84. E. ALLAN FARNSWORTH, CONTRACTS §7.11, at 263 (1990) (explaining that courts favor an interpretation that "gives meaning to the entire agreement").

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

86. *Black v. United States*, 91 U.S. 267, 269 (1897).

lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. . . .<sup>87</sup>

Section 3's "forever disclaim" language may lead some to believe that Utah's case for upholding the TPLA is a dead letter. However, it must be read in context.<sup>88</sup> Even within this section the language shows that the parties anticipate that title will at some point be extinguished (the "until the title thereto shall have been extinguished" language together with the discussion of "disposition," i.e., disposal). When opponents focus only on the "forever disclaim" segment of the UEA and say that this one sentence settles the case against the TPLA, they are looking at "a part only"<sup>89</sup> and "a single sentence"<sup>90</sup>—approaches expressly rejected under the rules of construction recognized in the courts and supported by U.S. Supreme Court precedents explaining precisely such rules. The interpretation of any written instrument must be informed by surrounding words and all sections of the document.

Moreover, the UEA's language is perfectly consistent with the ends to be achieved. The federal government needed clean title to lands so that it could dispose of these properties to *willing* buyers. There was a fear that potential buyers would be unwilling to purchase lands from either the federal government or the state government if the buyers could not be sure which one had superior title.<sup>91</sup> The UEA resolved that and sent a signal to would-be buyers

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87. Utah Enabling Act §3 (emphasis added).

88. Some basic rules of contract interpretation include the following:

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

17A AM. JUR. 2D *Contracts* § 375 (2012).

89. *Black*, 91 U.S. at 269.

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

91. The need for the federal government to serve as an "impartial arbiter" of conflicting land claims emerged out of the failings of the Articles of Confederation and the need for certainty of title transfers. *See* Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 *COL. L. REV.* 327, 372, n.208 (2005) (citing the

of the world that the uncertainty of title had been resolved.<sup>92</sup> The State in return also gave a promise that added further certainty to the buyers when it agreed that it did not have the power to interfere with the process of disposal or with rights granted through disposal.<sup>93</sup> The State, as part of its obligation under the compact, gave the federal government the clean title and agreed not to interfere with the federal disposition—which included not prejudicing the private recipients of title gained through disposal.<sup>94</sup>

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

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

That *five per centum of the proceeds of the sales of public lands* lying within said State, ***which shall be sold*** by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, *shall be paid to the said State, to be used as a permanent fund,* the interest of which only shall be expended for the support of the common schools within said State.<sup>95</sup>

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statements of Governor Edmund Randolph at the Virginia ratifying convention). That same role was carried out, in effect, when the federal government became agent of sale for the Western lands for which the states disclaimed ownership so as to clean the title of any such disputes.

92. Utah Enabling Act §3.

93. *Id.*

94. *Id.*

95. *Id.* § 9 (emphasis added).

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

Basic rules of construction require harmonization of Section 3 with Section 9.<sup>96</sup> By reading the two together, one can see that they generate a “duty to dispose.” If the federal government could retain the property, the State would never get any benefit from Section 9. It is impracticable to believe that the State intended to agree to disclaim rights in return for a cut of the sales of those lands (and in anticipation therefore that actual sales would occur so that there was a cut to be had), yet intended no corresponding obligation that the federal government actually dispose of such lands.<sup>97</sup>

This interpretation is further strengthened by the words in Section 9 proclaiming that the lands ceded in Section 3 “*shall be sold.*”<sup>98</sup> This commanding language indicates that disposal was not only anticipated but also demanded and expected as a condition of the agreement.<sup>99</sup> This mandatory language removes from the federal

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

97. *Mauran v. Bullus*, 41 U.S. 528, 534 (1842) (“In the construction of all instruments, to ascertain the intention of the parties is the great object of the court . . . .”); *Creason v. Peterson*, 470 P.2d 403, 405 (Utah 1970) (“[C]onveyances of property are to be construed in accordance with the intentions of the parties . . . .”); *Haynes v. Hunt*, 85 P.2d 861, 864 (Utah 1939) (citation omitted) (“When language is found in the instrument making the grant, fitted to create the grant naturally to be desired by both parties, although not in the usual form of such a grant, it should be given its evidently intended force and effect.”).

98. Utah Enabling Act §9 (emphasis added).

99. The U.S. Supreme Court has repeatedly called such language “the mandatory ‘shall.’” *See, e.g.*, *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 660–61 (2007) (describing Clean Water Act “shall approve” language as creating a mandatory obligation on EPA to approve a state program when listed statutory triggering criteria were met (citing *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting Congress’ “use of a mandatory ‘shall’ . . . to impose discretionless obligations”)); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory ‘shall’ . . . normally creates an obligation impervious to

government the choice to never dispose and instead retain such lands as were ceded in the previous part of the UEA. The federal retention of these lands deprives the state of revenue that would come from, *inter alia*, (1) the State's receipt of a guaranteed percentage of the proceeds from disposal sales; and (2) the State's ability to tax property after it is disposed into private hands, whereas while the federal government retains those lands they are exempt from taxation.<sup>100</sup>

Some may claim that the "disclaim" language in Section 3 should be read as meaning that the federal government received the title free and clear of any encumbering duties and that it therefore can retain such public lands designated in the UEA. So long as the property is *unencumbered* then perhaps the statement that the government may retain or refrain from disposing holds true. However, the principle argument in favor of the TPLA is that it calls for the disposal of lands that by the very nature of their acquisition came with an encumbrance attached. The encumbrance exists within the compact and promise—made between two sovereigns—where the federal government committed itself to disposal and promised that it would exercise its disposal obligations in a manner so that both a percentage of the proceeds from the sales would be shared with the State, and where the State thereafter would have the capacity to tax such lands when disposed into private hands. Thus, any "disclaiming" was done with an understanding and expectation by the State that the federal government would honor its promise and dispose of such lands. Utah's claim seems more than reasonable in light of these promises in Section 9.<sup>101</sup>

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judicial discretion."); *Ass'n of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994) ("The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive."); *BLACK'S LAW DICTIONARY* 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory.").

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

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

CDC Nov. 2012 Case Statement, *supra* note 10.

101. Some analogies help demonstrate that demands of this type are not unprecedented in law. Beneficiaries of trusts, for example, have rights to demand an account from a trustee. *E.g.*, *GEORGE GLEASON BOGERT, LAW OF TRUSTS AND TRUSTEES* § 966 (2d rev. ed. 1983 & supp. 2009)

Utah would not be the first to advance this interpretation of the “consideration” included in such structuring of the provisions in an enabling act. In 1828, for example, Representative Joseph Duncan of Illinois delivered a report to Congress from the Committee on Public Lands.<sup>102</sup> In that report, Duncan contended that the states, by terms of the rather uniform enabling acts, expected disposal to occur.<sup>103</sup> Duncan identified a duty to dispose of federally held lands in consideration for the states’ giving up rights to such properties and surrendering the rights to tax such properties and obtain revenue.<sup>104</sup> Duncan’s statement urged that if the lands are not disposed of, the states affected “will for many generations . . . be retarded in endeavors to increase their comfort and wealth, by means of works of internal improvement, because they have not the power, incident to all sovereign States, of taxing the soil, to pay for the benefits conferred upon its owner by roads and canals.”<sup>105</sup> Duncan continued, “*When these States stipulated not to tax the lands of the United States until they were sold, they rested upon the implied engagement of Congress to cause them to be sold within a reasonable time.*”<sup>106</sup> He further reiterated that not disposing of the federal lands would lead to differential

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(describing trustees’ duties to render formal accounts for trust property and assets upon demand of beneficiary or others, including to “learn whether the trustee has performed his trust and what the current status of the trust is” and in some instances upon completion of the accounting to order transfers of property). In many ways the federal government has an obligation to both Utah and the original states that gave the Western lands to the federal government in trust that it would use the lands for limited purposes and ultimately dispose of them. The federal government has a fiduciary duty to dispose of the property and do so in a reasonable amount of time. Where its delay or refusal to dispose puts the beneficiary in a lesser position—far from what would be considered the best interests of the beneficiary—it is violating its fiduciary duty.

Consider also the existence of “lapse” statutes in some states. Another interesting analogy to the Utah effort is the passage of “lapse” statutes in some states where legislation ends interests in certain mineral estates within split estates where the mineral estate holder fails to use the mineral estate for a certain period of years. With such statutes, ownership generally reverts to the owner from which the lesser estate is carved. The statutes are intended to encourage the productive use of property. Particularly where the surface estate holder, for example, expects royalties from the use of the dormant mineral estate, that surface owner’s ability to receive profits from its own estate is impeded by the non-productive use of the mineral estate. Such lapse statutes have been seen as a way to more efficiently allocate valuable and scarce resources to those that can profit from them, and such statutes have been upheld as legitimate exercises of state power. *See, e.g., Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

102. H.R. Rep. No. 125 (1828).

103. *Id.*

104. *Id.*

105. *Id.* at 3–4.

106. *Id.* at 4.

treatment between the states as “[n]o just equivalent has been given those States for a surrender of an attribute of sovereignty so important to their welfare, and to an equal standing with the original States.”<sup>107</sup> Duncan’s summary of the consequences of non-disposal provides a well-stated interpretation of these compacts, and it supports reading Sections 3 and 9 together as part of a whole agreement, which includes corresponding duties and considerations where both parties receive the benefit of their bargain.

As Farnsworth explains, courts should err on the side of an interpretation that ensures that each party receives the benefit of the bargain struck in the written instrument.<sup>108</sup> The State of Utah can be treated fairly under the UEA with some benefit of the bargain protected *only if it can impose a duty to dispose*, as explicitly included in Sections 3 or 9 or as implicitly mandated within a comprehensive reading of the whole of the UEA.<sup>109</sup> If the federal government does not dispose of the public lands, then the State will not receive its anticipated percentage of the proceeds of sales and will be unable to realize taxation and productivity benefits from the private owners and their uses of the property.

There is also a strong argument that the intent and expectations of the State of Utah and the federal government at the time of the UEA were informed by the predominant ethic in favor of, and presumptions toward, the disposal of federally controlled public lands into private hands.<sup>110</sup> Some have argued that at the founding of the United States, there was a “universal expectation that the

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107. *Id.*

108. FARNSWORTH, *supra* note 84, at 265 (explaining a rule of construction that “the assumption [is] that the bargaining process results in a fair bargain, so that, between an interpretation that would yield such a bargain as a reasonable person would have made and one that would not, the former is preferred”).

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

110. James R. Rasband & Megan E. Garrett, *A New Era in Public Land Policy? The Shift Toward Reacquisition of Land and Natural Resources*, 53 ROCKY MTN. MIN. L. INST. § 11.02[1] (2007); Touton, *supra* note 52, at 818 (“During most of our history, the national government pursued a policy of promoting settlement and private development of the public domain.”). Touton explains that “[i]n admitting new states . . . Congress retained ‘unappropriated lands’ within their borders and *continued its policy of encouraging settlement and development*. Nearly all of the land in the Midwest and South was distributed in this manner.” *Id.* (emphasis added).

lands would, in fact, be disposed of.”<sup>111</sup> Patterson notes that, at the Founding, the idea of vast federal retention would have been unthinkable, and surely would have been objected to, by the ratifying states:

If the states had had the slightest notion that the Federal Government could lay claim to the soil or to its resources or could make great reservations of land within their boundaries or of their mineral resources as a price of their admission into the Union, thus destroying the equality of the states in the Union, the Constitution would never have been ratified.<sup>112</sup>

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

*Resolved*, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, . . . shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states . . . . That the said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled.<sup>113</sup>

Furthermore, even those who strongly favor federal retention have agreed with this history. Gaetke, for example, states that “[i]t must be conceded that no delegates could foresee the vast retention of federal land ownership that has occurred in states subsequently carved from the public domain,”<sup>114</sup> and even concedes that “the delegates would have opposed such retention if it had been

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111. Natelson, *supra* note 91, at 368.

112. Patterson, *supra* note 73, at 62.

113. 18 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 915 (1780) (congressional resolution of October 10, 1780).

114. Eugene R. Gaetke, *Refuting the 'Classic' Property Clause Theory*, 63 N.C. L. REV. 617, 638 (1985). It is important to note that Gaetke also admits that “[t]he language employed by the Convention certainly permits congressional implementation of the policies of rapid disposal of federal lands.” *Id.* Thus, he admits that there is nothing in the Constitution that would prohibit federal disposal of public lands (and thereby nothing that prohibits the Federal government from complying with the demands of legislation such as the TPLA). Gaetke quibbles with any arguments that the federal government is constitutionally required to dispose of such lands.

foreseen.”<sup>115</sup> These attitudes regarding federal land management continued through the nineteenth century and surrounded the circumstances of, and thereby colored the expectations within, the UEA and its drafting.<sup>116</sup> These expectations, therefore, must be considered in deciding whether one can find a duty to dispose in the UEA.

Utah became a state during this disposal era in public lands law. The U.S. Supreme Court has explained that, when interpreting contracts, “[t]he intention of the parties is to be gathered, not from [a] single sentence . . . but from the whole instrument read *in the light of the circumstances existing at the time of negotiations leading up to its execution.*”<sup>117</sup> The UEA was entered into against a backdrop of an ethic of disposal. Consequently, this ethic informed the expectations of the parties and is relevant in interpretation.<sup>118</sup>

The disposal ethic constitutes a relevant “state of affairs” that must be considered a critical element in the interpretation of a compact like the UEA,<sup>119</sup> and it lends support to an interpretation of the *whole* document that mandates disposal. The pro-disposal climate that existed while the UEA and similar state agreements were reached supports the claim that the State of Utah reasonably believed that, by making other concessions in the UEA, it would later receive consideration for its disclaimed rights in the form of payments from Section 9. As Farnsworth explains in his treatise on contracts, “It seems proper to regard one party’s assent to the

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115. *Id.*

116. Rasband & Garrett, *supra* note 110 (“Beginning in 1776 and continuing for most of the nineteenth and into the twentieth century, the primary goal of the United States was to dispose of as much public land as possible.”).

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

118. *See* FARNSWORTH, *supra* note 84, § 7.10, at 255 (“The overarching principle of contract interpretation is that the court is free to look to all of the relevant circumstances surrounding the transaction.”); *Semi-Materials Co. v. MEMC Elec. Materials, Inc.*, 655 F.3d 829, 833 (8th Cir. 2011) (“When interpreting a written contract under Texas law, the court is ‘to ascertain the true intent of the parties as expressed in the instrument.’ To make this determination, we ‘examine all parts of the contract and the circumstances surrounding the formulation of the contract.’” (citations omitted)).

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

agreement with knowledge of the other party's general purposes as a ground for resolving doubts in favor of a meaning that will further those ends, rather than a meaning that will frustrate them."<sup>120</sup> Utah "assented" to the UEA with knowledge of the federal government's "general purposes" of disposal. Therefore, finding a meaning in the UEA that includes a duty to dispose furthers the ends anticipated by the parties, including the revenue stream from disposal considered in Section 9. To find disclaimed rights by the State with no corresponding duty to dispose would be to adopt a meaning that frustrates the expectations of the parties to the UEA (principally the State of Utah and the federal government). To find such would also unjustly give the federal government a greater benefit than that for which it bargained. Again, the parties' interests within the agreement require the existence of some duty requiring the federal government to dispose.

Furthermore, past statements by officials recognized the logic and historical underpinnings of a compact-based, duty-to-dispose theory. For example, President Andrew Jackson made an eloquent and persuasive defense of the compact-based duty to dispose in a pocket veto message to Congress.<sup>121</sup> Jackson refused to sign Congress' bill because Congress wanted to use public land disposal proceeds for certain general, federal purposes rather than comply with terms of disposal set out in compacts between the federal government and certain states.<sup>122</sup> Jackson believed that the legislation was based on improper assumptions of federal power vis-à-vis the lands subject to the bill. He believed the bill failed to recognize the necessity of permanent disposals of federal public land holdings.<sup>123</sup>

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120. FARNSWORTH, *supra* note 84, at 258; *see also* Wood v. Ashby, 253 P.2d 351, 353 (Utah 1952) ("It is also established in this state that a deed should be construed so as to effectuate the intentions and desires of the parties, as manifested by the language made use of in the deed. . . . [T]he circumstances attending the transaction, the situation of the parties, and the object to be attained are also to be considered." (citations omitted)); RESTATEMENT (SECOND) OF CONTRACTS § 202(1) ("[I]f the principal purpose of the parties is ascertainable it is given great weight.").

121. Andrew Jackson, *Veto Message of December 4, 1833*, in MESSAGES AND PAPERS OF THE PRESIDENTS VOL. III (James D. Richardson ed., 1911) [hereinafter Jackson 1833 Veto Message], available at <http://www.presidency.ucsb.edu/ws/index.php?pid=67041>.

122. *Id.* at 56–69.

123. *Id.*

Jackson's veto message stressed the need for a permanent resolution of public lands disposition and "[t]he importance, as it respects both the harmony and union of the States, of making, as soon as circumstances will allow of it, a proper and final disposition of the whole subject of the public lands."<sup>124</sup> Jackson started his rather long statement with a history lesson on "the manner in which the public lands upon which it is intended to operate were acquired and the conditions upon which they are now held by the United States."<sup>125</sup> He explained that the original states were induced to cede their land to the federal government by the promise that the federal government eventually would dispose of all of these lands.<sup>126</sup> For example, the deed of cession from Virginia provided that the lands "*shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.*"<sup>127</sup>

Jackson described the commitment to dispose, found in agreements with the original states, as "solemn compacts" where "[t]he States claiming those lands acceded to those views and transferred their claims to the United States upon certain specific conditions, and on those conditions the grants were accepted."<sup>128</sup> By vetoing the bill and articulating this interpretation of the federal duty to dispose, Jackson was looking out for the interests of "new States" and their interest in "the rapid settling and improvement of the waste lands within their limits."<sup>129</sup>

Jackson concluded his veto message with a strong argument that the agreements with the original states for cession of their rights to Western lands and the commitments made to new states could only be read as creating a duty to dispose and an obligation to "abandon"

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124. *Id.* at 57.

125. *Id.*

126. *Id.*

127. *Id.* at 60.

128. *Id.* at 60–61. Jackson touched further upon the binding nature of these compacts: The Constitution of the United States did not delegate to Congress the power to abrogate these compacts. On the contrary, by declaring that nothing in it "*shall be so construed as to prejudice any claims of the United States or of any particular State,*" it virtually provides that these compacts and the rights they secure shall remain untouched by the legislative power, which shall only make all "needful rules and regulations" for carrying them into effect. All beyond this would seem to be an assumption of undelegated power.

*Id.* at 64.

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

the property that the federal government cannot, or no longer has a financial need to, dispose of.<sup>130</sup> Jackson noted the expectation that lands should be sold by the federal government and the “refuse remaining unsold shall be abandoned to the States and the machinery of our [federal] land system entirely withdrawn.”<sup>131</sup> He stressed that “[i]t can not be supposed the compacts intended that the United States should retain forever a title to lands within the States which are of no value, and no doubt is entertained that the general interest would be best promoted by surrendering such lands to the States.”<sup>132</sup> Jackson’s statements support a theory that the federal government must at some point “extinguish” their claims to title to the public lands obtained in the enabling acts.

Importantly, Jackson concludes that nothing in existing law precludes this interpretation of the duty to dispose, and—almost saying that in the absence of a barrier to this interpretation, and given that the interpretation makes sense, one should accept his interpretation. No law would be broken.<sup>133</sup> If nothing precludes the interpretation that the federal government must extinguish its rights to these public lands at issue, yet many general principles favor an interpretation that identifies a duty to dispose, Jackson counsels that the latter interpretation in favor of disposal should be chosen.<sup>134</sup> That may be wise counsel for those vacillating on whether to embrace a duty to dispose.

The CDC’s summary of its legal theory supporting the TPLA makes some of the arguments articulated and analyzed in the above subsection of this Article. The CDC’s theory is based, in part, on an expectation of disposal within enabling acts, colored by a sense of

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130. *Id.* at 68–69.

131. *Id.*

132. *Id.* at 69.

133. *Id.* (“This plan for disposing of the public lands impairs no principle, violates no compact, and deranges no system.”). Consider also the fact that even proponents of federal retention of lands agree that the federal government is not prohibited from disposing of its lands. See Gaetke, *supra* note 114, at 637–38 (discussing the constitutional language and concluding that the federal government is permitted to dispose of public lands). Natelson also explains the “unqualified nature of the Disposal Power” in the Constitution. Natelson, *supra* note 91, at 364. He states, “That this was the original meaning is corroborated by contemporary records showing a universal expectation of disposal, by a congressional ordinance contemplating disposal, and a high level of agreement on how lands were to be alienated and how the proceeds were to be used.” *Id.* at 369.

134. *Id.*

fairness for the states like Utah where disposal has yet to occur (while the federal government largely fulfilled its commitment to other states).<sup>135</sup> The CDC report contends that “[l]egal justification for the transfer of the public lands into State ownership is based on the history of federal land policy,”<sup>136</sup> stressing the historical expectation of disposing of federal lands when it states that, “[f]rom the inception of this Nation and through much of its history, it was the policy of the federal government to dispose of the public lands both to pay off federal debt and to encourage the settlement of western lands for the benefit of the states and the nation.”<sup>137</sup> The CDC report continues to stress that this expectation was met in “most of the states east of the Colorado-Kansas state line,” where those states “have very little federal public lands within their borders as a result of the historical implementation of this policy.”<sup>138</sup> The CDC concludes that “[t]his policy of disposal was very much a part of the various enabling acts that authorized new states to join the Union.”<sup>139</sup> Furthermore, the CDC explains that the Enabling Act’s “disclaimer of title was only intended to facilitate the disposal of the public lands so that, eventually such lands would contribute to the revenue bases of federal, State and local governments.”<sup>140</sup> Once title passes from federal hands to private, that property becomes subject to state regulation.<sup>141</sup>

One perception-based problem with the legal analysis presented in this subsection from a “public relations”-type standpoint lies in the following: 1) the courts have had occasion to discuss states’ obligations under these compacts and in that process courts have even contended that these are *bilateral* contractual agreements—meaning the federal government has some duties,<sup>142</sup> too; but 2) the courts have had very little occasion to consider and discuss

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135. CDC Nov. 2012 Case Statement, *supra* note 10, at 3–4. While the CDC report presents its theory of legal validity, it does not seem intended to be a detailed legal analysis.

136. *Id.* at 3.

137. *Id.*

138. *Id.* at 3–4.

139. *Id.* at 4.

140. *Id.*

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

142. *See, e.g., Andrus v. Utah*, 446 U.S. 500, 539 (1980).

interpretations of the compacts that identify the duties imposed upon the other half of the *bi*-lateral agreement, the federal government. Thus, opponents to the TPLA invoke broad statements about federal power when the States overstep in relation to the compacts and call them “precedents” for the present case of the TPLA’s legitimacy.<sup>143</sup> Opponents highlight these broad statements even though the language used in those cases went beyond what was necessary for their holdings and are, therefore, of little to no precedential value.

But on the other side of the debate, advocates favoring the TPLA hold almost *no* directly-responsive “precedential” cards—real controlling precedent or even dicta pretending-to-be precedent—as there are almost no cases about the states’ powers when the federal government oversteps its obligations or fails to fulfill its promises in these compacts. The advocates of laws like the TPLA must employ the power and skill of distinguishing cases and educate the courts and the public about when some seemingly precedential judicial statements are distinguishable or are actually dicta. The next subsection dissects some of the most often touted precedential obstacles to upholding the TPLA.

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

The major legal arguments against the TPLA rest on broad interpretations of the Property Clause in the U.S. Constitution Article IV, Section 3.<sup>144</sup> This constitutional provision provides: “The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any

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143. See, e.g., Richard Shaw, *The Case Against Transferring Public Lands to Utah*, SUN ADVOC. (Carbon County, Utah) (July 11, 2013), [http://www.sunad.com/index.php?tier=1&article\\_id=28643](http://www.sunad.com/index.php?tier=1&article_id=28643) (surveying the arguments of opponents to the TPLA); Marty Trillhaase, *Opinion: Isn't Something About this Movie Familiar?*, LEWISTON MORNING TRIB. (Lewiston, Idaho) (July 24, 2013), [http://lmtribune.com/opinion/article\\_b82479f8-6965-5515-98c2-e8b3f00fb605.html](http://lmtribune.com/opinion/article_b82479f8-6965-5515-98c2-e8b3f00fb605.html) (criticizing the TPLA efforts in Idaho and fatalistically asking “Come on . . . [d]o you really think the federal courts will reverse two centuries of case law just for Idaho’s convenience? We all know how this ends.”).

144. U.S. CONST. art. IV, § 3.

particular state.”<sup>145</sup> The Property Clause does indeed confer broad powers to Congress, but it is not without limitations.<sup>146</sup>

Setting aside the validity or invalidity of any of the arguments made by TPLA opponents in relation to other and separate measures taken by the State of Utah or others to realize state control of currently federally held lands, the primary arguments made against the TPLA miss their target, and the authorities relied upon by TPLA opponents are almost entirely inapposite. This section sets forth the primary reasons why the cited precedent against the TPLA is either dicta or otherwise inapplicable to the TPLA debate.

This section accomplishes two main goals. First, it deconstructs the lofty and overbroad language in several cases that opponents of the TPLA claim as dispositive precedent. This section will focus on distinguishing the seemingly broad interpretations of the Property Clause that are claimed to weigh in favor of finding the TPLA invalid or unconstitutional. It does so by looking at the cherry-picked bits of language offered by opponents within the full context of the cases where the language appears. It will examine these bits of language in light of the limited holdings in the cases where such language appeared but was not necessary to resolve the cases. It also will identify many of these broad “interpretations” as nothing more than non-controlling dicta. Second, this section will reiterate the idea that the UEA and its duty to dispose act as *limitations* on the Property Clause power, the likes of which were never considered or discussed in any of the cases where broad Property Clause powers were heralded.

Much of what is being cited as “precedent” against the TPLA is not precedent at all. Instead, much of this claimed precedent either resides in categories of excessive dicta or in unrelated cases contextually distinct from, and not on point with, the TPLA. At times, courts say in a case opinion more than is necessary to resolve the case.<sup>147</sup> They can be verbose and sometimes they overstate background principles. And sometimes in the process they use

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145. *Id.*

146. *See generally, e.g.,* Natelson, *supra* note 91; Patterson, *supra* note 73; Touton, *supra* note 52.

147. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1011 (2005) (“If we accept the premise that judges are motivated to advance their views of legal policy, a substantial risk arises that ambitious judges operating within a stare decisis system will use the cases that they decide to announce their preferred views of law and public policy as ‘holdings.’”).

excess language that is susceptible to interpretations beyond what the judges would have meant to say had they been able to fully predict the misuse of their words. “There is no denying . . . the importance of understanding—both as a matter of theory and at the level of practice—how to approach such a central task as sorting holding and dicta,”<sup>148</sup> and that task must be undertaken when evaluating the Property Clause cases cited against the TPLA.

One of the classic statements regarding the definition of dicta and its non-controlling nature comes from Chief Justice John Marshall in the seminal case of *Cohens v. Virginia*.<sup>149</sup> There, the Court stated that:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.<sup>150</sup>

One of the reasons to treat dicta as non-binding is because it involves statements regarding points of law not thoroughly evaluated in part because the facts do not present themselves in the case and the parties are unlikely to have briefed all of the relevant arguments necessary for a court to reach an informed decision on the broader points.<sup>151</sup> Indeed, it is beyond the power of a court to decide more than the case or controversy before it,<sup>152</sup> further supporting the conclusion that dicta lacks authority. The non-controlling effect of

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148. *Id.* at 958. *See also* Comment, *Dictum Revisited*, 4 STAN. L. REV. 509, 513 (1952); Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 180 (1930).

149. 19 U.S. 264, 399 (1821) (Marshall, C.J.).

150. *Id.*

151. *Id.* at 399–400. As the Court explained, “The reason of this maxim is obvious,” because “[t]he question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.” *Id.* *See also* David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2012, 2027 (2013) (“The distinction between holding and dictum reflects fundamental norms of American law, from the common law precept that legal principles develop incrementally, with any one decision having only a limited impact, to Article III’s requirement that judges decide concrete disputes and not issue advisory opinions.”).

152. KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* 14 (Paul Gewirtz ed., Michael Ansaldi trans., 1989) (“[C]ourt *can* decide nothing but the legal dispute before it. . . . Everything, but everything, said in an opinion is to be read and understood only in relation to the actual case before the court.”).

dicta serves both legitimacy functions, ensuring that courts resolve only cases before them rather than making “law in the abstract,” and instrumental functions, including cabining holdings to those things actually carefully considered and argued before a court.<sup>153</sup>

*Black’s Law Dictionary* defines obiter dictum—which it notes is coterminous with dictum—as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.”<sup>154</sup> This concept of “extra” or “unnecessary” language is ever present in most of the cases discussed in this section. These statements that go beyond what is necessary to decide a case simply do not have precedential effect.<sup>155</sup> While there is some scholarly commentary regarding the difficulties in defining dicta, most recognize that surplus language and positions taken that are broader than necessary to decide a case are beyond the holding and, therefore, not precedential.<sup>156</sup>

We should not be surprised to find dicta in the Property Clause cases nor should we be surprised that some will gravitate toward it to support their position. Additionally, lower courts may think they must obey the dicta of higher courts. Unfortunately, lower courts often make the same error as the proponents of the TPLA, giving undue weight to higher court dicta.<sup>157</sup> Dicta is not uncommonly

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153. Michael Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000–01 (1994); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1255–60 (2006). See also Abramowicz & Stearns, *supra* note 147, at 1021–22 (“The holding-dicta distinction similarly should serve both functions, delaying resolution of issues until judges can properly consider them and encouraging judges to focus on the issues before them.”).

154. BLACK’S LAW DICTIONARY 1102 (8th ed. 2004).

155. EUGENE WAMBAUGH, *THE STUDY OF CASES* § 13, at 18–19 (2d ed. 1894) (“So far as the opinion goes beyond a statement of the proposition of law necessarily involved in the case, the words contained in the opinion, whether they be right or wrong, are not authority of the highest order, but are merely words spoken, *dicta*, *obiter*, or *obiter dicta*.”).

156. See, e.g., Abramowicz & Stearns, *supra* note 147, at 1065 (“A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.”).

157. See Klein & Devins, *supra* note 151, at 2026, 2036. A particular risk is that an appellate court will issue sweeping statements that should be dicta, hoping that the lower courts and others will treat such statements like holdings. *Id.* at 2021 (“Higher courts can issue sweeping rulings that address questions not immediately before them, knowing that those statements will not be treated as dicta.”); Abramowicz & Stearns, *supra* note 147, at 995 (identifying “the risk that judges will present overly broad written opinions as precedent”).

used by courts, and one must therefore keep a watchful eye for it and not overstate the precedential effects of dicta in court opinions.<sup>158</sup>

Critics of the TPLA have been focused on making largely conclusory statements that the TPLA is invalid<sup>159</sup> and, where they cite to cases, such critics have often relied on nothing more than distinguishable dicta. Consider, for example, a research note attached to H.B. 148.<sup>160</sup> On February 4, 2012, the Utah Office of Legislative Research and General Counsel appended its “Legislative Review Note” to the introduced version of H.B. 148 “as required by legislative rules and practice.”<sup>161</sup> Despite the near conclusive effect

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158. See Klein & Devins, *supra* note 151, at 2032–33 (“[T]here have been fairly frequent reports in recent years of failures to distinguish between dictum and holding. Academics contend that judicial opinions ‘are often larded with dicta,’ including ‘passing observations, generalizations, analogies, illustrations, or asides not necessary to the resolution of the case.’”); Leval, *supra* note 153, at 1263 (“I cannot tell you how many times I have read briefs asserting an improbable proposition of law and citing a case as authority . . . [only to find that] the proposition is indeed there, but was uttered in dictum.”).

159. Consider, for example, one of the only major national news articles to cover the TPLA that makes some bold statements about the law’s chances of being upheld if challenged. See Johnson, *supra* note 3. Johnson’s article reports on failures of past efforts by States to restrain federal power over Western lands in light of broad precedent in favor of the federal government’s Property Clause powers. *Id.* He then claims that “[m]any legal experts say they expect the same result this time.” *Id.* Furthermore, the article proceeds to claim that “[l]egal experts said the problem for the new state claims was that Congressional authority over federal land had been upheld over and over by the United States Supreme Court. If property rights are the issue being raised, many experts said, proponents of the new land drive are facing traditions and precedents that run deep in the law and culture.” *Id.* I do not doubt that many legal experts will rely on the breadth of dicta in sometimes seemingly relevant case precedent and find that Utah faces an uphill battle. However, opponents should not rely too much on the Johnson article for their claim of legal illegitimacy. That article proceeds to identify and quote only one expert, Professor Charles F. Wilkinson of the University of Colorado. *Id.* As there seem to be very few experts publicly weighing in on the issue so far in any manner, I think the “most experts” claim in the article is probably unsupported (although I make no claim to know how many legal academics will line up against the law should it start to receive more attention and therefore cause such legal commentators to form an opinion).

A news article discussing the New Mexico TPLA legislation printed statements that are similarly illustrative of the conclusory nature of most opposition claims. See Stella Davis, *New Mexico Lands Commissioner Says Federal Land Swap Would Be “Catastrophic”*, CARLSBAD CURRENT-ARGUS (Carlsbad, N.M.) (Feb. 7, 2013), [http://www.currentargus.com/carlsbad-news/cj\\_22588817/new-mexico-lands-commissioner-says-federal-land-swap](http://www.currentargus.com/carlsbad-news/cj_22588817/new-mexico-lands-commissioner-says-federal-land-swap) (saying that the New Mexico lands commissioner “believes the transfer would be unconstitutional” but without providing any further analysis for that claim).

160. UTAH OFFICE OF LEGISLATIVE RESEARCH & GEN. COUNSEL, TRANSFER OF PUBLIC LANDS ACT AND RELATED STUDY: LEGISLATIVE REVIEW NOTE [hereinafter H.B. 148 Legislative Review Note], <http://le.utah.gov/~2012/bills/hbillint/hb0148.pdf> (appended to H.B. 148 as introduced Feb. 4, 2012).

161. *Id.*

some opponents of the legislation have tried to give the Legislative Review Note, the authors specifically explain that the Note is designed to “provide information relevant to legislator’s consideration of this bill” and not to “influenc[e] whether the bill should become law” and it is “not a substitute for the judgment of the judiciary” on the constitutionality of the TPLA.<sup>162</sup>

After citing the Property Clause, the Legislative Review Note relies on statements in *United States v. Gratiot*,<sup>163</sup> *Kleppe v. New Mexico*,<sup>164</sup> and *Gibson v. Chouteau*.<sup>165</sup> The Legislative Review Note concludes that, in light of these precedents and “[u]nder the *Gibson* case, that requirement [in H.B. 148 of the federal government to extinguish title] would interfere with Congress’ power to dispose of public lands. Thus, that requirement, and any attempt by Utah in the future to enforce the requirement, have [sic] a high probability of being declared unconstitutional.”<sup>166</sup>

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

The Supreme Court of the United States has held that “Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation . . . .” *United States v. Gratiot*, 39 U.S. 526, 537 (1840). *See also Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Pursuant to its broad authority under the Property Clause, Congress may enact legislation to manage or sell federal land, and any legislation Congress enacts “necessarily overrides conflicting state laws under the Supremacy Clause.” *Kleppe*, 426 U.S. at 543. *See* U.S. Const. art. VI, cl. 2.<sup>167</sup>

After examining each case in turn below, it should become evident that these quotations from case law cited by the Legislative Review Note are valueless for the interpretation of the TPLA and certainly create no controlling precedent to be applied in any challenge to the TPLA.

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162. *Id.*

163. 39 U.S. 526, 537 (1840).

164. 426 U.S. 529 (1976).

165. 80 U.S. 92 (1872).

166. H.B. 148 Legislative Review Note, *supra* note 160.

167. *Id.*, at 7.

*Gratiot*, for example, does little to inform an interpretation of the TPLA. Its holding was that the Property Clause “authorize[s] the leasing of the lead mines on the public lands, in the territories of the United States” the terms of which would be enforceable.<sup>168</sup> It also stands for the proposition that property rights created prior to statehood could not be upset by a new state.<sup>169</sup> There is nothing in *Gratiot* that would require a determination that Congress has plenary power under the Property Clause so broad that it may ignore all other possible duties to states or others.<sup>170</sup> This “without limitation” language is only dicta unnecessary to resolve the case. The *Gratiot* case seems of little value in any legal controversy over the TPLA as the facts have no similarity to the questions regarding the TPLA.

Similarly, *Kleppe* has limited value in any TPLA dispute, and the Note’s reliance on it is misplaced. *Kleppe* simply holds that a state law allowing the state to come onto federal land and rustle up and later auction burros is unconstitutional because it interferes with federal management policies while the federal government is an owner of public lands.<sup>171</sup> The holding says nothing either in favor of or against giving Congress a power to ignore other commitments to dispose of property like it made in the UEA.

The *Kleppe* holding simply maintains that *while* the federal government is an owner, states have a type of “duty of noninterference” with federally controlled lands (including refraining from passing laws that conflict with the federal policies while the federal government occupies such lands).<sup>172</sup> If a state passes a law that so interferes, then it will be subject to conflict or other preemption doctrines, and the Supremacy Clause will indeed make the federal law control over the state one.<sup>173</sup> But again, there was no

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

169. *Id.*

170. Abramowicz & Stearns, *supra* note 147, at 1029 (“[N]onsupportive propositions should count as presumptive dicta” and as such dicta exists “[w]here a judge resolves an issue in a manner that does not contribute to the disposition of the case.”).

171. *Kleppe v. New Mexico*, 426 U.S. 529, 546 (1976).

172. *Id.* at 540–41. *See also* Touton, *supra* note 52, at 825 (discussing *Kleppe* and concluding with yet another argument that “[a]lthough the *Kleppe* decision was unanimous, its assertion that the property power is ‘without limitations’ should not be accepted uncritically. The property power, like all other congressional powers, is circumscribed by external limitations found in the Bill of Rights and elsewhere in the Constitution.”).

173. *Kleppe*, 426 U.S. at 539–40.

need to grant Congress some truly “unlimited” Property Clause power to reach this holding in *Kleppe*. In the *Kleppe* case, unlike in a challenge to the TPLA, there were no other relevant laws (comparable to, for example, the UEA) to consider other than the interfering municipal law that was invalidated.<sup>174</sup>

It is true that with conflict preemption in the *Kleppe* case, the Supremacy Clause mandated that the federal law over burros win out against a conflicting state law.<sup>175</sup> But that holding says nothing of whether the state can demand that the federal government honor its promises and perform its duties. And it says nothing about when and whether there can be an enforceable demand for adherence if the state is the beneficiary of those promises.

The Legislative Review Note also quoted, at length, the U.S. Supreme Court’s 1872 decision in *Gibson v. Chouteau*:

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).<sup>176</sup>

The Legislative Review Note and most opponent arguments seem to focus on the claim in *Gibson* that “[n]o State legislation can interfere with this [Property Clause] right or embarrass its exercise.”<sup>177</sup> *Gibson* does not, however, resolve the issue of whether the TPLA violates the Property Clause.

*Gibson* only held that a state cannot interfere with a disposal and that incident to what might be called a “duty of noninterference with disposal” on the part of the state, there is also a prohibition on the

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174. *See generally id.*

175. *Id.* at 546.

176. H.B. 148 Legislative Review Note, *supra* note 160.

177. *Gibson v. Chouteau*, 80 U.S. 92, 99 (1872).

state “depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.”<sup>178</sup> The *Gibson* decision equates any measure a state takes to deprive the transferee of “the right to possess and enjoy the land,” with “a denial of the power of disposal in Congress.”<sup>179</sup> While *Gibson* demonstrates that a state may not interfere with U.S. ownership or disposal—such as by adversely affecting the buyers’ market for government property by creating discriminatory or disadvantageous rules on purchasers of federal government disposed property<sup>180</sup>—it does not speak to whether a state may, nonetheless, demand that the federal government follow through on promises made to the state to eventually dispose, in some manner or another, of the property it holds rather than to retain it. Those interpreting opinions must be diligent in evaluating possible uses of dicta in the face of its overuse,<sup>181</sup> like here, when a court says more than what is necessary to resolve the case.

Consider also another case, *Irvine v. Marshall*, which is not discussed in the Legislative Review Note, but, nonetheless, could be claimed to support opponents of the TPLA.<sup>182</sup> While *Irvine* indicated broad authority for the federal government over its property in the Territories “to be disposed of to such persons, at such times, in such modes, and by such titles as the Government may deem most advantageous to the public fisc, or in other respects most politic,”<sup>183</sup> all of that language *still anticipates* disposal and merely constrains State power to interfere with the government *while it owns* the public lands or *in the legally effective transfer* of such lands.<sup>184</sup> The focus in *Irvine* was on questions regarding “what mode, and by what title, the public lands shall be conveyed,”<sup>185</sup> and the mechanics of effective disposal that should remain in the discretionary control of the federal government while it owns lands. But, *Irvine* hints at nothing

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178. *Id.* at 100.

179. *Id.*

180. *Id.*

181. See Klein & Devins, *supra* note 151, at 2048–49.

182. 61 U.S. 558 (1857).

183. *Id.* at 561–62.

184. *Id.*

185. *Id.* at 558.

about the power to retain public lands (especially those lands encumbered with a duty to dispose) indefinitely.<sup>186</sup>

The holdings in all of these cases relied upon by opponents of the TPLA state that, when the federal government acts as it is empowered to act, the states may not impede the federal powers to manage the public lands, nor may they intervene to diminish the federal government's capacity to dispose.<sup>187</sup> These holdings are about *not interfering* when the federal government has *discretion* to act and is operating within that discretion. These holdings say nothing at all about whether the state may demand that the federal government comply with an affirmative duty to act.

A similar legislative review memorandum was written in the State of Wyoming that was designed to inform the Wyoming Legislature about the consequences of adopting legislation in that state similar to Utah's TPLA.<sup>188</sup> This is one of the few other legal analyses that this Author has found regarding the constitutional validity of the TPLA. It is a very short and conclusory analysis, relying (like the Utah Legislative Review Note) on overbroad and inapplicable dicta to make its point.<sup>189</sup> The memorandum quotes *United States v. Gratiot*, and it also relies upon broad Supremacy Clause language in *Kleppe* and *Gibson*.<sup>190</sup> The flaws in those analogies are described above.

But the Wyoming memorandum also uses a few cases that are not discussed in the Utah Legislative Review Note<sup>191</sup>—most

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186. *See generally id.*

187. *See generally, e.g.* H.B. 148 Legislative Review Note, *supra* note 160 (discussing cases and mischaracterizing their precedential impact). *See also* Vince Rampton, *My View: Finding the Proper Balance Between State, Federal Land Interests*, DESERET NEWS (Salt Lake City) (Aug. 12, 2012), <http://www.deseretnews.com/article/765596366/Finding-the-proper-balance-between-state-federal-land-interests.html?pg=all> (Democratic candidate for lieutenant governor of Utah focusing on the Legislative Note's claims that there is a high probability of finding the TPLA unconstitutional).

188. Memorandum from Josh Anderson and Matt Obrecht, Wyo. Legislative Serv. Office Staff Attorneys to Members of State of Wyo. Legislature Minerals Comm., *Utah Land Transfer of Public Lands Act, Utah 2012 HB 148*, (Oct. 9, 2012) (on file with author) [hereinafter Wyoming Legislative Memo] (“Memorandum discusses likely conflicts with the United States Constitution and the Constitution of the State of Wyoming if a similar piece of legislation [to H.B. 148] were introduced and passed in Wyoming.”).

189. *Id.*

190. *Id.*

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

important among these are *Shannon v. United States*,<sup>192</sup> *Utah Power & Light Co. v. United States*,<sup>193</sup> *United States v. Gardner*,<sup>194</sup> and *Light v. United States*.<sup>195</sup> In addition, the case cited in *Light (Camfield v. United States)*<sup>196</sup> must be discussed, as it serves as the origin for one of the most often-used claims of plenary retention power for Congress vis-à-vis the public lands.

Each of these cases, like the others discussed above, can be distinguished from any arguments related to the TPLA. *Shannon* had only a limited holding irrelevant to the facts of the TPLA.<sup>197</sup> The appeals court in *Shannon* held that the State of Montana, through its laws, could not grant its citizens a right to pasture on federal public lands and, in essence, authorize a trespass.<sup>198</sup> So long as the government held the lands and had not yet disposed of them, it could maintain a trespass action against such individuals.<sup>199</sup> Before getting to that limited holding, the court in *Shannon* repeated some of the rhetoric on broad federal powers, but it had neither the occasion nor the necessity to evaluate the limits of such powers in the face of separately identifiable constraints on the power.<sup>200</sup>

*Utah Power & Light* only held that a state could not interfere with the federal government's use and enjoyment of its property while the federal government owned the property and, therefore, the state's attempt to exert the power of easement over federal lands was invalid.<sup>201</sup> The otherwise broad statements unnecessary to that limited holding are dicta and have no precedential effect. Put simply, here as with the general rule, dicta is weighted differently from holdings; it is not entitled to precedential effect and does not limit a future court facing an issue distinct from the resolved issues related to the actual facts in a previous case.<sup>202</sup>

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192. 160 F. 870, 874 (9th Cir. 1908).

193. 230 F. 328, 339 (8th Cir. 1915), *modified on other grounds*, 242 F. 924 (1917).

194. 107 F.3d 1314, 1318 (9th Cir. 1997).

195. 220 U.S. 523, 536 (1911).

196. 167 U.S. 524 (1897).

197. *Shannon*, 160 F. at 875.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Utah Power & Light Co. v. United States*, 230 F. 328, 339 (8th Cir. 1915), *modified on other grounds*, 242 F. 924 (1917).

202. See Klein & Devins, *supra* note 151, at 2024 ("Dictum and holding are usually thought to be entitled to very different weight in the American legal system, as in other common law

*Gardner* holds that “[t]he United States was not required to hold public lands it received in various treaties with foreign nations or sovereign tribes for the establishment of future states.”<sup>203</sup> Although *Gardner* cited the language in *Light* regarding Congress’s power to withhold property from sale, that language had no bearing on the holding in *Gardner*<sup>204</sup> and, therefore, should have no precedential effect. Again, that language is overly broad and dicta only.

In *Light*, too, the Court there made a few seemingly broad statements about the reach of the Property Clause.<sup>205</sup> The following paragraph is the one from which *Gardner* quotes and the one most likely to be cited by TPLA critics:

But “the nation is an owner, and has made Congress the principal agent to dispose of its property. . . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.” *Butte City Water Co. v. Baker*, 196 U.S. 126, 49 L. ed. 412, 25 Sup. Ct. Rep. 211. “The government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.” *Canfield v. United States*, 167 U.S. 524, 42 L. ed. 262, 17 Sup. Ct. Rep. 864.<sup>206</sup>

The holding in *Light*, however, is quite limited. The *Light* opinion used that broad rhetorical language only as dicta in reaching a far narrower and unexceptional holding that the federal government had the power—like any owner—to expel trespassers.<sup>207</sup> *Light* simply borrowed the broad language to reach its holding that the federal government “may . . . as an owner, object to its property being used for grazing purposes, for ‘the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation,’”<sup>208</sup> but no

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systems.”).

203. Wyoming Legislative Memo, *supra* note 188.

204. *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997).

205. *Light v. United States*, 220 U.S. 523, 536–37 (1911).

206. *Id.* at 536.

207. *Id.* at 537.

208. *Id.* at 536.

broader Property Clause power needed to be found to resolve that case.<sup>209</sup>

Similarly, the *Camfield* case, where the Court first used the unnecessarily verbose language of “may sell or withhold them from sale,”<sup>210</sup> was also about trespassers on federal lands.<sup>211</sup> The Court used the quoted language in a long paragraph discussing incidents of ownership, but it did not reach a holding that was anywhere near the issue of whether the federal government has discretion to withhold lands from sale where the federal government might otherwise have committed itself to dispose of such lands.<sup>212</sup> The *Camfield* holding can be summarized loosely as saying the following: The fact that the federal government has not yet sold (or, to phrase it differently, has currently withheld from sale) a parcel does not mean that a private individual can just step in, put a fence around the property, and call it his own simply on the defense that the federal government has not sold it.<sup>213</sup> That hardly amounts to a holding that creates a precedent for a sweeping and plenary power on the part of the federal government to withhold from sale any public lands it wishes to retain. And of even further importance, the *Camfield* Court had absolutely no occasion to consider the powers of the United States in light of the federal government’s independently existing duties or commitments to dispose of public lands, as, for example, in the commitment it made to Utah.<sup>214</sup>

Other Property Clause cases are similar to those discussed here—they have almost nothing to say about a duty-to-dispose theory and instead focus on what a state may do while the federal government is an owner.<sup>215</sup> There is a difference between

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209. Abramowicz & Stearns, *supra* note 147, at 1037 (“[P]ropositions that are hypothetical should count as dicta” as should those statements that are unnecessary to some holding in the case).

210. *Camfield v. United States*, 167 U.S. 518, 524 (1897).

211. *Id.*

212. *Id.* at 528.

213. *Id.* at 525–26.

214. *See generally id.*

215. *See, e.g., Wyoming v. United States*, 279 F.3d 1214, 1227 (10th Cir. 2002) (applying *Kleppe* to determine whether Congress’s legislative or management power over public lands is plenary); *United States v. Utah Power & Light Co.*, 209 F. 554, 557 (8th Cir. 1913) (explaining that the federal government can control public lands as part of its protection over property that it could dispose of and “[h]aving the power of disposal and of protection, Congress alone can deal with the title, and no state law, whether of limitations or otherwise, can defeat such title” (quoting *Jourdan v. Barrett*, 45 U.S. 169, 185 (1846))).

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

In its October 2012 Term, the Supreme Court had occasion to quote Marshall's lessons regarding dicta from *Cohens v. Virginia* in a case particularly apt to the discussion of the federal lands cases here in question.<sup>216</sup> In *Arkansas Game & Fish Commission v. United States*, the government attempted to argue that a single sentence from a previous case, *Sanguinetti v. United States*,<sup>217</sup> resolved the issue of whether temporary flooding ever constitutes a "taking" of private property for Fifth Amendment purposes. In the 1924 *Sanguinetti* opinion, the Court had loosely stated "in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land."<sup>218</sup> In *Arkansas Game & Fish*, the government tried to argue that because the *Sanguinetti* Court used the word "permanent" that it meant to exclude "temporary" flooding from being deemed a physical invasion sufficient to be called a taking; and, therefore, it argued that the Court had already resolved that temporary floodings were indeed constitutional and did not trigger the Takings Clause.<sup>219</sup> This structure of argument sounds strikingly similar to the argument by TPLA opponents that because the Court has issued broad statements regarding the States' power to interfere with federal lands while the federal government holds those lands, it must follow that the Court has also already decided any and all other cases regarding States rights to federal lands including rights under a compact-based duty.

In *Arkansas Game & Fish*, the Supreme Court rejected the government's interpretation and attempted stretching of the sentence beyond its original, limited usage. The Court explained that the "sentence in question [from *Sanguinetti*] was composed to summarize the flooding cases the Court had encountered *up to that point*, which had unexceptionally involved permanent, rather than

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216. *See* Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012).

217. 264 U.S 146 (1924).

218. *Ark. Game & Fish Comm'n*, 133 S. Ct. at 520 (quoting *Sanguinetti v. United States*, 264 U.S 146, 149 (1924)).

219. *Id.* ("The Government would have us extract from this statement a definitive rule that there can be no temporary taking caused by floods.").

temporary, government-induced flooding. But . . . no distinction between permanent and temporary flooding was material to the result in *Sanguinetti*.<sup>220</sup> One can argue that, similarly, any public lands cases with broad language currently on the books state, at best, some generalities regarding *only* the limited state interference cases the courts have resolved up to this point, which have unexceptionally never dealt with the federal government's compact-based obligations to the States.

In *Arkansas Game & Fish*, the Court concluded that one word and one sentence from a previous case regarding matters not necessary to that previous case have no precedential weight. "We do not read so much into the word 'permanent' as it appears in a nondispositive sentence in *Sanguinetti*," the Court stated.<sup>221</sup> It continued by explaining that the Court will "resist reading a single sentence unnecessary to the decision as having done so much work," and quoted the "sage observation" of Chief Justice Marshall against the use of dicta as support.<sup>222</sup> One might say that those TPLA opponents who depend on isolated, nondispositive sentences from the public lands cases likewise ask those sentences to carry a load and labor far greater than the courts will allow.

Most of the cases decided across the years under the Property Clause have focused on the states' obligations and commitments under the compacts—such as the obligation not to intervene in Federal use or disrupt the sanctity of federal disposal agreements—but very little case law has examined the flip side of the compacts: the obligations and commitments agreed to by the federal government. A compact is not a one-way street.

The statements by courts that states cannot interfere in federal affairs *while* the federal government owns property do not necessarily say anything about whether the federal government has a duty to dispose of that property in some manner and at some point in

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220. *Id.* (emphasis added) (citation omitted).

221. *Id.*

222. *Id.*

time.<sup>223</sup> It is the latter duty that is embodied in the demand made by the State of Utah in the TPLA.

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

The State of Utah may have some additional theories to defend the TPLA beyond the compact-based duty to dispose. Primary among these theories would be those that rely on the Equal Footing Doctrine and general Federalism principles,<sup>224</sup> along with a narrow interpretation of the Property Clause power envisioned in language from the U.S. Supreme Court's 1845 decision in *Pollard v. Hagan*.<sup>225</sup>

The Equal Footing Doctrine and Federalism principles can serve two purposes for those advocating for the TPLA's validity. First, these principles could simply be employed as background principles that color an interpretation of the Enabling Act that finds the existence of a compact-based duty to dispose. Additionally, they could help support efforts to resolve any ambiguities in the Enabling Act. These policies generally weigh in favor of greater state autonomy and can therefore be used to help distinguish the

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223. Because the broad and lofty statements of federal powers regarding public lands have been made in cases analyzing whether states have interfered with federal prerogatives rather than whether the federal government has made a commitment that requires the federal government itself to take certain affirmative steps, that case law can be distinguished and at the very least should not be so over-stated as conclusive of the issues at play with the validity or constitutionality of the TPLA.

224. For a summary of these doctrines, see generally Touton, *supra* note 52. Consider also the Northwest Ordinance, proclaiming that:

[T]o provide also for the establishment of States, . . . and for their admission to a share in the federal councils on an equal footing with the original States

. . . .

. . . The legislatures of those . . . new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers . . . .

THE NORTHWEST ORDINANCE (1787), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 130–31 (Henry Steele Commager ed., 8th ed. 1968). On the importance of the Northwest Ordinance and its implications for current state claims to lands, see Patterson, *supra* note 73, at 67–72. *See also* UTAH ENABLING ACT, *available at* <http://archives.utah.gov/research/exhibits/Statehood/1894text.htm>. (“AN ACT to enable the People of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States.”).

225. 44 U.S. 212, 224 (1845) (“Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever.”).

inapposite cases where broad federal powers were stated to exist (when litigating compact-based *duties of noninterference*) from a compact-based *duty to dispose*. That distinction is discussed in the previous subsection. Such a duty to dispose is designed, like these principles, to limit federal power. Importantly, these Equal Footing and Federalism doctrines may not be necessary to find a duty to dispose on a compact theory of the Enabling Act, but these principles could help tip that theory towards the State's position if there is some reluctance to accept an interpretation finding a compact-based duty to dispose.

Separately and independently, the Equal Footing Doctrine and/or basic tenets of Federalism might create independent duties for the federal government requiring it to dispose of public land holdings wholly apart from (and perhaps in addition to) a compact-based duty to dispose arising from the Enabling Act.<sup>226</sup> There are strong arguments from the original understanding and purpose of the Equal Footing<sup>227</sup> and Federalism Doctrines<sup>228</sup> to support the State of Utah. However, the State will need to distinguish the TPLA from the broad precedents that seem to reject a narrower reading of the Property Clause adopted in *Pollard*—in much the same way this Article has described those cases should be distinguished in relation to the compact-based duty to dispose. Moreover, Utah will need to overcome the limitations on the breadth of the Equal Footing doctrine recognized in some courts.<sup>229</sup>

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226. Some of the critical articles evaluating these doctrines in relation to Western land claims against the federal government include, generally: Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 Pac. L.J. 693, 696 (1981); Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398 (1948); Natelson, *supra* note 91; Patterson, *supra* note 73, at 43 (“[The landholding relation] is one of the most basic foundations of our federalism, if, indeed, it is not the corner stone.”); Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 254 (1976) (“Every expansion of the property clause increases the power of the federal government at the expense of the states’ authority, and by the traditional jurisprudence of federalism that is cause for unease.”).

227. *See, e.g.*, Patterson, *supra* note 73, at 65 (discussing the Equal Footing Doctrine and its relation to Western state claims against federal land retention).

228. *See, e.g., id.* at 43 (“The landholding relation . . . is one of the most basic foundations of our federalism, if, indeed, it is not the corner stone.”).

229. *See, e.g.*, Nevada v. United States, 512 F. Supp. 166, 171–72 (D. Nev. 1981) (holding that the equal footing doctrine does not cover economic equality of states and that different impacts on different states were acceptable under the doctrine while reasoning that the broad language to the contrary in *Pollard* was dicta and citing *Light* to support the idea that it may sell or withhold from sale).

This Article will not fully analyze the strengths and weakness of these additional theories, but the argument in favor of the TPLA from *Pollard* will be *briefly* introduced here nonetheless. *Pollard* involved a question of whether the United States had the power to grant title to certain tidelands in the Mobile Bay in Alabama.<sup>230</sup> The Court was required to evaluate the effect of Georgia's cession of the Alabama territory to the United States, which was done in the first instance to help the United States satisfy Revolutionary War debts.<sup>231</sup> The Court's discussion of the issues led to a very limited interpretation of the Property Clause—an interpretation that would be, as one scholar said, “breathtaking in its scope” if it were to be controlling.<sup>232</sup> The Court reasoned that the federal government acted as a mere proprietor in relation to these lands, that it would have a duty to sell its holdings in Alabama if that state was to be on an equal footing with other states, and that the Property Clause merely “authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.”<sup>233</sup>

The *Pollard* opinion includes broad language that federal land holdings were always meant to be temporary and that the Property Clause gives no separate authority for the federal government to retain ceded Western lands.<sup>234</sup> The Court explained:

[T]he United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic, of the 30th of April, 1803, ceding Louisiana.<sup>235</sup>

As Rasband describes it, according to *Pollard*, the Property Clause “was not intended to give the United States authority to keep and regulate public lands. Instead, the Property Clause was

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

231. *Id.*

232. RASBAND ET AL., *supra* note 15, at 99.

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

234. *Id.* at 221.

235. *Id.*

something like temporary management authority pending the final sale and disposition of the public lands that would make Alabama a full sovereign.”<sup>236</sup> Rasband continues that, “[a]ccording to *Pollard*, the Constitution provided only one way for the United States to obtain complete authority over public land and that way was the Enclave Clause.”<sup>237</sup>

However, many cases after *Pollard* have taken a broad view of the Property Clause that is contrary to *Pollard*'s language. Rasband contends, in part correctly, that courts “were so easily able to dismiss *Pollard*'s narrow view of federal power to retain and regulate land within the states [because] it was dicta.”<sup>238</sup> Another argument, however, would be that *Pollard* might have some limited applicability to another set of cases—those like the TPLA—and that the cases dismissing *Pollard* have been distinguishable from the demand for disposal claims in the TPLA. Most courts, even when taking a broad view of the Property Clause, have not had to confront the issues of federal duties that exist to constrain its own federal powers discussed in *Pollard*; instead, those courts have only had to resolve issues of state interference with clear and non-duty-constrained federal powers. Any *Pollard*-based argument will need to distinguish those subsequent cases discussed in previous parts that call for a near-limitless Property Clause power.

There may be several ways to accomplish this task of differentiation, and this Article leaves the bulk of that research to

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236. RASBAND ET AL., *supra* note 15, at 98.

237. *Id.*

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

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

*Id.* at 101.

future projects. For now, consider just one example. A reasonable case for reconciling *Pollard* and cases like *Kleppe* can be made based on the following methodology adopted in a persuasive student comment.<sup>239</sup> First, “[t]he inconsistency between *Pollard* and *Kleppe* may best be resolved by recognizing the equal footing doctrine as a continuing limitation on the exercise of the property power, not merely as a limit on Congress’s power to impose conditions on the admission of states.”<sup>240</sup> As such, “*Pollard* clearly indicates that the federal government may not retain land when such retention gives it plenary power to displace state autonomy,”<sup>241</sup> that is it can exercise a power to acquire land or create enclaves it may do so and cannot create de facto enclaves by retaining rather than disposing of public lands.<sup>242</sup> “Accordingly,” the comment continues, “Congress may not use the property power to infringe the municipal sovereignty of the Western states, because such infringement would be the direct result of federal usurpation of a prerogative of the original states: ownership of unappropriated lands.”<sup>243</sup> Under this reasoning, *Pollard*’s broad language would still be operable even in a post-*Kleppe* world. As this case reconciliation theory concludes, “Congress can, of course, purchase land anywhere in the nation for governmental purposes and, under *Kleppe*, exercise broad powers over that land.”<sup>244</sup> As Natelson has noted, “[t]he Property Clause said nothing about retention. It authorized management and disposal.”<sup>245</sup> This is

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239. Touton, *supra* note 52, at 837–38.

240. *Id.* at 837.

241. *Id.*

242. *Id.* For similar arguments, see also Natelson, *supra* note 91, at 331 & n.9, 350–51.

243. Touton, *supra* note 52, at 837. Touton continues that such a theory would leave the federal government with substantial opportunities to still own and control land if it wishes:

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

*Id.* at 838.

244. *Id.* at 837–38. Touton wonders about what role the courts can play in forcing disposal, but concludes at the very least that courts “should not allow Congress to use the property power in such a way as to destroy ‘the constitutional equality of the States . . . essential to the harmonious operation of the scheme upon which the Republic was organized.’” *Id.* (quoting *Coyle v. Smith*, 221 U.S. 559, 580 (1911)).

245. Natelson, *supra* note 91, at 362. Natelson continues that “the Property Clause’s

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

Alternatively, the State (rather than distinguishing seemingly contrary case law from the wisdom of *Pollard*) may simply need to convince the courts to re-embrace the historical findings and dicta from *Pollard* that led to a narrow reading of the Property Clause in that case and lead the *Pollard* Court to describe a broad mandate for federal disposal of its land holdings; and, if that is the situation, the State will need to convince the court to reject some otherwise controlling precedents, if any, that embrace a broader Property Clause power.<sup>246</sup>

The Federalism and Equal Footing Doctrine arguments and similar constitutional claims are also sometimes characterized as “constitutional duty to dispose” cases. A *contract-based* duty to dispose must be considered separate and independent of any *constitutional* duty to dispose that some have advanced. For example, Natelson summarized that “textual analysis suggests that because all powers not granted were reserved and because the Constitution conferred no *independent* power to acquire or retain ‘other Property,’ the original meaning of the Constitution was that the federal government was required to dispose of any land not ‘necessary’ or ‘needful’ for enumerated purposes.”<sup>247</sup> To the extent there is a constitutional duty to dispose—something which is not resolved in this Article—it is also important to recognize that any compact between the federal government and a new state cannot alter that duty even by supposed consent of the state.<sup>248</sup>

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Management Power did not authorize ownership. It merely authorized management of land owned for other reasons.” *Id.* at 363. *See also* Patterson, *supra* note 73, at 61 (“A very important matter to notice is that when it was considered that the Federal Government would need the ownership of the soil for the exercise of its powers . . . specific provision was made in the Constitution for its acquisition with the consent of the legislature.”).

246. This approach, as well as a full assessment of its strength as a matter of law, would require a substantial amount of additional legal investigation and research beyond the scope of this Article.

247. Natelson, *supra* note 91, at 365 (“The founding generation’s constitutional values support the conclusion that Congress was required to dispose of all ‘other Property’ unneeded for enumerated purposes.”); Patterson, *supra* note 73, at 61–62 (“[T]here was no general grant of ownership of the soil that accompanied the grant of the powers of Congress.”).

248. *See* Patterson, *supra* note 73, at 67 (“A compact of Congress with a state is nothing more than a law of Congress. The Constitution cannot be changed by a compact between

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

*D. A Few Thoughts on Justiciability Concerns*

Aside from the arguments on the merits, should the Federal government fail to comply with Utah's demand in the TPLA, and should the State of Utah wish to sue on the theories that support that demand, the State will need to evaluate potential justiciability hurdles that might preclude enforcement in the courts.<sup>249</sup> Further analysis of this issue would be necessary should such a lawsuit come to pass.

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Congress and a state or all of the states.”). While there are certainly some very interesting, alternative courses of argument (such as this constitutional one, which separately identifies reasons Congress may be obligated to dispose of federal public lands), evaluating these arguments is a task best taken separate from this Article's focus.

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

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

*Light v. United States*, 220 U.S. 523, 537 (1911); *Kleppe v. New Mexico*, 426 U.S. 529, 536 (1976) (“[W]e must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress.”). Nevertheless, the courts have adjudicated disputes involving alleged state violations of compact terms, and *Kleppe* does recognize that “courts must eventually pass upon” Property Clause disputes. *Kleppe*, 426 U.S. at 536. Without further research and analysis, this Article takes no position on how the courts might or should deal with these justiciability issues.

However, even if the TPLA's enforceability were determined non-justiciable, the inability to use the federal courts to enforce a duty does not eviscerate the existence of the duty itself. The federal government would still have an independent obligation to live up to its commitments, but it would require political will on the part of legislators and pressure applied and accountability demanded by the electorate. Congress could still demonstrate that it is a reliable contractual participant in its deal making. Congress has a responsibility to respect the states and many questions of federalism require congressional commitment and self-adherence to its promises and respect for the limits in the Constitution's institutional structure. There are many obligations in our constitutional scheme that require political actors to abide by their oath and constitutional duties, irrespective of whether a court order can compel the action. As it is within Congress's power to dispose,<sup>250</sup> it could choose to do so and honor its promise and relieve itself of the indebtedness it owes to the states.

#### V. CONCLUSION

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

This Article has provided an overview of the legal arguments on both sides of the TPLA debate. As Utah continues along its TPLA path and as other states explore similar measures, each state's legislation should be analyzed in light of its own individual enabling act commitments and relevant constitutional provisions. Given many similarities in those documents across Western states, this Article should prove of some utility for the analysis of each state's transfer legislation as it emerges. In the end, there is a credible case that rules of construction favor an interpretation of the Utah Enabling Act that includes some form of a duty to dispose on the part of the federal government. Other theories may also support the TPLA demand. At a minimum, the legal arguments in favor of the TPLA

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250. *See supra* notes 112 through 130 and accompanying text.

are serious and, if taken seriously, the TPLA presents an opportunity for further clarification of public lands law and the relationship between the states and the federal government regarding those lands.