

A Legal Analysis of the Transfer of Public Lands Movement

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Introduction. On March 23, 2012, Utah's Governor signed into law the Transfer of Public Lands Act (TPLA).¹ The TPLA demands that the United States transfer title to federal public lands to Utah by December 31, 2014, turning approximately 30 million acres of federal public land and the resources they contain into state property.² Following on the TPLA's footsteps, the American Legislative Exchange Council enacted a model resolution demanding the conveyance of federal public lands to the states,³ and both the Republican National Committee⁴ and National Association of Counties⁵ passed resolutions supporting public land transfers. Idaho,⁶ Wyoming,⁷ Nevada,⁸ and Montana⁹ joined Utah, enacting legislation either calling for or studying a federal lands takeover.

Other efforts to enact transfer legislation show remarkable resilience, and interest appears to be growing. In Arizona, transfer legislation made it through both legislative chambers before falling to the Governor's veto pen.¹⁰ Unwilling to admit defeat, transfer backers then unsuccessfully attempted to amend the Arizona Constitution.¹¹ During 2013, the Colorado Legislature beat back two transfer bills,¹² New Mexico defeated five similar efforts only to thwart a similar effort the next year,¹³ and Washington State had to fight off a transfer bill.¹⁴ Following on its Transfer study bill, the Nevada Land Management Task Force recommended introducing state legislation requiring the federal government to convey federal public lands to Nevada.¹⁵

The frustration underlying the Transfer Movement stems from federal land ownership and management. In Utah, 65 percent of the land surface is federally controlled.¹⁶ Across the ten other contiguous Western states federal ownership ranges from 28 percent in Montana to over 83 percent in Nevada.¹⁷ Federal lands are not subject to state or local taxes,¹⁸ impacting revenue generation. Conflicts also arise where federal conservation lands surround state or private lands that are managed for revenue generation.¹⁹ These challenges notwithstanding, the Transfer Movement's legal strategy is not viable, and it does not address the underlying problems. This white paper examines and refutes the transfer effort's legal arguments.

Federal Ownership of Public Lands. The federal government's authority over public lands is set forth in the Property Clause of the United States Constitution, granting Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."²⁰ Utah and her sister states accepted the U.S. Constitution as the "supreme law of the land" as a condition of statehood.²¹ The Supreme Court has made clear that the Property Clause grants Congress an "absolute right" to decide upon the disposition of federal land and "[n]o State legislation can interfere with this right or embarrass its exercise."²² The power to make decisions regarding disposition includes the power to forego disposition and to retain property in federal ownership because, "it lies in the discretion of the Congress, acting in the public interest, to determine of how much of [its] property it shall dispose."²³ Furthermore, "inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use . . . and to prescribe the conditions upon which others may obtain rights in them."²⁴

More than a century ago, the Supreme Court upheld the nascent National Forest System, concluding that the federal government could retain public lands for broad national benefits, and that it could do so indefinitely. In *Light v. United States*,²⁵ a Colorado resident who had been enjoined from grazing cattle on National Forest System lands argued that Congress could not withdraw public lands from settlement without state consent. The Supreme Court disagreed, holding that the United States owns the public lands "and has made Congress the principal agent to dispose of property," which includes the right to "sell or withhold [public lands] from sale."²⁶ As an owner and sovereign, "the United States can prohibit absolutely or fix terms on which its property

can be used. As it can withhold or reserve the land it can do so indefinitely.²⁷ As the owner of the public lands, the United States holds the public lands “in trust for the people of the whole country,” not solely for the benefit of adjacent landowners.²⁸ Stated simply, Congress has discretion to decide how much of the public domain to retain and how much to dispose of. State legislation cannot displace that discretion.

Historical Context. European settlers obtained land title via conquest over American Indians.²⁹ In the Eastern United States, the thirteen colonies then obtained title from Great Britain following the Revolutionary War,³⁰ conveying the frontier to the federal government.³¹ In the West, the federal government obtained land title via treaties with foreign powers, most notably the Louisiana Purchase, the Oregon Compromise, and the Treaty of Guadalupe Hidalgo.³² The federal government, after obtaining this land with federal blood and treasure, created federal territories and authorized formation of the Western states.³³ Federal ownership of the West came first, and states cannot demand that the federal government “give back” that which never belonged to them.

The federal government did, however, make extensive land grants to new states in order to fund state governments and public institutions. The federal government, upon statehood, granted Utah the right to title to approximately 7.5 million acres of land, or 13.8 percent of the land within the state.³⁴ To put this in perspective, the federal land granted to Utah is roughly equivalent to all the land in Maryland and Delaware, combined.³⁵ All Western states fared similarly, with New Mexico receiving a high of 12.4 million acres of federal land while Washington State received a low of 3.0 million acres.³⁶ In total, the eleven contiguous Western states received over 70 million acres of federal land.³⁷ In addition to grants to states (which totaled over 328 million acres nation wide), the federal government conveyed 959 million acres directly to settlers, miners, railroads, and others.³⁸

The persistence of federal land ownership across the West was not for lack of effort. Between 1822 and 1884 the federal government made almost 408 million acres of public land available for sale,³⁹ of which just over 179 million acres were sold.⁴⁰ Other public lands were available for settlement, often free of charge, through homesteading and similar laws. As of 1905, almost 450 million acres remained open to settlement,⁴¹ with 418 million acres in the eleven contiguous Western states.⁴² Land remained in federal ownership because it was too difficult to settle and develop. Outside of valleys with reliable snowmelt fed rivers, consistent year-around water sources were often unavailable, and even where rivers and streams existed, rugged topography and the cost of developing reservoirs and irrigation systems limited agricultural opportunities. Until the 1920s and the birth of large federal irrigation projects, much of the West was simply too dry for productive agriculture and homesteading.

In the West, the federal government tried to convey more public land to the states but many states, including Utah, refused. In 1932 President Hoover convened a committee to investigate turning over the public domain to the states. Although Congress drafted the necessary legislation,⁴³ those bills died for lack of Western support.⁴⁴ States were reluctant to acquire the public domain because they feared they would lose federal reclamation funds, mineral revenue, and highway funds, while facing increasing administrative costs.⁴⁵

Federal policy, however, has always been about more than disposal. As early as 1785, Congress reserved federal interests in minerals found on federal land.⁴⁶ Withdrawals for what would become National Parks began in 1832,⁴⁷ and Yellowstone National Park was established in 1872.⁴⁸ In 1891, the President received authority to withdraw federally owned forest lands from disposal,⁴⁹ and Presidents Harrison and Cleveland promptly set aside 17.5 million acres of new Forest Reserves (which became

National Forests)⁵⁰ — all before Utah was invited to become a state. Such an evolutionary public land policy makes sense in a constantly changing nation. Growing urbanization, an expanding population, and a finite land base have demanded continued evolution in federal land policy.

More recently, the Federal Land Policy and Management Act of 1976 (FLPMA) unified 3,000 separate and often conflicting public land laws into a coherent package.⁵¹ FLPMA expressly requires that “the public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest.”⁵² Yet even under a policy favoring retention, the BLM managed to dispose of over 24 million acres of land between 1990 and 2010.⁵³

In sum, it was early federal policy to dispose of public lands, the federal government did dispose of millions of acres of public land, and it attempted to dispose of many more. Much of the land sought by Utah and its neighbors was open to settlement but bypassed in favor of greener pastures. The federal decisions to retain land in federal ownership, many predating establishment of Western states, are clearly within the federal government’s constitutional authority and not contrary to state enabling acts.

The Disclaimer Clauses. The enabling acts for all Western states contain similar language and pose a formidable barrier to transfer demands. Section III of the Utah Enabling Act states:

*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.*⁵⁴

This “forever” disclaimer was incorporated into, and remains part of, the Utah Constitution.⁵⁵ Furthermore, section XII of the Utah Enabling Act states that, “Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act.”⁵⁶ These disclaimer provisions are unambiguous and, as a matter of statutory construction, provide a clear measure of congressional intent.

Transfer proponents attempt to get around these disclaimers by contending that under section III, the federal government was obligated to “extinguish” title to additional lands, and that state disclaimers of rights to additional land are inoperative because the federal government failed to meet its extinguishment obligations. Traditional rules of statutory construction highlight four critical failings with this argument.

First, assuming that section III requires the federal government to extinguish title to unappropriated public lands, the provision does not require the federal government to extinguish title to *all* such lands. “Extinguish,” if read as referring to the immediately preceding language, applies to “*all* lands lying within said limits owned or held by any Indian or Indian tribes.”⁵⁷ “Extinguish,” if read to refer back to the first clause, as TPLA backers prefer, applies to “the unappropriated public lands lying within the boundaries thereof.”⁵⁸ “All” is notably absent from the clause the TPLA’s backers rely upon. Congress could have made the extinguishment language applicable to *all* unappropriated public lands just as it made the state’s disclaimer of title to Indian lands applicable to “*all* lands lying within said limits owned or held by any Indian or Indian tribes.” But Congress chose not to do so. According to the Supreme Court, courts “do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has

shown elsewhere in the same statute that it knows how to make such a requirement manifest.”⁵⁹ Transfer proponents’ interpretation cannot stand because it would defeat congressional intent.

Second, even if Transfer advocates can get around the section III disclaimer, they run headlong into section XII’s prohibition against land grants not “expressly provided for” in the act. The right to title to additional public land is not “expressly provided for,” and is therefore in conflict with congressional intent. Furthermore, Transfer advocates’ broad reading of section III risks making section XII superfluous, violating another cardinal rule of statutory construction.⁶⁰

Third, even if the federal government is obligated to dispose of public lands, that obligation does not require the federal government to *give* land to the states. Section XII of the Utah Enabling Act states that, “Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this Act.”⁶¹ Text obligating the federal government to convey away lands is “strictly construed against the grantee.”⁶² To the extent that the Utah Enabling Act is ambiguous, that ambiguity should be construed in the federal government’s favor. Congress should be held to retain discretion over the manner of disposal, and a strong case can be made that disposal should generate value for the American people. Identical provisions are found in the enabling acts for most Western states admitted during the same period.⁶³ If additional disposal is required, states may need to pay for the additional land, or lands may need to be conveyed to non-state entities.

Finally, the obligation to “extinguish” title refers to title to Indian lands, not to public lands. Following the Civil War, federal Indian policy favored land disposal. “There was no place left to remove the Indian, and there was little sympathy for the preservation of a way of life that left farmlands unturned, coal unmined, and timber uncut. Policymakers had determined that the old hunter way and new industrial way could not coexist.”⁶⁴ Under the General Allotment Act of 1887 (the Dawes Act), tribal members surrendered their shared interest in tribal reservations in return for individually owned land.⁶⁵ Upon allotment approval, the Secretary of the Interior issued patents to the Indian allottees, and these patents were held in trust for individual Indians.⁶⁶ Upon conclusion of the trust period, title to individual allotments was conveyed to individual Indian allottees.⁶⁷ Additional lands were held in common by the tribe; the remaining lands were declared “surplus,”⁶⁸ and made available for non-Indian settlement.⁶⁹

Allotment was an effective tool in extinguishing Indian land claims. “In 1887, when the Dawes Act provided for allotting tribal lands to individual Indians, the American Indian’s heritage in land totaled 138 million acres. Less than 50 years later, when the allotment policy was abandoned, only 48 million acres were left in Indian hands.”⁷⁰ Notably, the Dawes Act became law in 1887. None of the pre-1887 statehood enabling acts refer to “extinguishing” title to lands. However, the enabling acts authorizing admission of the next eight states, including Utah, all contain the extinguishment provision.⁷¹

Reading the Enabling Act and Utah Constitution’s “extinguishment” requirements as referring to Indian lands comports with congressional policy and Utah history. Prior to white settlement in 1847, Utah was home to five major Indian tribes, of which the Utes controlled the greatest expanse of territory.⁷² From the Ute’s initial reservation, 1,010,000 acres were added to the Uintah Forest Reserve (now the Uinta National Forest), 1,004,285 acres were opened to homestead entry, and thousands of acres were set aside for other purposes.⁷³ It is a well-established legal principle that statutes should be construed to affect congressional intent.⁷⁴ Thus “extinguish” should be read to refer to Indian land, not to ownership of public lands.

Federal Discretion to Sell Land. Transfer advocates next argue that “shall” in the Enabling Act’s ninth section obligates the federal government to dispose of federal public lands. Section IX reads:

That five per centum of the proceeds of the sale of public lands lying within said State, which *shall* be sold by the United States subsequent to admission of said State into the Union . . . shall be paid to the said State, to be used as a permanent fund.⁷⁵

Transfer advocates contend that “shall” is a term of obligation,⁷⁶ relieving the federal government of discretion to retain public lands. While “shall” is normally understood to be a term of obligation,⁷⁷ important exceptions exist. “Shall,” may also be “[u]sed before a verb in the infinitive to show . . . something that will take place or exist in the future.”⁷⁸ For example, “we shall arrive tomorrow.” This interpretation was recognized by legal scholars at the time of Utah’s admission to the Union and is reflected in legal dictionaries then in use.⁷⁹

Just as a will that included testamentary gifts to children that “shall be borne” creates a potential class of beneficiaries but does not obligate future births, “shall” in an enabling act indicates that at some future date, the federal government may sell public lands. If the federal government does sell more land, five-percent of the proceeds would go to the state, but the Utah Enabling Act does not obligate the federal government to dispose of public lands. Moreover, even if shall is interpreted as a term of obligation, at the turn of the 19th century, “shall” meant “[m]ay, when used against a government; and must, when used under other circumstances.”⁸⁰ The meaning attached to statutory terms at the time of their enactment controls, not the meaning some apply more than a century later.⁸¹

Moreover, the federal policy of retaining lands in federal ownership was firmly established well before Utah was offered statehood. For example, the federal government reserved mineral resources as early as 1785,⁸² as lands for Indian reservations since at least 1789,⁸³ and for National Parks and National Forests as already discussed — policies that the Supreme Court has repeatedly affirmed.⁸⁴ The states clearly knew that not all public lands would be given to them, and arguing that “shall” obligates more sales ignores this reality.

The Equal Footing Doctrine. Transfer supporters often refer to the equal footing doctrine as evidence of Western states’ right to title to federal public lands.⁸⁵ The equal footing doctrine holds that “all states are admitted to the Union with the same attributes of sovereignty (i.e., on an equal footing) as the original 13 states.”⁸⁶ The Utah Enabling Act, like the enabling acts of other Western states, guaranteed that Utah would be admitted on an equal footing with the existing states.⁸⁷

The doctrine traces its roots to the 1845 *Pollard v. Hagan* decision,⁸⁸ which involved competing claims to title to submerged lands, one originating with the state and the other from the federal government. Georgia, as one of the original thirteen states, obtained title to land via the Revolutionary War⁸⁹ and then conveyed title to its westernmost frontier, including the lands at issue, to the federal government. This conveyance required that the land be held in trust for newly created states. The federal government subsequently issued Mr. Pollard title to the submerged land at issue. Mr. Hagan contended that his title, which came from the State of Alabama, was superior. The Supreme Court held that since the original states held title to submerged lands as an attribute of sovereignty, and new states were admitted on par with the original states, Alabama received title to the submerged lands and the federal government had no

interest to grant to Mr. Pollard.⁹⁰ However, the equal footing doctrine does not apply to dry land⁹¹ or require an equal distribution of land to each state, as the 1996 case of *United States v. Gardner*⁹² makes clear.

In *Gardner*, the United States issued a permit to the Gardners to graze cattle on National Forest System lands. The Forest Service suspended the permit following a wildfire, providing time for vegetation to regrow. The Gardners resumed grazing prematurely, and the United States sued for damages to the range and to enjoin further grazing. The Gardners defended by challenging the federal government's title to the land, contending that after receiving the land from Mexico via the Treaty of Guadalupe Hidalgo, "the United States was entitled to hold the land in trust for the creation of future states, and was not authorized to retain the land for its own purposes."⁹³ The Gardners also argued that under the equal footing doctrine, "a new state must possess the same powers of sovereignty and jurisdiction as did the original thirteen states upon admission to the Union . . . [so] Nevada must have 'paramount title and eminent domain of all lands within its boundaries' to satisfy the Equal Footing Doctrine."⁹⁴

The court found the Gardners' arguments unavailing, holding that the "United States . . . was not required to hold the public lands in Nevada in trust for the establishment of future states. Rather, under the Property Clause, the United States can administer its federal lands any way it chooses, including the establishment of national forest reserves."⁹⁵ The *Pollard* doctrine applies only to submerged lands, not to the public lands acquired by treaty.⁹⁶ The court also noted that the equal footing doctrine "applies to political rights and sovereignty, not the economic characteristics of the states."⁹⁷ The doctrine is not intended to "eradicate all diversity among states but rather to establish equality among the states with regards to political standing and sovereignty."⁹⁸

The equal footing doctrine therefore does not require uniform disposal of federally owned lands. Rather, it guarantees that each state will have equivalent political rights. Retention of public lands in federal ownership is consistent with the equal footing doctrine, and as *Gardner* makes clear, the doctrine provides no tangible support for the Transfer Movement.

Conclusion. Utah's legal claims to federal land grow out of its statehood enabling act. Since similar statutory language is found throughout the Western states, a successful claim by Utah could fuel more claims and potentially end the public land system as we know it. Utah's claims, like those of its neighbors, are doomed to failure, however. The federal government has absolute control over federal public lands, including the constitutional authority to retain lands in federal ownership. Statutes authorizing Western states to join the Union required those same states to disclaim the right to additional lands and that disclaimer cannot be spun into a federal duty to dispose. Statehood enabling acts' guarantee of equal political rights also cannot be spun into a promise of equal land ownership. Furthermore, though statehood enabling acts guarantee states a share of the proceeds resulting from federal land sales, that guarantee is not an obligation to sell.

As a BLM spokeswoman recently said with respect to confrontations over public land management and Utah's antagonistic tone towards the federal government: "It is frustrating as we work to identify the best possible path forward for everyone when some of the entities we are trying to work with consistently feel the need to poke us in the eye and then complain we are not working with them."⁹⁹ This may be the larger lesson — that the Transfer Movement does more harm than good to the federal-state relationship needed for effective public land management.

Endnotes

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¹ H.B. 148, 2012 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-6-101 through -104 (Supp. 2014)).

² UTAH CODE ANN. § 63L-6-103(1) (Supp. 2014). Under the TPLA, "public lands" are essentially all BLM and U.S. Forest Service managed lands, excluding congressionally designated Wilderness Areas. National Parks and Monuments are not "public lands" under the Act, though the Grand Staircase-Escalante National Monument is considered public land and would therefore be transferred to the state. *Id.* at § 102(3). Other states' transfer legislation apply slightly different definitions of public lands.

³ American Legislative Exchange Council, Resolution Demanding that Congress Convey Title of Federal Public Lands to the States approved Jan. 28, 2013 *available at* <http://www.alec.org/model-legislation/resolution-demanding-that-congress-convey-title-of-federal-public-lands-to-the-states/>.

⁴ Republican National Committee, Resolution in Support of Western States Taking Back Public Lands, adopted Jan. 24, 2014 *available at* <http://www.gop.com/wp-content/uploads/2014/01/RESOLUTION-IN-SUPPORT-OF-WESTERN-STATES-TAKING-BACK-PUBLIC-LANDS.pdf>.

⁵ National Association of Counties, Adopted Resolutions, 2013 Annual Conference 21 (July 19-22, 2013) *available at* <http://www.naco.org/legislation/Documents/2013-Annual-Conference-Adopted-Resolutions.pdf>.

⁶ H.R. Con. Res. 22, 62nd Leg., 1st Reg. Sess. (Idaho 2013) (adopted) (demanding the federal government to "imminently transfer title to all of the public lands within Idaho's borders directly to the State of Idaho.").

⁷ H.R. 228, 62nd Leg., Gen. Sess. (Wyo. 2013) (adopted) (creating a commission to study the takeover of federal public lands).

⁸ A.B. 227, 77th Reg. Sess. (Nev. 2013) (enacted) (creating a commission to study the takeover of federal public lands).

⁹ S.J.R. 15, 63rd Reg. Sess. (Mont. 2013) (adopted) (creating a commission to investigate, among other things, ownership of and jurisdiction over U.S. Forest Service and BLM managed lands).

¹⁰ S.B. 1332, 50th Leg., 2d Reg. Sess. (Ariz. 2013); Governor Jan K. Brewer, Veto Statement for S.B. 1332 (May 14, 2013) (on file with author).

¹¹ Arizona Secretary of State, State of Arizona Official Canvas, 2012 General Election, November 7, 2012 *available at* <http://www.azsos.gov/election/2012/general/electioninformation.htm>.

¹² S.J.R. 13-031, 2013 Reg. Sess. (Colo. 2013), and S.B. 13-142, 2013 Reg. Sess. (Colo. 2013).

¹³ H.B. 102, 2014 Leg. Sess. (N.M. 2014); H.B. 292, 2013 Leg. Sess. (N.M. 2013); S.B. 404, 2013 Leg. Sess. (N.M. 2013); S.J.M. 53, 2013 Leg. Sess. (N.M. 2013); S.J.M 56, 2013 Leg. Sess. (N.M. 2013); and S.M. 93, 2013 Leg. Sess. (N.M. 2013).

¹⁴ H.B. 2268, 63rd Leg. 1st Reg. Sess. (Wash. 2014).

¹⁵ A REPORT OF THE NEVADA LAND MANAGEMENT TASK FORCE TO THE NEVADA INTERIM LEGISLATIVE COMMISSION ON PUBLIC LANDS: CONGRESSIONAL TRANSFER OF PUBLIC LANDS TO THE STATE OF NEVADA 1 (2014) (on file with authors).

¹⁶ BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, PUBLIC LAND STATISTICS 2013 7 (2014).

¹⁷ *Id.*

¹⁸ See *United States v. State Tax Comm'n*, 412 U.S. 363 (1973). As a condition on admission into the United States, all of the western states also agreed that federal property was nontaxable.

¹⁹ See e.g., *Utah v. United States*, 486 F.Supp. 995, 1002 (D. Utah 1979) (involving a dispute over the state's ability to access and develop state school trust lands which were located wholly within a federal Wilderness Study Area).

²⁰ U.S. CONST. art. IV, § 3, cl. 2. See also, *McKelvey v. United States*, 260 U.S. 353, 359 (1922) ("It is firmly settled that Congress may prescribe rules respecting the use of the public lands. It may sanction some uses and prohibit others, and may forbid interference with such as are sanctioned.").

²¹ See e.g., UTAH CONST. art I, § 3.

²² *Gibson v. Chouteau*, 80 U.S. 92, 99 (1872) (upholding claim to land by a federal patent holder against a competing claim reliant on state law).

²³ *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 336 (1936) (holding that where the United States holds title to a hydroelectric dam, rights to the water passing through the dam, and all features incident to power generation, the electricity produced "constitutes property belonging to the United States," and the Property Clause does not constrain Congress's power to determine the terms of property dispossession).

²⁴ *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917) (holding that the Enclave Clause does not require cession of state jurisdiction over federal lands and that the United States retains authority under the Property Clause).

²⁵ 220 U.S. 523 (1911).

²⁶ *Id.* at 536 (internal citations and quotations omitted).

²⁷ *Id.*

²⁸ *Id.* at 537.

²⁹ *Johnson v. McIntosh*, 21 U.S. 543 (1823). See also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1324 (1880).

³⁰ *Martin v. Waddell*, 41 U.S. 367, 410 (1842).

³¹ See generally PAUL W. GATES, HISTORY OF PUBIC LAND LAW DEVELOPMENT, ch. III (1968).

³² *Id.* at ch. V.

³³ *Id.* at ch. XII.

³⁴ See 28 Stat. 107, 109-10 (1894); see also, GATES, *supra* note 31, at 804 (quantifying land grants to states). Acreage figures vary slightly by source. States also hold title to lands lying below the ordinary high water mark of bodies of water that were navigable at the date of statehood. See *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987). Within Utah, sovereign lands total approximately 1.5 million acres and 2,200 miles of shoreline, including the bed of the Great Salt Lake, Utah Lake, Bear Lake, and portions of the Colorado, Green, Jordan, and Bear rivers. See UTAH CODE ANN. § 65A-10-1(1) (2011).

³⁵ See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2011, Table 358 – Land and Water Area of States and Other Entities: 2008, 223 (2012).

³⁶ GATES, *supra* note 31, at 804 (quantifying land grants to states).

³⁷ *Id.*

³⁸ PUBLIC LAND STATISTICS, *supra* note 16, at 5.

³⁹ GATES, *supra* note 31, at 802.

⁴⁰ *Id.*

⁴¹ *Id.* at 502.

⁴² REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE, 59th Cong. 1st Sess., H. Doc. 4958 5/2, 383 (1905).

⁴³ See S. 17, 72nd Cong., 1st Sess. (1932), S. 2272, 72nd Cong., 2d Sess. (1932), and S. 4060, 72nd Cong., 2d Sess. (1932).

⁴⁴ Don B. Colton, *Control of the Public Domain: A National or State Function?*, N.Y. TIMES, Apr. 10, 1932, pp. 1, 11 (“if I sense general Western sentiment correctly, and I have had an excellent opportunity to observe it, the West is not in favor of such legislation.”).

⁴⁵ UTAH CONSTITUTIONAL DEFENSE COUNCIL, REPORT ON UTAH’S TRANSFER OF PUBLIC LANDS ACT, H.B. 148, 17-19 (2012) (quoting George Dern, then Governor of Utah) (hereinafter CDC REPORT) *available at* <http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148.pdf>.

⁴⁶ An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territories, May 20, 1785, 28 J. CONT. CONG. 375, 378 (1785). See also, 1 Stat. 464, 466 (1796) (reserving “every other salt spring-which may be discovered, together with the section of one mile square which includes it, and also four sections at the centre [sic] of every township, containing each one mile square.”).

⁴⁷ 4 Stat. 505 (1832) (withdrawn lands became Hot Springs National Park in Arkansas).

⁴⁸ 17 Stat. 32-33 (1872).

⁴⁹ Withdrawals to create forest reserves, which later became national forests, occurred

under authority granted by 26 Stat. 1095, 1102-03 (1891), which is commonly referred to as the Forest Reserve Act.

⁵⁰ SAMUEL TRASK DANA AND SALLY K. FAIRFAX, *FOREST AND RANGE POLICY* 58 (2d ed. 1980).

⁵¹ See H.R. Rep. No. 94-1163 (1976) (“These laws represented and effectuated Congressional policies needed when they were passed. Many of them are still viable and applicable today [1976] under present conditions. However, in many instances they are absolute and, in total, do not add up to a coherent expression of Congressional policies adequate for today’s national goals.”).

⁵² 43 U.S.C. § 1701(a)(1) (2012). Note, FLPMA allows for the sale of federal public lands if the tract to be sold is difficult and uneconomic to manage as part of the public lands and unsuitable for management by another federal agency; the tract was acquired for a specific purpose and no further federal use for the tract exists; or disposal will serve important public objectives. 43 U.S.C. § 1713(a).

⁵³ ROSS W. GORTE ET AL., CONGRESSIONAL RESEARCH SERVICE, *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA* 16 (2012). Congress also continues to dispose of public land when doing so is in the public interest. See e.g., Pub. L. No. 112-138 (2012) (granting National Forest System lands to the town of Alta, Utah), Pub. L. No. 106-460 (2000) (granting land to the Landusky, Montana School District), and Pub. L. No. 103-346 (granting land within a National Wildlife Refuge to the City of Imperial Beach, California).

⁵⁴ 28 Stat. 107, 108 (1894) (emphasis added).

⁵⁵ UTAH CONST. art. III.

⁵⁶ 28 Stat. 107, 110 (1894).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See e.g., *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005).

⁶⁰ *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (“It is our duty to give effect, if possible, to every clause and word of a statute, rather than emasculate an entire section.”) (internal quotations and citations omitted).

⁶¹ 28 Stat. 107, 110 (1894).

⁶² *United States v. Alaska*, 521 U.S. 1, 35 (1997) (“The statute is a grant of federal property, and the scope of that grant must be construed strictly in the United States’ favor.”). See also, *N. Pac. Ry. Co. v. United States*, 330 U.S. 248, 257 (1947) (internal citations omitted) (“where there is any doubt as to the meaning of a statute which ‘operates as a grant of public property to an individual, or the relinquishment of a public interest,’ the doubt should be resolved in favor of the Government and against the private claimant.”) quoting *Slidell v. Grandjean*, 111 U.S. 412, 437 (1884).

⁶³ See 25 Stat. 676, 681 (1889) (Montana, Washington, North Dakota, and South Dakota); 25 Stat. 215, 217 (1890) (Idaho); and 26 Stat. 222, 224 (1890) (Wyoming).

⁶⁴ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2009).

⁶⁵ 28 Stat. 388 (1887). *See also, id.*

⁶⁶ 28 Stat. 388, 389.

⁶⁷ *Id.*

⁶⁸ 24 Stat. 388, 389-90, 25 U.S.C. § 348 (2012).

⁶⁹ COHEN, *supra* note 64, at § 1.04; *see also*, Marc Slonim, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 GONZ. L. REV. 517, 522 (2009).

⁷⁰ COHEN, *supra* note 64, at § 1.04.

⁷¹ 25 Stat. 676 (1889) (Montana, North Dakota, South Dakota, and Washington State), 28 Stat. 107 (1894) (Utah), 34 Stat. 267 (1906) (Oklahoma), 36 Stat. 557 (1910) (New Mexico), and 36 Stat. 568 (1910) (Arizona). Idaho and Wyoming were both admitted to the Union in 1890, after petitioning Congress for statehood.

⁷² A HISTORY OF UTAH'S AMERICAN INDIANS 2 (Forrest S. Cutch ed., 2000).

⁷³ ROBERT KEITER ET AL., LAND AND RESOURCE MANAGEMENT ISSUES RELEVANT TO DEPLOYING IN-SITU THERMAL TECHNOLOGIES, DEP'T OF ENERGY TOPICAL REPORT 113 (2011).

⁷⁴ *See e.g., Takao Ozawa v. United States*, 260 U.S. 178, 194 (1922), (“It is the duty of this Court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail.”).

⁷⁵ 28 Stat 107, 110 (1894) (emphasis added).

⁷⁶ Donald J. Kochan, *Public Lands and the Federal Government's Compact-Based "Duty to Dispose": a Case Study of Utah's H.B. 148—The Transfer of Public Lands Act*, 2013 B.Y.U. L. Rev. 1133, 1158-59.

⁷⁷ *See e.g., Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“The mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”).

⁷⁸ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2011). *See also* www.oxforddictionaries.com (defining “shall” as “expressing the future tense.”), www.merriam-webster.com (“shall” is “used to say that something is expected to happen in the future.”). *See also*, Salahuddin v. Mead, 174 F.3d 271, 274 (2d Cir. 1999) (“There is no doubt that ‘shall’ is an imperative, but it is equally clear that it is an imperative that speaks to future conduct.”).

⁷⁹ 1 FREDERICK STROUD, THE JUDICIAL DICTIONARY OF WORDS AND PHRASES JUDICIALLY INTERPRETED 722 (photo. reprint 2003) (1890).

⁸⁰ 1 ARTHUR ENGLISH, A DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW 728 (1899).

⁸¹ *See e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965) (attaching great weight to

contemporary interpretations).

⁸² An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territories, May 20, 1785, 28 J. CONT. CONG. 375, 378 (1785) (reserving to the United States “one third part of all gold, silver, lead and copper”). See also, 10 J. OF CONGRESS (Folwell’s Ed) 118, as cited in *United States v. Sweet*, 245 U.S. 563, 567 (1918).

⁸³ See Treaty with the Choctaw, 7 Stat. 21 (1786) (allocating lands “within the limits of the United States of America” and which are “under protection of the United States of America” to the Choctaw Nation).

⁸⁴ See e.g., *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), *Light v. United States*, 220 U.S. 523 (1911), and *United States v. Gratiot*, 39 U.S. 526 (1840).

⁸⁵ See e.g., *Kochan*, *supra* note 76, at 1182-83.

⁸⁶ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999).

⁸⁷ See 28 Stat. 107, 106 (1894).

⁸⁸ 44 U.S. 212 (1845).

⁸⁹ See Definite Treaty of Peace, U.S.-Britain, Sept. 3, 1783, 1 Malloy 586 at art. I (1910). See also, *Martin v. Waddell*, 41 U.S. 367, 410 (1842) (“when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.”).

⁹⁰ *Pollard v. Hagan*, 44 U.S. 212, 230 (1845).

⁹¹ *Scott v. Lattig*, 227 U.S. 229, 224 (1913).

⁹² 107 F.3d 1314 (9th Cir. 1996).

⁹³ *Id.* at 1317.

⁹⁴ *Id.* at 1318.

⁹⁵ *Id.*

⁹⁶ See e.g., *United States v. Oregon*, 295 U.S. 1, 14 (1935) (holding that title to dry lands did not pass to Oregon upon admission to the Union).

⁹⁷ *Id.* at 1319.

⁹⁸ *Id.* (citing *United States v. Texas*, 339 U.S. 707, 716 (1950)).

⁹⁹ Amy Joy O’Donoghue, *Battle Between Utah’s Rural Counties and BLM Intensifies*, DESERET NEWS, June 28, 2014 available at <http://www.deseretnews.com/article/865605994/Battle-between-Utahs-rural-counties-and-BLM-intensifies.html?pg=all>.