• Public Lands and the Federal Government's Compact-Based "Duty to Dispose" &
• A Legal Analysis and Case Study of Utah's H.B. 148 – The Transfer of Public Lands Act; Perspectives on Idaho's Opportunities

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Federal Lands Interim Committee

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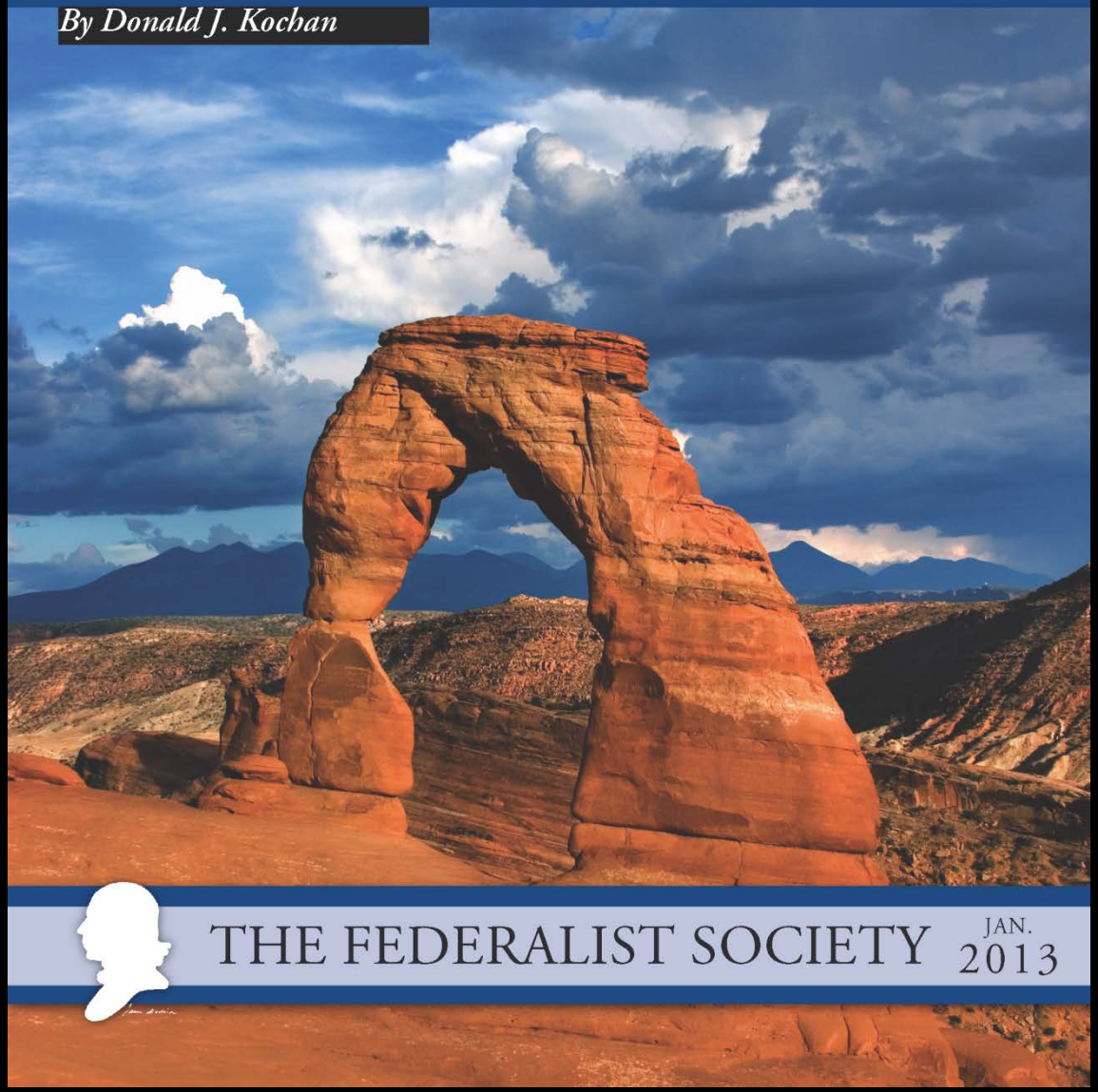
Boise, Idaho

A Legal Overview of Utah's H.B. 148 — The Transfer of Public Lands Act

By Donald J. Kochan



THE FEDERALIST SOCIETY JAN. 2013

A Legal Overview of Utah's H.B. 148 – The Transfer of Public Lands Act

Donald J. Kochan

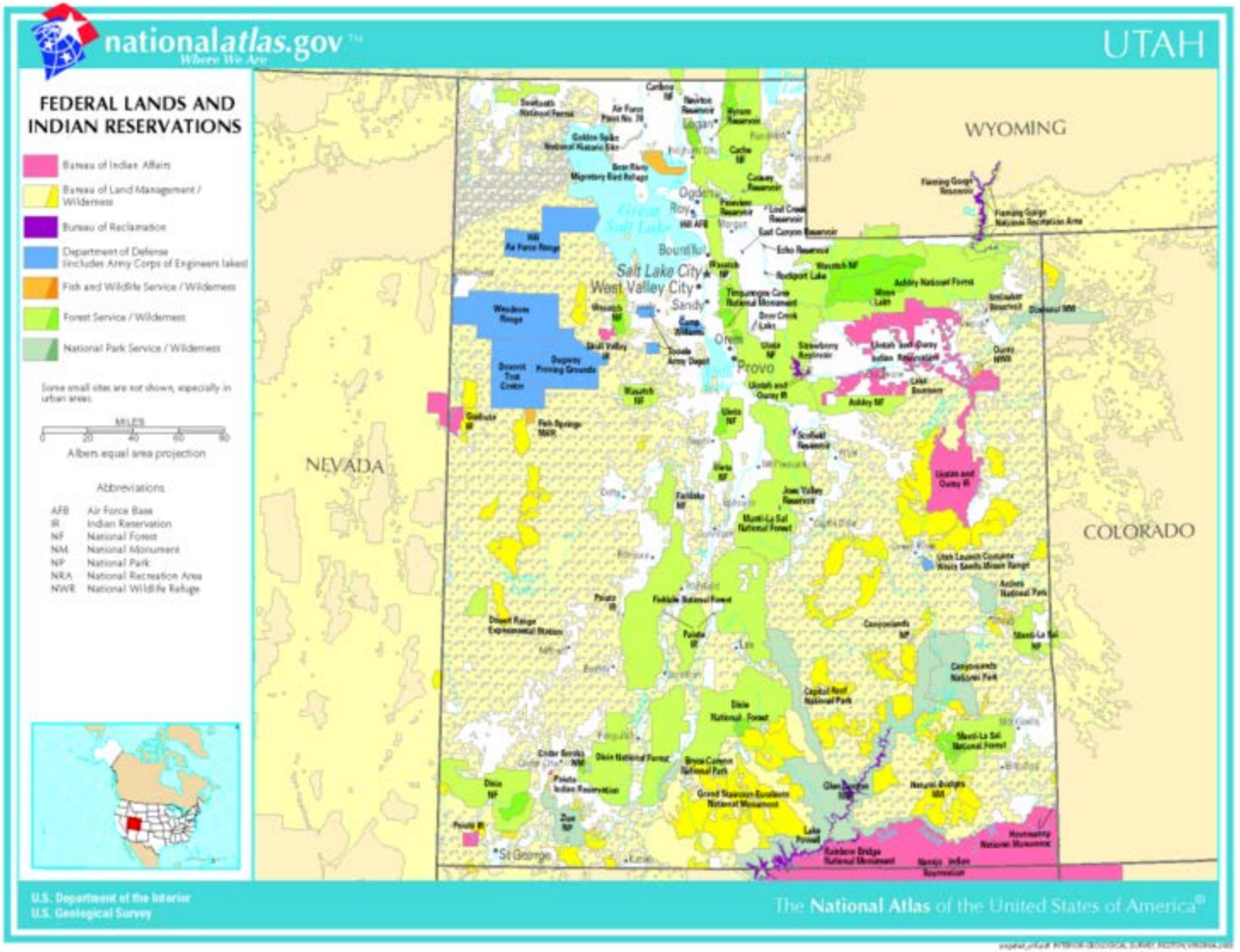
Abstract:
Recent legislation passed in March 2012 in the State of Utah – the "Transfer of Public Lands Act and Related Study," ("TPLA") also commonly referred to House Bill 148 ("H.B. 148") – has demanded that the federal government, by December 31, 2014, "extinguish title" to certain public lands that 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 our nation's lands are owned by the federal government and 63.9 percent of the lands in Utah are owned by the federal government.

This White Paper 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, as 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 White Paper takes a first step into that discussion.

Full Abstract and Paper Available at: http://ssrn.com/abstract=2200471


nationalatlas.gov
Where We Are
UTAH
FEDERAL LANDS AND INDIAN RESERVATIONS
Bureau of Indian Affairs
Bureau of Land Management / Wilderness
Bureau of Reclamation
Department of Defense (includes Army Corps of Engineers lakes)
Fish and Wildlife Service / Wilderness
Forest Service / Wilderness
National Park Service / Wilderness
Some small sites are not shown, especially in urban areas.
MILES
0 20 40 60 80
Albers equal area projection
Abbreviations
AFB Air Force Base
IR Indian Reservation
NF National Forest
NM National Monument
NP National Park
NRA National Recreation Area
NWR National Wildlife Refuge
WYOMING
NEVADA
COLORADO
Salt Lake City
West Valley City
Sandy
Ogden
Provo
St George
U.S. Department of the Interior
U.S. Geological Survey
The National Atlas of the United States of America

Property Clause

- The major legal arguments against the TPLA rest on broad interpretations of the Property Clause in the U.S. Constitution Article IV, Section 3.

"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."

U.S. CONST., Art. IV, Sec. 3.

The Enclave Clause

- U.S. Constitution, Article I, Section 8:

"The Congress shall have power . . . To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;-"

Commitments Separately Made in Enabling Acts, Acts of Admission, and Similar Documents

Utah's TPLA (H.B. 148)

Three basic parts codified in Utah Code §§ 63L-6-101 through 104:

(1) the *scope* part explaining the breadth of the TPLA by defining terms and identifying exceptions;

(2) the *demand* part; 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.

Scope

"'Public lands' means lands within the exterior boundaries of [Utah] *except,*" . . .

§ 63L-6-102 (emphasis added).

Excepted, to one degree or another: private lands, Indian lands, lands held in trust for the state, lands reserved for state 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.

Demand

- The heart of the TPLA is in the "demand" part:

"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."

Utah Code § 63L-6-103 (1) (emphasis added).

Planning and Management Provisions

- "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."

Utah Code § 63L-6-103(2)

(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 had (and as if) the United States sold the property itself.)

Planning and Management Provisions

- Uncodified Section 5 of H.B. 148:

  calls for the creation of a Utah Constitutional Defense Council ("CDC") study.

  See H.B. 148, Sec. 5 (Enrolled Copy (Mar. 16, 2012)), available at http://le.utah.gov/~2012/bills/hbillenr/hb0148.pdf.

- The CDC published both a "case statement" and a separate "report" in November 2012.

Constitutional Defense Council, *A Report on Utah's Transfer of Public Lands Act: H.B. 148 – Presented to Utah State Legislature Interim Committees Natural Resources, Agriculture and Environment, and Education*, Nov. 2012 [hereinafter "CDC Nov. 2012 Report"], available at http://utah.gov/ltgovernor/docs/CDC-AGLandsTransferHB148.pdf.

2013 Actions in Utah

- SJR 13 (March 2013):

"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."

See http://le.utah.gov/~2013/htmdoc/sbillhtm/SJR013.htm.

Reiterates many "whereas" clauses in Utah's House Joint Resolution 3 of March 16, 2012, and noticeably also adds substantial language regarding the "expectations" of the State of Utah when entering into the UEA consistent with the contract-based elements of a legal duty to dispose articulated in the White Paper).

- H.B. 142 (April 2013):

"requires the Public Lands Policy Coordinating Office to conduct a study and economic analysis of the transfer of certain federal lands to state ownership." Several political subdivisions within Utah also continue to consider resolutions supporting the TPLA and several have so far passed such statements of approval and support.

See http://le.utah.gov/~2013/htmdoc/hbillhtm/HB0142.htm.

States Recently Considering Legislation or Other Action Related to Transfers of Public Lands

- Utah
- Arizona,
- Colorado,
- Idaho,
- Montana,
- Nevada,
- New Mexico
- Wyoming

Idaho Legislation to Date

- HCR 221 – a concurrent resolution – after passing the House in March 2013 was finalized with passage in the Senate in April 2013,

"Stating 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."

See http://www.legislature.idaho.gov/legislation/2013/HCR021.htm.

- HCR 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."

http://www.legislature.idaho.gov/legislation/2013/HCR022.htm (emphasis added).

  - The resolution also 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.

HISTORICAL ANTECEDENTS TO THE 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 to the very formation of the new states across the decades after the Revolutionary War.

- The TPLA/H.B. 148 is
  - yet another – although arguably distinguishable – chapter in federal-state tensions and battle for control of the public lands.

- This Presentation will make no attempt to provide a survey of these disputes and instead only acknowledges the existence of longstanding and enduring conflicts.

1915 Utah Resolution

- 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. That statement, titled Senate Joint Memorial 4, read, 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 of the State and to the strength of the nation. "

Utah S.J.M. No. 4, *A Memorial Asking for a More Liberal Policy in the Disposition of the Public Domain and Urging that the Natural Resources of the State of Utah be Made Available for Development* (Mar. 15, 1915), *excerpted and reprinted in* CDC Nov. 2012 Report, at 17.

Move Toward Retention and FLPMA

- Across the 20th century, there were increasing legislative and regulatory movements toward federal retention of public lands
- 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."

- FLPMA, §102(a)(1); 43 U.S.C. § 1701(a)(1).

Consistent with FLPMA

- FLPMA cannot trump a pre-existing promise; but even if FLPMA is controlling --

- Complying with Demand can even be consistent with FLPMA which allows disposal when --

"it is determined that disposal of a particular parcel will serve the national interest"

- Fulfilling Promises and Respecting Agreements Serves the National Interest.

“Sagebrush Rebellion”

- 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
- 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.”

"Sagebrush Rebellion" Efforts, and Distinguishing *Nye*

- A variety of legal maneuvers were tried
- None looked exactly like the TPLA
- Nevada passed a law declaring ownership of certain federal lands
  - invalidated by a federal district court
  - TPLA distinguished: 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.

- *See* United States v. Nye County, 920 F. Supp. 1108 (1996)
  - applying broad Property Clause power to reject Nevada's claims of title using Equal Footing theory.
  - In *Nye*, 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.
  - the *Nye* case is only the opinion of one district court and therefore has limited precedential effect.

A Legal Analysis of Utah's TPLA

Major Legal Arguments

- *Compact-Based Duty to Dispose*

- Equal Footing Doctrine,
- General Principles of Federalism
- A *Pollard*-based interpretation of the Property Clause

AN ENFORCEABLE COMPACT/CONTRACT THEORY OF THE UTAH ENABLING ACT ("UEA") WITH A FEDERAL "DUTY TO DISPOSE"

- Utah's Enabling Act ("UEA") establishing its statehood was approved July 16, 1894.

  UTAH CODE ANN., ENABLING ACT, available at http://archives.utah.gov/research/exhibits/Statehood/1894text.htm.

- Utah ratified its new constitution on November 5, 1895.

  See UTAH CODE ANN., 1953, CONST.

- Where required by the UEA, the Utah Constitution codified certain parts of the UEA, including relevant portions of UEA Section 3.

  UTAH CODE ANN., 1953, CONST. ART. 3.

Summary of Duty to Dispose

From the White Paper:

"The question becomes whether: (1) 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 would timely allow the state to obtain/receive/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. Upon disposal, the state can also otherwise obtain the benefits that flow to the State generally from private ownership and investment that is precluded while retained in federal control."

Bilateral Agreements

- Agreements matter; and the parties to them should faithfully and diligently adhere to their promises.
- This is true whether such agreements are between private parties, private parties and the government, or two governments.
- Longstanding precedents support the theory that the UEA is a bilateral compact that should be treated like it is, and interpreted as, a binding contractual agreement.

Solemn Compacts Between Sovereigns

- Importance of federal commitments made at entry into the Union and the inability for Congress after giving 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." And that proposition applies a fortiori [with even greater force] where virtually all of the State's public lands . . . are at stake.

Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 176 (2009).

- Promises in Enabling Acts are **"'solemn agreement[s]' which in some ways may be analogized to a contract between private parties."**

Andrus v. Utah, 446 U.S. 500, 506 (1980).

Solemn Compacts (Cont.)
Powell, Although Dissenting, Explains Concept Accepted by Majority in Andrus

- Justice Powell made note of the relationship between federal retention of lands and less tax revenue, and he then also recognized the agreements within Utah's Enabling Act and others like it "were solemn bilateral compacts between each State and the Federal Government."

Andrus at 522-23 (Powell, J., dissenting).

- Powell later in his opinion further describes the "bilateral" nature of the compact.

"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."

Andrus at 539.

- Powell explained that, in return, the State agreed not to tax the federal lands and agreed to use the lands granted for public education purposes in perpetuity. Both parties had corresponding rights and duties.

Remedy for Breach

- In *Andrus*, the U.S. Supreme Court also recognized that these compacts anticipate remedies for breach – even against the federal government if it fails to perform duties arising under the compact.

Andrus at 506-08.

- In *Andrus* the Court found an explicit stipulation of the remedy within the compact, 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 it were to find such a duty; and 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.

Andrus, 446 U.S. 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.

Utah UEA Sections 3 and 9

- 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.

Rules of Construction – Give Effect to *Whole* Agreement

- 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."

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

- "For 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."

  Black v. U.S., 91 U.S. 267, 269 (1897).

- E. ALLAN FARNSWORTH, CONTRACTS §7.11, at 516 (1990) (explaining that courts favor an interpretation that "gives meaning to the entire agreement").

UEA Section 3

- UEA 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 lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use;

UTAH CODE ANN., ENABLING ACT. §3 (emphasis added).

Idaho's Corresponding Provision

August 6, 1889 Territory Ordinance adopting the Constitution of the United States (also Idaho Constitution, Art. XXI, section 19):

SECTION 19. RELIGIOUS FREEDOM GUARANTEED — DISCLAIMER OF TITLE TO INDIAN LANDS. It is ordained by the state of Idaho that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. **And the people of the state of Idaho do agree and declare that we 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 Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be 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 the lands belonging to citizens of the United States, residing without the said state of Idaho, shall never be taxed at a higher rate than the lands belonging to the residents thereof. That no taxes shall be imposed by the state on the lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use.** And the debts and liabilities of this territory shall be assumed and paid by the state of Idaho. That this ordinance shall be irrevocable, without the consent of the United States and the people of the state of Idaho.

Meaning of “Forever Disclaim . . .”

- Popular Argument is that Section 3’s “forever disclaim” language ends the debate
- It must be read in context.
- 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).

Context Matters

- ***The interpretation of any written instrument must be informed by surrounding words and all sections.***

- 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," Black v. U.S., 91 U.S. 267, 269 (1897), and
  - "a single sentence," Miller v. Robertson, 266 U.S. 243, 251 (1924), –

  approaches expressly rejected under the rules of construction recognized in the courts and supported by U.S. Supreme Court precedents explaining precisely such rules.

Rules of Construction

- 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 (emphasis added).

Rules of Construction

- Ascertaining Intent and Effect to the Whole in Context:

"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.'".

Secura Ins. v. Horizon Plumbing, Inc.,
670 F.3d 857, 861 (8th Cir. 2012)

Why "Disclaim" Language is Overstated by Critics

From the White Paper:

"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 – a 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 (and with an understanding that respects the expectation by the State that the federal government would dispose of such lands) so that both a percentage of the proceeds from the sales would be shared with the State and the State thereafter would have the capacity to tax such lands when disposed into private hands. Utah's claim seems more than reasonable in light of these promises in Section 9."

Federal Government as Neutral Broker with Clean Title

- Consider 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.
  - The UEA resolved that and sent a signal to would-be buyers of the world that the uncertainty of title had been resolved.
  - The State in return also gave a promise that added further certainty to the buyers – the State agreed it did not have the power to interfere with the process of disposal or with rights granted through disposal.
  - 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.

Necessity of Giving Clean Title

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 they received a percentage of such sales elsewhere in the UEA, particularly Section 9.

Utah's UEA Section 9

Section 9 of the UEA provides:

SEC. 9. That *five per centum of the* ***proceeds of the sales*** *of public lands* lying within said State, ***which shall be siold*** 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.

UTAH CODE ANN.,
ENABLING ACT. §9 (emphasis added).

Idaho's Corresponding Provision

Idaho Act of Admission:

§ 7. Public lands – Sale – Per cent paid state for school fund. – Five per cent 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.**

26 Stat. L. 215, ch. 656, am. 1998,
P.L. 105-296 (emphasis added)

Impact of Section 9: *Reliance and Expectations*

- Section 9 entitles the State to proceeds from disposals.

- This means that the State is invested in and *relying upon the existence of disposal*

- 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 property disposed of.

Reading Sections 3 & 9 Together

- From the White Paper:

"Basic rules of construction require harmonization of Section 3 with Section 9. 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. <u>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</u> (and in anticipation therefore that actual sales would occur so that there was a cut to be had) <u>yet intended no corresponding obligation</u> that the federal government actually dispose of such lands."

Rules of Construction -- Harmonization

"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.'"

Southwestern Bell Telephone Co. v. Fitch,
801 F.Supp.2d 555, 566-67 (S.D. Texas 2011).

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."

Nicolson Pavement Co. v. Jenkins,
81 U.S. 452, 456 (1871).

"In the construction of all instruments, to ascertain the intention of the parties is the great object of the court"

Mauran v. Bullus,
41 U.S. 528, 534 (1842)

Further Support: “Shall be Sold . . .”

- This interpretation is further strengthened by the words in Section 9 proclaiming that the lands ceded in Section 3 “*shall be sold.*”

- Disposal was not only anticipated but demanded and expected as a condition of the agreement.

- This mandatory language removes from the federal 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 which 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.

“Benefit of the Bargain”

- 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, at 4.

Utah Sections 3 and 9: The Language Together

"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 lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; "

UTAH CODE ANN., ENABLING ACT. §3 (emphasis added

"SEC. 9. That *five per centum of the* ***proceeds of the sales*** *of public lands* lying within said State, ***which shall be siold*** 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."

UTAH CODE ANN.,
ENABLING ACT. §9 (emphasis added).

Idaho Sections 19 (Constitution) and 7 (Admissions Act): The Language Together

- Section 19
  - Temporary nature “until”
  - sets the expectation
- Section 7
  - The consideration and expected return for ceding lands
  - State thinks it will eventually get funds for schools because it believes the federal government will dispose of these lands
  - If the federal government was never required to sell, would the state have agreed to this deal? If they knew there was a chance that the federal government could unilaterally act in a manner that would ensure that no funds would go to schools under Section 7?

Rules of Construction – Benefit of the Bargain

- 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:

"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."

E. ALLAN FARNSWORTH,
CONTRACTS §7.11, at 517 (1990).

Rules of Construction – Benefit of the Bargain

- 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.

- 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.

BREAK

The State of Utah's Expectation

From the White Paper:

"Utah "assented" to the UEA with knowledge of the federal government's "general purposes" of disposal and 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. Finding 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), and unjustly give the federal government a greater benefit than that for which they bargained. Again, the parties' interests within the agreement require the existence of some duty to dispose on the part of the federal government."

Rules of Construction – Interpretation in Light of Surrounding Circumstances

- 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.

- At the Founding, some have called it a "universal expectation that the lands would, in fact, be disposed of."

Robert G. Natelson,
Federal Land Retention and the Constitution's Property Clause: The Original Understanding,
76 COLORADO L. REV. 327, 371-72 & n. 208 (2005)

Disposal Ethic

- 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."

C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding,* 28 TEXAS LAW REVIEW 43, 62 (1949)

Disposal Ethic

- 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."

18 JOURNALS OF THE CONTINENTAL CONGRESS 915-16 (1780) (congressional resolution of October 10, 1780).

Near Universal Agreement on Disposal Ethic at Founding

- Even those that 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," and concedes further that "the delegates would have opposed such retention if it had been foreseen."

Eugene R. Gaetke,
Refuting the "Classic" Property Clause Theory,
63 N.C. L. REV. 617, 638 (1985).

Rules of Construction – Interpret in Light of Surrounding Circumstances

- The Disposal Expectation continued through the 19th century and surrounded the circumstances of, and thereby colored the expectations within, the UEA and its drafting.

- Utah and Idaho became States during this disposal era in public lands law.

- The U.S. Supreme Court has explained tha:t
  - **"The 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.*"**

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

- These expectations, therefore, must be considered in interpreting whether one can find a duty to dispose in the UEA.

Rules of Construction – Interpret in Light of Surrounding Circumstances

- 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.

"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"

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)

- **"The overarching principle of contract interpretation is that the court is free to look to all of the relevant circumstances surrounding the transaction."**

See E. ALLAN FARNSWORTH, CONTRACTS §7.10, at 511 (1990)

Rules of Construction – Intent and State of Affairs

- 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, and it lends support to an interpretation, of the *whole* document, that mandates disposal.
- The Supreme Court has described the rule that courts must 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 that 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.*"

Chesapeake & Ohio Canal Co. v. Hill,
82 U.S. 94, 100, 103 (1872) (emphasis added).

Rules of Construction – Effecutuate Known Purposes of Parties Especially Where Assent Was Dependent on Expected Understanding

- The State of Utah entered into the compact with an expectation. The federal government knew of that expectation. These are relevant factors in interpreting the contract to protect the parties.

"[i]t seems proper to regard one party's assent to the 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."

E. ALLAN FARNSWORTH, CONTRACTS §7.10, at 513 (1990).

The Persuasive Interpretation of Compacts by Andrew Jackson

- I refer you to the White Paper for a more detailed discussion of this point.

- Andrew Jackson described the commitment to dispose 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." 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."

- Jackson concluded his veto message with a strong statement 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" the property that the federal government cannot, or no longer has a financial need to, dispose of.

The Persuasive Interpretation of Compacts by Andrew Jackson

- 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."

- He stressed that:

"It 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."

- These statements by Jackson 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.

Utah's CDC Report

"Legal justification for the transfer of the public lands into State ownership is based on the history of federal land policy,"

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."

Utah's CDC Report

- 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."**

- 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."

- Furthermore, the CDC explained 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."

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

From the White Paper:

"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."

Property Clause

- The major legal arguments against the TPLA rest on broad interpretations of the Property Clause in the U.S. Constitution Article IV, Section 3.

"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."

U.S. CONST., Art. IV, Sec. 3.

The Enclave Clause

- U.S. Constitution, Article I, Section 8:

"The Congress shall have power . . . To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;-"

The Underappreciated Importance of Understanding Dicta

- Precedent's Importance in Our System
- The Meaning of Precedent and Dicta are Critical to the Effective Functioning of Our Court System
- Courts Sometimes Speak More Broadly Than Necessary to Decide Cases; Dicta is not binding
- Only Precedent is Binding
- But, Many Lay Observers Like to Grab the "Big," Broad Lines From Court Opinions and Apply Them in Policy Debates When They are Nearly Meaningless in Law

What is Dicta?

Classic statement regarding the definition of dicta and its non-controlling nature comes from Chief Justice John Marshall in the seminal case of *Cohens v. Virginia*:

"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."

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.).

What is Dicta?

Black's Law Dictionary defines obiter dictum – which it notes is coterminous with dictum:

"A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential."

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

- This concept of "extra" or "unnecessary" language is ever present in most of the cases discussed by those opposing TPLAs.
- Surplus language and positions taken that are broader than necessary to decide a case are beyond the holding and therefore not precedential.

What is a Holding? Dicta?

"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*."

EUGENE WAMBAUGH,
THE STUDY OF CASES § 13, at 18-19
(Boston, Little, Brown, & Co., 2d ed. 1894)

"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."

Michael Abramowicz & Maxwell Stearns,
Defining Dicta, 57 STANFORD LAW REVIEW 953, 1065 (2004-2005)

Why Do We Care What is Dicta?

- Dicta involves statements regarding points of law not thoroughly evaluated
  - 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.
  - Indeed, it is beyond the power of a court to decide more than the case or controversy before it, further supporting the conclusion that dicta lacks authority.
  - The non-controlling effect of 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.

Why Do We Care What is Dicta?

The Supreme Court has 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."**

Cohens v. Virginia,
19 U.S. (6 Wheat.) 264, 399-400 (1821) (Marshall, C.J.).

The System of Precedent Has Rules

- "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."

David Klein & Neal Devins,
Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making,
54 WM. & MARY L. REV. 2012, 2027 (2013) ().

Why Do We Care What is Dicta?

A "court 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."

KARL LLEWELLYN,
THE CASE LAW SYSTEM IN AMERICA 14
(Paul Gewirtz ed., Michael Ansaldi trans., 1989).

"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."

Michael Abramowicz & Maxwell Stearns,
Defining Dicta, 57 STANFORD LAW REVIEW 953, 1021-1022.

The Claims of "Unconstitutionality" Under Existing "Precedents" is Unfounded

The Claims in the "Legislative Review Note" for Utah's H.B. 148 as An Example

- The Legislative Review 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."

The Claims in the "Legislative Review Note" for Utah's H.B. 148 as An Example

- 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

  Utah Office of Legislative Research and General Counsel, Legislative Review Note (Appended to H.B. 148 as Introduced. Feb. 4, 2012, available at http://le.utah.gov/~2012/bills/hbillint/hb0148.pdf.

- After citing the Property Clause, the Legislative Review Note relies on statements in *United States v. Gratiot*, *Kleppe v. New Mexico*, and *Gibson v. Chouteau*. 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."

- **The Cases Must Be Examined Beyond Broad Sentences Plucked From Dicta Within the Opinions**

- **At the very least, an analysis in light of our understanding of precedent versus dicta reveals that these cases HAVE NOT DECIDED THE ISSUE of the TPLA's constitutionality, or otherwise its legitimacy or legal validity.**

- **Admittedly, the courts have also not expressly embraced the compact based duty to disclose under the exact facts of the TPLA either. There are open questions. But those who try to shut down the debate with dicta soundbites are misguided and not on sound legal footing.**

- Let’s Look at a Few Cases to Demonstrate the Point.

- All of the Cases Cited in the Parsons, Behle & Latimer Memorandum Can Be Similarly Distinguished

United States v. Gratiot (S.Ct. 1840)

- *Gratiot's* 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;
  - it also stands for the proposition that property rights created prior to statehood could not be upset by a new state.

- Thus, what does *Gratiot* NOT show?
  - 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.
  - This "without limitation" language is only dicta unnecessary to resolve the case. And as the facts have no similarity to the questions regarding the TPLA, the *Gratiot* case seems of little value in any legal controversy over the TPLA. *Gratiot*, 39 U.S. at 524.

Further Lessons on NonSupportive Propositions as Dicta

"nonsupportive 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"

Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STANFORD LAW REVIEW 953, 1029 (2004-2005).

Kleppe v. New Mexico (S.Ct. 1976)

- *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.

  Kleppe, 426 U.S. at 546.

- 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.

Kleppe (cont.)

- 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).
- 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.
- There was no need to grant Congress some truly "unlimited" Property Clause power to reach this holding in *Kleppe*.
- 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.

Kleppe (cont.)

- 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 state law over burros that was in conflict.
- That holding says nothing of whether the state can demand that the federal government honor its promises and perform its duties.
- It says nothing about when and whether, if the state is the beneficiary of those promises, there can be an enforceable demand for adherence.

Gibson v. Chouteau (S.Ct. 1871)

- The Legislative Review Note also quoted at length from the U.S. Supreme Court's 1872 decision in *Gibson v. Choutou*, claiming "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, 99 (1872).

- **The Legislative Review Note and most opponent arguments seem to focus on the claim in *Gibson* that "No State legislation can interfere with this [Property Clause] right or embarrass its exercise."**

Gibson (cont.) – The Case is About Duty of Non-Interference With Disposal

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

- 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."

- A State cannot interfere with U.S. ownership or interfere with disposal – such as by adversely affecting the buyers' market for government property by creating discriminatory or disadvantaging rules on purchasers of federal government disposed property.

Reminder re Dicta

- *Gibson* 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 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, like here when a court says more than what is necessary to resolve the case.

Irvine v. Marshall (S.Ct. 1857)

- *Irvine* seemingly indicated broad authority for the federal government over its property in the Territories "to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic,"

- BUT all of that language

  1) *still anticipates* disposal and

  2) merely constrains State power to interfere with the federal government *while it owns* the public lands or *in the legally effective transfer* of such lands.

- The focus in *Irvine* was on questions regarding 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 about the power to retain public lands (and especially those lands encumbered with a duty to dispose) indefinitely.

Difference Between Not Interfering While Feds Control and Asking Feds to Dispose per Promise

From the White Paper:

"The holdings in all of these cases relied upon in the Legislative Review Note (or likely in those cases similar to these selected cases that otherwise may be used by opponents to 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. <u>These holdings are about *not interfering* when the federal government has *discretion* to act and it 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.</u>"

Shannon v. United States (9th Cir. 1908)

- *Shannon* had only a limiting holding not relevant to the facts of the TPLA.
  - The appeals court there 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.
    - So long as the government held the lands and had not yet disposed of the lands, it may maintain a trespass action against such individuals.
    - 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.

Utah Power & Light Co. v. United States (8th Cir. 1915)

- *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. *Utah Power & Light Co.*, 230 F. at 339.

- The otherwise broad statements unnecessary to that limited holding are dicta and have no precedential effect.

Again, Remember Dicta

- Dictum 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.

"dictum and holding are usually thought to be entitled to very different weight in the American legal system, as in other common law systems"

David Klein & Neal Devins,
Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making,
54 WM. & MARY L. REV. 2012, 2024 (2013)

United States v. Gardner (9th Cir. 1997)

- *Gardner* was a case holding 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."

  Gardner, 107 F.3d at 1318.

- 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*, and therefore should have no precedential effect.

- Again, that language is overbroad and dictum only.

Light v. United States (S.Ct. 1911)

- The forwarded passage from TPLA critics in *Light:*:

"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."

- Broad rhetorical language only as dicta in reaching a far narrower and unexceptional <u>holding that the federal government had the power – like any owner – to expel trespassers</u>.

- *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,'" but no broader Property Clause power needed to be found to resolve that case.

Camfield v. United States (S.Ct. 1897)

- Court first used the unnecessarily verbose language of "may sell or withhold them from sale" *Camfield*, 167 U.S. at 524.

- The case was also about trespassers on federal lands.

- The Court used the quoted language in a long paragraph discussing incidents of ownership, but leading to a holding that did not reach anywhere near the issue of whether the federal government has discretion to withhold lands from sale where it might otherwise have committed itself to dispose of such lands.

Camfield v. United States (S.Ct. 1897)

- The *Camfield* holding can be summarized loosely as saying the following:

These are my words now → 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 and claim and put a fence around the property and call it his own simply on the defense that the federal government has not sold it. 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.

- The *Camfield* Court had absolutely no occasion to consider the powers of the United States in light of independently existing duties or commitments to dispose like what the federal government entered into with the states like Utah.

State of Nevada ex rel. Nevada State Bd. Of Agriculture v. United States (D. Nev. 1981)

- "May sell or withold from sale" language unnecessary to holding and therefore dicta; cites Light and see previous discussion regarding why that language was unnecessary there too
- Involved only an interpretation of the scope of the Equal Footing Doctrine
- Broad challenge to FLPMA; nothing like the facts here
- Only a District Court Opinion – limited precedential weight even for the holdings actually decided

Summary of Distinguishing Cases

From the White Paper:

"There is a difference between 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."

Summary of Distinguishing Cases

From the White Paper:

“Most of the cases decided across the years under the Property Clause have focused on the state’s 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.”

Summary of Distinguishing Cases

From the White Paper:

“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.”

Summary of Distinguishing Cases

From the White Paper:

"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 time. It is the latter duty that is embodied in the demand made by the State of Utah in the TPLA."

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

- As the White Paper Indicates, Additional Theories Supporting the Validity and Enforceability of TPLAs Has Been Beyond the Scope of Current Research

- Any Defense of These Statutes Should Undertake a Further Serious Analysis of These Doctrines and Theories

Regardless of Court Remedies, Congress Should Honor Its Commitments

- Comity
- Respecting Agreements and States as Sovereign Parties
- Independent obligation to live up to commitments

- Congress could still demonstrate that it is a reliable contractual participant in its dealmaking.

- 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, it could choose to do so and honor its promise and relieve itself of the indebtedness it owes to the states.

Andrew Jackson:
Nothing, No Law, Precludes Disposal

- Importantly, Jackson concludes that nothing in existing law precludes this interpretation of the duty to dispose – almost saying that in the absence of a barrier to this interpretation, and given that the interpretation makes sense, one should accept his interpretation.

"This plan for disposing of the public lands impairs no principle, violates no compact, and deranges no system."

- This is an Important Point:
  - 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.

- **The point is -- No law would be broken if the Federal Government Agreed to the Demand.**

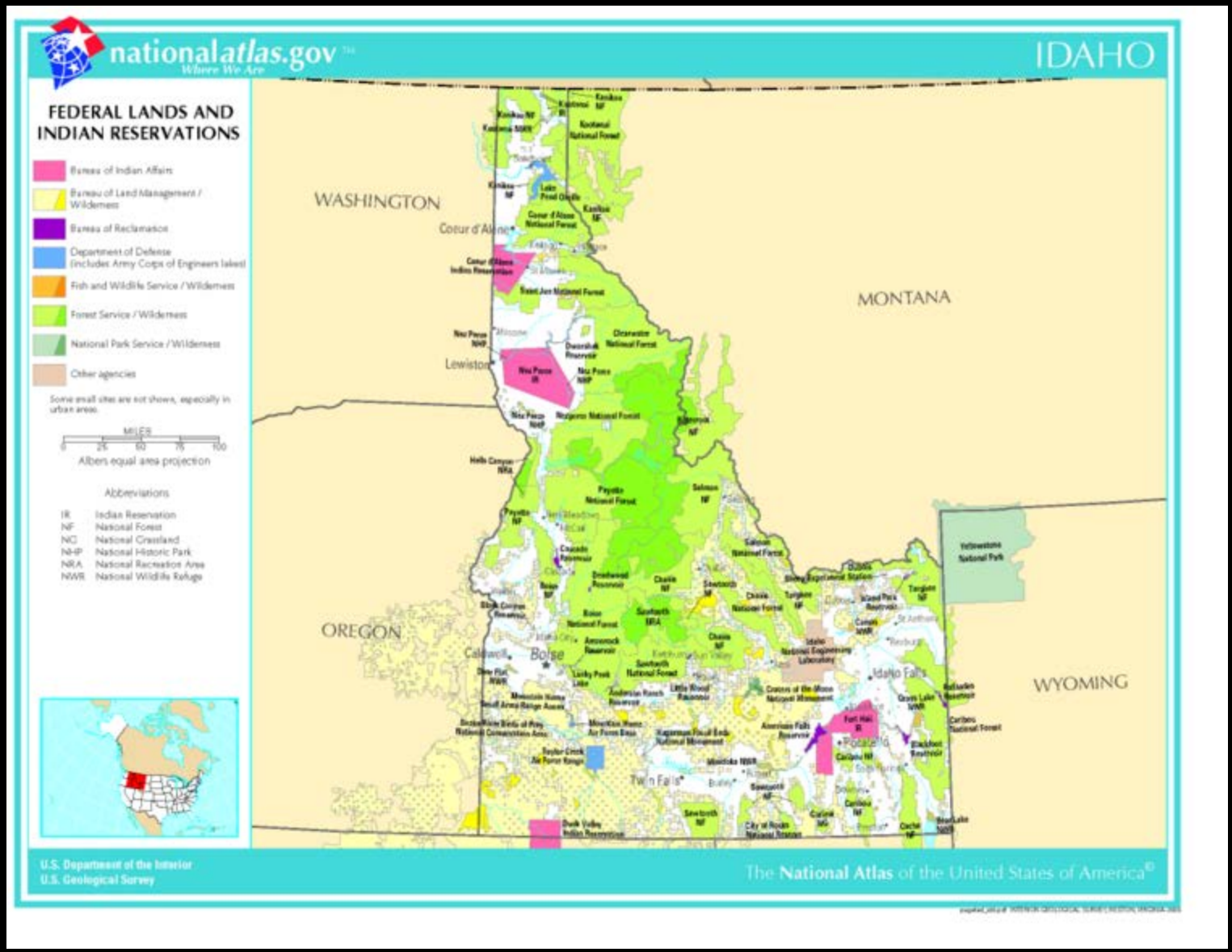
Nothing Prohibits Federal Government from Agreeing to Demand

- Noted critic of state claims to land, Gaetke, admits that:

"the language employed by the Convention certainly permits congressional implementation of the policies of rapid disposal of federal lands."

Gaetke at 638.

- Gaetke 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, he just quibbles with any arguments that the federal government is constitutionally required to dispose of such lands.


nationalatlas.gov
Where We Are
IDAHO
FEDERAL LANDS AND INDIAN RESERVATIONS
Bureau of Indian Affairs
Bureau of Land Management / Wilderness
Bureau of Reclamation
Department of Defense (includes Army Corps of Engineers lakes)
Fish and Wildlife Service / Wilderness
Forest Service / Wilderness
National Park Service / Wilderness
Other agencies
Some small sites are not shown, especially in urban areas.
MILES
0 25 50 75 100
Albers equal area projection
Abbreviations
IR Indian Reservation
NF National Forest
NG National Grassland
NHP National Historic Park
NRA National Recreation Area
NWR National Wildlife Refuge
WASHINGTON
MONTANA
OREGON
WYOMING
Coeur d'Alene
Lewiston
Boise
Idaho Falls
Pocatello
Twin Falls
Yellowstone National Park
U.S. Department of the Interior
U.S. Geological Survey
The National Atlas of the United States of America®

Idaho Legislation to Date

- HCR 221 – a concurrent resolution – after passing the House in March 2013 was finalized with passage in the Senate in April 2013,

"Stating 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."

See http://www.legislature.idaho.gov/legislation/2013/HCR021.htm.

- HCR 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."

http://www.legislature.idaho.gov/legislation/2013/HCR022.htm (emphasis added).

  - The resolution also 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.

Idaho's Ceding in Expectation of Disposal Provision

August 6, 1889 Territory Ordinance adopting the Constitution of the United States (also Idaho Constitution, Art. XXI, section 19):

SECTION 19. RELIGIOUS FREEDOM GUARANTEED — DISCLAIMER OF TITLE TO INDIAN LANDS. It is ordained by the state of Idaho that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. **And the people of the state of Idaho do agree and declare that we 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 Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be 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 the lands belonging to citizens of the United States, residing without the said state of Idaho, shall never be taxed at a higher rate than the lands belonging to the residents thereof. That no taxes shall be imposed by the state on the lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use.** And the debts and liabilities of this territory shall be assumed and paid by the state of Idaho. That this ordinance shall be irrevocable, without the consent of the United States and the people of the state of Idaho.

Idaho's Expectation to Receive Consideration Provision

Idaho Act of Admission:

§ 7. Public lands – Sale – Per cent paid state for school fund. – Five per cent 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.**

26 Stat. L. 215, ch. 656, am. 1998,
P.L. 105-296 (emphasis added)

Idaho Sections 19 (Constitution) and 7 (Admissions Act): The Language Together

- Section 19
  - Temporary nature “until”
  - sets the expectation
- Section 7
  - The consideration and expected return for ceding lands
  - State thinks it will eventually get funds for schools because it believes the federal government will dispose of these lands
  - If the federal government was never required to sell, would the state have agreed to this deal? If they knew there was a chance that the federal government could unilaterally act in a manner that would ensure that no funds would go to schools under Section 7?

CONCLUSIONS

- **Compact-Based Duty to Dispose Exists, Upon Close Examination of the Terms of Enabling and Admission Agreements**

- **When Read In Context and According to the Rules of Contract Interpretation**

- **Despite Conclusory and Bold Claims, None of the Cases Cited By Those Opposing the TPLAs Passes the Test for Proper Precedential Authority**

- **Understanding Dicta is the Key to Opening Up a Real Legal Debate Rather Than Dismissing These Pieces of Legislation Outright with Inapposite One Liners from Distinguishable Cases**