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MEMORANDUM

TO: Sen. Chuck Winder, Co-chair Rep. Lawrence Denney, Co-chair

FROM: Parsons Behle & Latimer
L. Michael Bogert
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DATE: July 19, 2013

SUBJECT: Initial Survey of Issues for the Federal Lands Interim Committee

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Contents

I. INTRODUCTION

This responds to your request for an initial outline of the potential legal and policy issues that could require attention by the Public Lands Interim Committee called for in House Concurrent Resolution 22 as enacted in the 62nd Idaho Legislature.

Below, we set forth an initial outline of the issues that may warrant study and attention by the Interim Committee. It is our aim to further inform the members of the Committee on the matters they may address and to provide background for any resulting work product. We have attempted to capture the initial horizon of issues and, where the primary materials have been made available, they are attached.

II. FUNDAMENTAL LEGAL FRAMEWORK

A. United States Constitution

1. Property Clause, U.S. CONST., art. IV, § 3, cl. 2.

> 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.

2. Supremacy Clause, U.S. CONST., art. VI, cl. 2.

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

B. The Evolution of Public Land Policy in the United States

The history of public land in the United States is commonly divided into three periods—disposal, retention, and management—characterized by the shifting policies of the Federal government with respect to that land.[1]

Early Federal policy regarding public land was motivated by the goal of transferring ownership of public land from the Federal government to private hands. The drive to dispose of public lands was motivated both by economic necessities associated with war debt and by philosophical views regarding the proper role of government. While the Federal government reserved some land for its own use, it generally did so on a limited basis and where it had a particular—often military—purpose. In the latter half of the nineteenth century, concerns about the sustainability of natural resources led Congress to reserve larger portions of the public domain for management by Federal agencies.

Finally, having determined to retain large portions of public land, the Federal government began to take a more assertive role in the management of that land. While previous Federal management focused primarily on ensuring that natural resources were harvested in a sustainable manner, Federal policy shifted towards the view that, in addition to the sustainable harvesting of natural resources, proper management must focus on the preservation of public land in its natural condition. This shift culminated in the Federal Land Policy and Management Act, which declared that Federal policy with respect to public land was to retain and manage the land for, among other purposes, preserving its natural character, wildlife, and scenic and historical value.

1. Disposal

Early policy reflected the view that the Federal government should dispose of public land by distributing it to private owners. On this view, the Federal government should "merely h[o]ld the land long enough to make sure that it got into the hands of private persons who could be counted on to use it and to derive economic benefit from it so as to advance the welfare of the nation as a whole."[2]

This policy was motivated by several factors. First, the sale of public land promised a needed and immediate source of revenue for a nation mired in war debt.[3] By 1785, "the credit of the Nation had fallen to a low, and its government was forced to get along on the smallest possible expenditures."[4] Second, for many, the "policy of disposal of public lands was a conscious implementation of the Jeffersonian philosophy of agrarian democracy . . . ."[5]

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1. Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 Utah L. Rev. 1127, 1131 (2005); Jan G. Laitos and Thomas A. Carr, *The Transformation on Public Lands*, 26 Ecology L.Q. 140, 147 (1999) (including an additional period of "acquisition"). Scholars locate the boundaries between these periods differently. For a survey, see MARION CLAWSON, THE FEDERAL LANDS REVISITED 15-62 (1983).

2. FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 12.01 (2013).

3. PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 59–71 (photo. reprint 1987) (1968).

4. *Id.* at 63.

5. James L. Huffman, *The Inevitability of Private Rights in Public Lands*, 65 U. Colo. L. Rev. 241, 248 (1994).

According to Jefferson, "[t]he small land holders are the most precious part of a state."[6] Transferring ownership of public land to private owners was an obvious means of fostering a class of citizen farmers. Finally, "[f]or others a policy of [Federal] retention of [public land] would have resembled too closely what they had long since abandoned in Britain," where a significant portion of land was owned by the state.[7]

> As early as 1785, the Continental Congress expressed its view that:
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> [t]he 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.[8]

In the same year the Continental Congress enacted the Land Ordinance of 1785 which created a surveying system for the sale and disposition of public land to private owners.[9] Following ratification of the Constitution, the Congress passed a substantially similar act.[10]

Having determined that the land was to be passed to private owners, Congress attempted to further incentivize private parties to take the land. In the early nineteenth century, Congress reduced the prices of public land and eliminated interest charges on certain loans.[11] The Preemption Act of 1841 permitted individuals already living on public land to purchase up to 160 acres at a reduced price.[12] Most importantly, the Homestead Act of 1862 provided grants of public land to qualifying individuals willing to live on and improve the land.[13]

Of the approximately 1.8 billion acres of land that the Federal government has acquired, it disposed of nearly 1.3 billion.[14]

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6. GATES, *supra* note 3, at 62 (quoting Thomas Jefferson, Letter to Edmund Pendleton, August 13, 1776, in THE PAPERS OF THOMAS JEFFERSON, I, 492 (Julian P. Boyd, ed., 1950)).

7. Huffman, *supra* note 4, at 248.

8. Congressional Resolution of October 10, 1780, JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 915–16, *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc01830)).

9. Ordinance of May 20, 1785, JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 375–81, *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc028100)).

10. Act of May 18, 1796, ch. 29, 1 Stat. 464.

11. Act of Mar. 26, 1804, ch. 35, 9-11, 2 Stat. 277, 280–81.

12. Act of Sept. 4, 1841, ch. 16, §§ 10–15, 5 Stat. 455–57.

13. Homestead Act of 1862, ch. 75, 12 Stat. 392.

14. Bureau of Land Management, U.S. Dep't of Interior, Public Land Statistics 2 (2011), *available at* http://www.blm.gov/public_land_statistics/.

2. **Retention**

While Congress had always reserved land for Federal use,[15] such reservations were for "specific purposes, generally related to military and other public facility needs . . . ."[16] In the latter half of the nineteenth century, however, concerns about the preservation and responsible use of natural resources led Congress to begin reserving—and permitting the executive branch to reserve—large portions of land for the purposes of conserving those resources.

In 1872, Congress withdrew and reserved the land that is now Yellowstone National Park from "settlement, occupancy, and sale," to be set aside "as a park or pleasuring-ground for the benefit and enjoyment of the people . . . ."[17] The land was placed under the "exclusive control" of the Secretary of the Interior who was charged with "preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition."[18]

The General Revision Act of 1891 (also known as the Forest Reserve Act of 1891) authorized the President, without prior approval of Congress, to protect forests by declaring them national reserves.[19] Within twenty years, Presidents Harrison, Cleveland, and Roosevelt reserved approximately 165 million acres as public land.[20] The Organic Administration Act of 1897 provided that such land was to be administered "to improve and protect the forest within the boundaries . . . and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States . . . ."[21]

In 1934 Congress passed the Taylor Grazing Act, which was intended to prevent "overgrazing and soil deterioration" of public range land.[22] It authorized the Secretary of the Interior to establish grazing districts in any part of the public domain not already occupied, appropriated, or reserved.[23] It further authorized the Secretary to regulate such districts to "preserve the land and its resources from destruction or unnecessary injury . . . ."[24] While the Act specifically provided that the land was to be managed for conservation purposes "pending

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15. For instance, the Land Ordinance of 1785 reserved a section of every township "for the maintenance of public schools within the said township." Ordinance of May 20, 1785, JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 378, *available at* http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc028100)). In 1798, Congress empowered the President to "erect fortifications in any other place or places as the public safety shall require, in the opinion of the President of the United States." Act of May 3, 1798, ch. 37, 1 Stat. 554.

16. Huffman, supra note 4, at 250.

17. Act of March 1, 1872, ch. 24, 17 Stat. 32.

18. *Id.*

19. Act of March 3, 1891, ch. 561, 26 Stat. 1103.

20. GATES, supra note 3, at 567–68, 580.

21. Act of June 4, 1897, ch. 2, 30 Stat. 11.

22. Act of June 28, 1934, ch. 865, 48 Stat. 1269.

23. *Id.*

24. *Id.*

their disposal,"[25] it effectively ended the period of disposal by creating "grazing reservation out of most of the remaining public domain lands."[26]

3. **Management**

Having retained a significant quantity of public land and created a variety of Federal agencies to manage that land, [27] the Federal government gradually came to take a stronger view concerning its role in the management of public land. In particular, Congress began to take the view that proper management of the land required additional focus on environmental and wildlife conservation, in addition to sustainable harvesting of natural resources.

In 1960 Congress passed the Multiple-Use Sustained-Yield Act, providing the Forest Service with additional management responsibilities.[28] The Forest Service was previously charged with managing national forests for "the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . . ."[29] With passage of the Multiple-Use Sustained-Yield Act, the Forest Service was charged with managing national forests for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes."[30] The Forest Service was instructed to recognize that the management policy that "best meet[s] the needs of the American people . . . [will] not necessarily [be] the combination of uses that will give the greatest dollar return . . . ."[31] Over the course of the 1960s, Congress passed a number of statutes intended to safeguard the environmental quality of public land.[32]

In 1964, Congress established the Public Land Law Review Commission to make recommendations regarding the management of public land. The report issued by that commission in 1970 made a large number of recommendations, including that:

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25. *Id.*

26. Huffman, *supra* note 4, at 251–52.

27. *See, e.g.*, Forest Transfer Act, ch. 288, 33 Stat. 628 (1905) (codified as amended in scattered sections of 16 U.S.C (2006)) (creating the Forest Service); National Park Service Organic Act of 1916, ch. 408, 39 Stat. 535 (codified as amended at 16 U.S.C. 1-4 (2006)) (creating the National Park Service); Reclamation Act, National Irrigation Act of 1902, ch. 4, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C. (2006)) (creating the Bureau of Reclamation).

28. Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified at 16 U.S.C. §§ 528–31 (2006)).

29. June 4, 1897, ch. 2, § 1, 30 Stat. 34 (codified at 16 U.S.C. § 475 (2006)).

30. 16 U.S.C. § 528.

31. *Id.* § 531.

32. *See, e.g.*, The Wilderness Act, Pub. L. No. 88-557, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131–36 (2006)) (establishing a national wilderness preservation system to ensure that an expanding population does not eliminate "lands designated for preservation and protection in their natural condition"); The National Wildlife Refuge Administration Act, Pub. L. No. 89-669, 80 Stat. 926 (codified as amended at 16 U.S.C. 668dd–ee (2006)) (unifying the various national wildlife refuges into a single system for the "conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans").

> [t]he policy of large-scale disposal of public lands reflected by the majority of statutes in force today be revised and that future disposal should be of only those lands that will achieve maximum benefit for the general public in non-Federal ownership, while retaining in Federal ownership those whose values must be preserved so that they may be used and enjoyed by all Americans.[33]

Congress effectively adopted this recommendation in 1976 when it passed the Federal Land Policy and Management Act (FLPMA).[34]

FLPMA provides that "it is the policy of the United States that the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest."[35] At the same time, FLPMA repealed many of the statutes—primarily those governing homesteading—that provided for the transfer of public land to private owners.[36]

FLPMA made explicit what was previously only implicit in federal policy—that the Federal government had abandoned the policy of disposal. In fact, FLPMA essentially turned the disposal policy on its head. Under the disposal policy, the Federal government selectively retained small parcels of land for particular purposes while disposing of the bulk of public land to private use. FLPMA instituted a policy—or, explicitly recognized a policy that had already been instituted—of selectively disposing of small parcels of land for particular purposes while retaining the bulk of public land in Federal ownership.

4. The Sagebrush Rebellion

The Sagebrush Rebellion was a reaction against the shift from the policy of disposal to a policy of Federal retention and management of public land. It involved both state and local efforts to assert rights to public domain land.

Nevada was the first state to pass a law asserting legal and moral rights to public land within its borders.[37] Nevada's statute made three primary assertions: (1) that Congress had no authority to require that Nevada disclaim any right to public domain land within its borders when Nevada entered the Union, (2) that the Constitution does not entitle the Federal government to retain possession of public domain land within Nevada, and (3) that the Equal Footing Doctrine—requiring that states entering the Union do so with the same rights and sovereignty as

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33. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS BY THE PUBLIC LAND LAW REVIEW COMMISSION 1 (1970), *available at* http://archive.org/details/onethirdofnation3431unit.

34. Act of October 21, 1976, P.L. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701–1787).

35. 43 U.S.C. § 1701(a)(1).

36. Act of Oct. 21, 1976, Pub. L. No. 94–579, § 703, 90 Stat 2743.

37. A.B. 413, Regular Session (Nev. 1979) (codified at NEV. REV. STAT. §§ 321.596–321.599).

the original thirteen states—is violated when the Federal government retains approximately eighty-seven percent of the land in Nevada.[38]

These arguments were litigated and rejected in both *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997), and *State of Nevada ex rel. Nevada State Board of Agriculture v. United States*, 512 F. Supp. 166 (D. Nev. 1981), discussed *infra* Section C.

C. Selected Federal Case Law (Summary Briefs)

1. *United States v. Gratiot*, 39 U.S. 526 (1840)

The United States retained ownership of lead mines in the territory ceded to it by Virginia. In 1807 Congress passed a statute authorizing the President to lease mines in the territory. Gratiot and several others leased mines from the United States in territory that subsequently became the state of Illinois and failed to pay the amounts owed under the lease. The lessees argued that the Federal government does not have the authority to lease public land. In particular, they argued that the Property Clause provides for the making of rules and regulations for the *disposal* of public lands, but not for the leasing of public lands. They also argued that the leasing of land within the state of Illinois violates state sovereignty.

The Supreme Court found that Congress has the power to lease public land under the Property Clause. The Court stated that power over property belonging to the United States is vested in Congress "without limitation." Because the Property Clause is the source of the authority of territorial governments, the power must extend significantly beyond merely making rules and regulations for the sale of public lands. Moreover, state rights are not violated in virtue of the Federal government retaining and leasing land within the state because the law authorizing the President to lease public land was passed well before Illinois became a state and because no state can "claim a right to public land within her limits."

2. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845)

The Federal government attempted to convey partially submerged land in Alabama. Another party claimed to have acquired title to the property from that state and challenged the Federal conveyance. Alabama's enabling act included (1) a clause providing that Alabama enters the Union on equal footing with the original states, (2) a clause requiring that Alabama disclaim all title to unappropriated land within the state, and (3) a clause stating that all navigable waterways within the state will forever remain public property and open to use without fees or taxes. The Federal government claimed that the clauses purporting to retain unappropriated public lands and navigable waterways implied that the partially submerged land at issue was owned by the Federal government.

The Supreme Court held that because the original thirteen states retained sovereignty over their navigable waterways and submerged land, the United States cannot retain sovereignty over Alabama's navigable waterways and submerged land. According to the Court, the terms of the agreements in which territory was ceded to the Federal government by the original thirteen

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38. NEV. REV. STAT. § 321.596.

states make it clear that that territory was to be held in trust "to convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease."

Further, the new states were to enter the Union on equal footing with the original thirteen states. "Alabama is . . . entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it, before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. . . . [T]o Alabama belong the navigable waters and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights."

Thus, because the territory ceded to the United States by the original thirteen colonies was to be disposed of by the Federal government, and because each state must enter the Union on equal footing, the United States did not retain title to the partially submerged land at issue.

3. ***Irvine v. Marshall,* 61 U.S. 558 (1857)**

Marshall purchased property on behalf of Irvine and Barton at a sale of public land in Minnesota. The receipt for the purchase was made out in Marshall's name. Marshall refused to convey Irvine's interest in the property and Irvine sued to force Marshall to do so. A Minnesota territorial statute provided that the person who purchases land has legal title to it, even where the person was making the purchase on behalf of another. As a result, the district court and the Minnesota Supreme Court refused to force Marshall to convey title to Irvine.

The Supreme Court reversed and held that it is Federal law, and not Minnesota territorial law, that governs Marshall's obligations. According to the Court, public lands are "the exclusive property of the United States, 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." This right is protected not only by the Property Clause, but by "solemn compacts" agreed to by new states when they enter the Union. Because the "control, enjoyment, or disposal of [public land] must be exclusively in the United States," no state or territorial law can interfere with the power of the United States to convey that land as it sees fit. Minnesota's law interferes with the Federal government's ability to convey its land by preventing a party to whom the United States attempted to convey property from acquiring his interest in that property.

4. ***Gibson v. Chouteau*, 80 U.S. 92 (1871)**

Gibson brought an action for ejectment from property that he acquired in Missouri. The property had been public domain land, but was granted by the Federal government to another party from whom Gibson then acquired it. However, for a variety of reasons, the Federal government delayed significantly in officially conveying the title to the property. By the time the government officially issued title, Chouteau had occupied the property longer than is

necessary to bar an action for ejectment under Missouri's statute of limitations. On that basis, the Supreme Court of Missouri would not allow Gibson to bring an action for ejectment.

The Supreme Court held that the Missouri statute—as interpreted by the Missouri Supreme Court—was an improper interference with the Congressional power to dispose of public land. According to the Court, "that power is subject to no limitations." Both the Constitution and the acts that admit states into the Union ensure that no state can interfere with the absolute right to "prescribe the times, the conditions, and the mode of transferring [public domain land] . . . ." Just as a state cannot interfere with the Federal government's attempt to transfer ownership of public domain land, the state cannot prevent the individual to whom the government has granted property from possessing and enjoying that property simply because the government delayed in transferring title.

5. ***Coyle v. Smith*, 221 U.S. 559 (1911)**

The act admitting Oklahoma into the Union included a provision that located the capital of the new state in Guthrie and prohibited moving it until 1913. In 1910, the Oklahoma legislature voted to move the capital from Guthrie to Oklahoma City. The state was sued by a citizen of Guthrie who claimed that the attempt to move the capital was void as a violation of Oklahoma's enabling act.

The Supreme Court found that Congress cannot employ an enabling act to "deprive a new state of any of those attributes essential to its equality in dignity and power with other states." Congress can require, as a condition for entering the Union, that a new state's constitution meets certain conditions. However, "when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission." What force provisions in an enabling act have is derived from congressional authority elsewhere in the Constitution. Where there is no independent source of authority in the Constitution, a stipulation or requirement in an enabling act has no legal effect. Because Congress could not—after a state had entered the Union—forbid it from moving its capital, it cannot dictate to the state as it enters the Union that it will not move its capital.

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

Three parties disputed ownership of an island in the Snake River. One party had a claim based on the Federal Homestead Act, which would prevail if the island remained Federal property when Idaho became a state.

The Supreme Court held that the island had remained Federal property when Idaho became a state. According to the Court, state sovereignty requires that when a state enters the union, "lands underlying navigable waters within the several states belong to the respective states . . . ." However, the island in question "was not part of the bed of the stream or land under the water, and therefore its ownership did not pass to the state, or come within the disposing influence of its laws." Because the island was "fast dry land," it "remained the property of the

United States and subject to disposal under its laws . . . ." As it concerns the question which lands must be transferred by the Federal government to new states as an aspect of sovereignty, the case limits the impact of the Equal Footing Doctrine—according to which new states entering the Union must do so with equal rights and sovereignty as the original thirteen states—to submerged or partially submerged land in navigable water.

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

A Federal law—The Wild Free-Roaming Horses and Burros Act—prohibited causing the "capture, branding, harassment, or death" of "all unbranded and unclaimed horses and burros on public lands in the United States." New Mexico challenged the Act, claiming that the Property Clause does not authorize Congress to regulate in this way. New Mexico argued that the Property Clause authorizes only rules and regulations to protect the land from harm or to facilitate its disposal. Because this regulation did neither, New Mexico claimed that it was not authorized by the Property Clause. New Mexico also argued that allowing Congress to regulate in this way threatens to give the Federal government complete jurisdiction over property within New Mexico without New Mexico's consent, thereby violating New Mexico's sovereignty.

The Supreme Court held that the Property Clause authorizes Congress to regulate in this way. According to the Court, "the power over the public land thus entrusted to Congress is without limitations." "[T]he 'complete power' that Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there." Further, such a regulation does not violate New Mexico's sovereignty. While it may be a violation of New Mexico's sovereignty for Congress to exercise complete and exclusive jurisdiction over property in New Mexico without the state's consent, Congress does not exercise complete and exclusive jurisdiction over public domain land in New Mexico. New Mexico has the authority to enforce its laws on public domain land. Where there is a conflict, however, the Supremacy Clause ensures that Federal law governs.

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

The Utah Enabling Act granted Utah certain parcels of public land to be used for education. The Act also provided that—should those lands not be available—Utah can select alternative parcels of public land of equivalent size. In 1964, Utah selected land in Federal grazing districts established by the Taylor Grazing Act. That land contained valuable oil shale deposits. The Secretary of the Interior—responsible for the administration of the Federal grazing districts and the party that must approve the exchange of land under the Utah Enabling Act—notified Utah that it had recently adopted a policy of refusing to approve the selection of alternative land if the alternative land is significantly more valuable than the land initially designated for transfer to the state. Utah sued, claiming that the Secretary of the Interior does not have authority to approve or disapprove Utah's selections based upon whether the land selected is of equivalent value.

The Supreme Court held that the Taylor Grazing Act and the Utah Enabling Act give the Secretary of the Interior the authority to disapprove Utah's selection of alternative land based on disproportionate value. The Court held that Utah correctly characterized the Utah Enabling Act as a "solemn agreement." The inclusion of a mechanism for Utah to select alternative land

should be thought of as similar to a contractual remedy available if the Federal government does not live up to its bargain by providing the land initially designated. As such, the mechanism should be interpreted as requiring that Utah be made whole. There is no indication that any party ever intended the provision to allow Utah to select land that is significantly more valuable than the land initially granted. Further, the Taylor Grazing Act provides discretion to the Secretary of the Interior to classify and reserve lands within a Federal grazing district. The Secretary is properly exercising that discretion by considering the value of the land selected by Utah as compared to the land initially designated by the Federal government.

9. ***State of Nevada ex rel. Nevada State Bd. Of Agriculture v. United States*, 512 F. Supp. 166 (D. Nev. 1981)**

Nevada challenged the constitutionality of the Federal Land Policy and Management Act of 1976 (FLPMA). Nevada claimed that "the United States holds Nevada's public lands in trust temporarily, for the purpose of disposal to the State and its citizens." Because FLPMA states that it is Federal policy to retain public land indefinitely, Nevada claimed that FLPMA violates the Equal Footing Doctrine and Nevada's sovereignty.

The court dismissed the complaint. It held that the Equal Footing Doctrine—according to which new states entering the Union must do so with equal rights and sovereignty as the original thirteen states—"applies only to political rights and sovereignty; it does not cover economic matters, for there never has been equality among the states in that sense." Further, while *Pollard's Lessee* suggested that the Federal government held public land only in trust for disposal, that holding is limited to the public land ceded by the original thirteen states to the Federal government. It does not apply to public land "acquired by the Federal government through treaty or conquest." Thus, even if the Federal government could only administer public land in Alabama for the purposes of sale, it is not so limited with respect to public land in Nevada. Finally, because congressional power over public land is without limit, "the U.S. Government may sell public land or withhold it from sale."

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

A Nevada couple, the Gardners, grazed their livestock on national forest land without a required permit. The United States sued for an injunction to prevent continued grazing and for damages. The Gardners argued that the United States did not have legitimate title to the land because, though it was transferred to the United States by Mexico in the Treaty of Guadalupe, it was to be held in trust for future states and should have been transferred to Nevada. The Gardners also argued that the Equal Footing Doctrine—according to which new states entering the Union must do so with equal rights and sovereignty as the original thirteen states— requires that the land be transferred to Nevada and that the clause in the Nevada Constitution that disclaims any right to public land is ineffective.

The Ninth Circuit Court of Appeals held that the Federal government was under no obligation to turn the public land over to Nevada. According to the court, the holding in *Pollard's Lessee*—that the Federal government only had authority to hold land in Alabama for the purpose of sale—was based on "the terms of the cessions of the land from Virginia and Georgia to the United States." The land at issue here, by contrast, was acquired by the United

States by treaty and Nevada has no claim to sovereignty over it. As a result, the Federal government can do with it what it wishes under the Property Clause. Further, the Equal Footing Doctrine does not imply that the Federal government has an obligation to turn over the land to Nevada. "The Equal Footing Doctrine . . . applies to political rights and sovereignty, not to economic or physical characteristics of the states. Moreover, the Equal Footing Doctrine applies primarily to the shores of and lands beneath navigable waters, not to fast dry lands. Therefore, the Equal Footing Doctrine would not operate . . . to give Nevada title to the public lands within its boundaries." Finally, the court held that the Gardner's are correct that the clause in the Nevada Constitution in which Nevada disclaims any interest in public domain land is ineffective. However, that fact is irrelevant. While the disclaimer in the Nevada Constitution is ineffective and merely declaratory, "the United States did not need the disclaimer to gain title to the public lands in Nevada." The United States gained title to those lands through treaty and rightfully retains title through the Property Clause.

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

The Admission Act of Hawaii granted all public land held by the Federal government in Hawaii to the state to be held in trust or to be sold and the proceeds held in trust for Hawaiian citizens. When Hawaii's affordable housing agency sought to remove a portion of land from the trust and develop it, the Office of Hawaiian Affairs (OHA)—the agency charged with administering the trust lands and proceeds—refused to do so unless it received an acknowledgement that native Hawaiians retain claims to the land redeveloped. The state refused to provide any such acknowledgement and the OHA sued to enjoin the transfer of any trust land to third-parties. The OHA claimed that a resolution issued by Congress in 1993, apologizing for the overthrow of the Hawaiian Kingdom, had acknowledged that native Hawaiians retain legitimate claims to the trust lands.

The Supreme Court found that the resolution did not in any way suggest that native Hawaiians retain legitimate claims to the trust lands or in any other way diminish or cloud title to the land transferred from the United States to Hawaii in 1959. Because the Kingdom of Hawaii had granted the land to the United States, and the United States granted the land to the State of Hawaii, the State of Hawaii has title to the land. The Court noted that there would be "grave constitutional concerns" if the Apology Resolution could cast doubt on title to the land well after Hawaii's admission to the Union. According to the Court, "the consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed." (quoting *Idaho v. United States*, 533 U.S. 262, 284 (2001) (Rehnquist, C.J., dissenting)). That is particularly so where, as here, nearly all of a state's lands are at issue.

III. HAWAII AND TENNESSEE APPROACHES

A. **Hawaii**

Unlike most western states, when Hawaii entered the Union the Federal government granted the state nearly all of the public domain land within its boundaries. This difference is likely attributable to the unusual history of Hawaii.

In 1893, a contingent of American businessmen, acting with the assistance of the United States Minister to Hawaii and United States Armed Forces, overthrew the Hawaiian monarchy and established a provisional government.[39] At the time, President Cleveland wrote a letter to Congress in which he noted that the overthrowing of the Hawaiian government was illegal and that "a substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair."[40]

Despite efforts to return the monarchy to power, Hawaii was annexed as a United States territory in 1898.[41] The resolution annexing Hawaii provided that "the Congress of the United States shall enact special laws for the management and disposition [of public lands in Hawaii]," but "all revenue from or proceeds of the same . . . shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[42]

Hawaii was admitted as a state in 1959.[43] The Admission Act of Hawaii provided that "the United states grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other property . . . ."[44] While the Act made several particular reservations and permitted the Federal government to make additional reservations, it turned on its head the traditional practice with respect "unappropriated lands" within a state when that state enters the union. Rather than making discrete grants of land to the state and reserving the bulk of unappropriated land, Congress granted all of the public land except for some discrete reservations. The Act further provided that both the lands and income generated from the lands were to be held in trust by the state of Hawaii for educational purposes, the betterment of native Hawaiians, the development of farm and home ownership, and "for the provision of lands for public use."[45] Nevertheless, just over twenty percent of land in Hawaii remains in the possession of the Federal government.[46]

B. **Tennessee**

Tennessee was admitted into the Union on June 1, 1796. The act of Congress that did so is, compared to the acts admitting other states, remarkably brief.[47] The Act states, in its entirety, that:

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39. Rice v. Cayetano, 528 U.S. 495, 505 (2000).

40. President Grover Cleveland's Message to the Senate and House of Representatives, Dec. 18, 1893, H.R.Rep. No. 243, 53d Cong., 2d Sess., 3–15.

41. Joint Resolution of July 7, 1898, Public Resolution 55-51, 30 Stat. 750.

42. *Id.*

43. Act of March 18, 1959, Pub L 86-3, 73 Stat 4.

44. *Id.* § 5(b).

45. *Id.* § 5(f).

46. ROSS W. GORTE ET AL., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, CONGRESSIONAL RESEARCH SERVICE 4 (2012).

47. Act of June 1, 1796, ch. 47, 1 Stat. 491.

> Whereas by the acceptance of the deed of cession of the state of North Carolina, Congress are bound to lay out into one or more states, the territory thereby ceded to the United States: Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the whole of the territory ceded to the United States by the state of North Carolina, shall be one state, and the same is hereby declared to be one of the United States of America, on an equal footing with the original states, in all respects whatever, by the name and title of the State of Tennessee. That until the next general census, the said state of Tennessee shall be entitled to one Representative in the House of Representatives of the United States; and in all other respects, as far as they may be applicable, the laws of the United States shall extend to, and have force in the state of Tennessee, in the same manner, as if the state had originally been one of the United States.[48]

Tennessee has had three constitutions over the course of its history—the first was drafted and submitted to Congress in 1796, the second was drafted in 1834 and ratified by vote in 1835, and the last was drafted and ratified in 1870. None of those three constitutions mention public lands or disclaim any right to unappropriated land in the state, as does the Idaho Constitution.[49] The Federal government maintains slightly less than five percent of the land in Tennessee.[50]

It is unclear why the Tennessee Admission Act did not require Tennessee to disclaim title to public land, or why the original Tennessee Constitution was not required to have a similar provision. However, because Tennessee was the first state admitted to the Union after having been a territory ceded by one of the original thirteen colonies, it may be that uncertainty regarding the manner in which to proceed led to a relatively simple approach.

IV. STATE APPROACHES

A number of western states either have passed or are considering legislation that would demand title to public domain land within their borders. Utah and Arizona are discussed in more detail below. Nevada has recently established a committee to investigate the transfer of land from the Federal government to the state.[51] Wyoming has passed a similar statute, creating a task force to study "the transfer of Federal lands" and "possible legal recourses available to compel the Federal government to relinquish ownership and management of specified Federal lands in Wyoming."[52] New Mexico's House Bill 292, the Transfer of Public Land Act, was

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48. *Id.*

49. See *infra*, Section IV(B)(1).

50. ROSS W. GORTE ET AL., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, CONGRESSIONAL RESEARCH SERVICE 4 (2012).

51. A.B. 227, 77th Session (Nev. 2013), *available at* http://www.leg.state.nv.us/Session/77th2013/Reports/history.cfm?billname=AB227.

52. H.B. 0228, 2013 General Session (Wyo. 2013), *available at* http://legisweb.state.wy.us/2013/Engross/HB0228.pdf.

introduced January 1, 2013.[53] The content of the Act is virtually identical to the Utah bill discussed below. New Mexico's bill, however, seems to have been abandoned in committee.[54] A similar fate met Colorado's recent attempt to pass legislation demanding that the Federal government transfer title to "agricultural land."[55]

A. **Utah**

Representative Ken Ivory introduced the Transfer of Public Lands Act and Related Study on February 12, 2012.[56] The Act was signed into law by Governor Herbert on March 23, 2012.

Utah Code Annotated section 63L-6-103 demands that the Federal government "extinguish title to public lands" and "transfer title to public lands" to Utah by December 31, 2014. The term 'public lands' is defined by the statute and excludes, for instance, certain wilderness areas, national parks, and moments; particular parcels of land explicitly ceded to the United States in accordance with Utah law; and school trust lands.[57] The Utah statute provides that if Utah sells any public domain land transferred to it by the Federal government, Utah will retain five percent of the proceeds while turning over ninety-five percent of the proceeds to the Federal government.[58] This provision ensures that the Federal government gets the benefit of the bargain that, according to Utah, it accepted. Like many of the enabling or admission acts—including Idaho's[59]—the Utah Enabling Act provides that "five per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State."[60]

In signing the Act, Governor Herbert claimed that "[f]ederal control hampers our ability to adequately fund our public education system" because "[s]tate and local property taxes cannot be levied on Federal lands, and royalties and severance taxes are curtailed due to Federal land

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53. H.B. 292, 2013 Regular Session (N.M. 2013), *available at* http://www.nmlegis.gov/lcs/legislation.aspx?Chamber=H&LegType=B&LegNo=292&year=13.

54. *Id.* (identifying the current location of the bill as "Died").

55. S.B. 13-142, 2013 Regular Session (Colo. 2013), *available at* http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/3BC575329E0E94BB87257A8E0073C714?open&file=142_01.pdf (identifying the current status of the bill as "Postpone Indefinitely").

56. H.B. 148, 2012 General Session (Utah 2012) (enacted), *available at* http://le.utah.gov/~2012/bills/static/HB0148.html.

57. UTAH CODE ANN. § 63L-6-102.

58. *Id.* § 63L-6-103(2).

59. See *infra*, section IV(A).

60. Utah Enabling Act, 28 Stat. 107, § 9 (1894).

use restrictions."[61] Governor Herbert also cited Federal mismanagement of public lands as providing motivation for the Act.[62]

B. **Arizona**

Arizona's Senate Bill 1332 was introduced to the Senate on January 26, 2012.[63] The Bill was passed and was sent to Governor Brewer on May 1, 2012.[64] Governor Brewer vetoed the bill on May 14, 2012.[65]

The content of Senate Bill 1332 was virtually identical to Utah's Transfer of Public Lands Act. The bill demanded "that the United States extinguish title to all public lands in and transfer title to this state" on or before December 31, 2014.[66] Like Utah's Act, it provided that the state would pay the Federal government five percent of the proceeds from the sale of any land transferred to the state by the Federal government.[67]

Governor Brewer articulated her reasons for vetoing the bill in a letter to Arizona's Secretary of State.[68] According to the Governor, the bill was problematic because it "does not identify an enforceable cause of action to force Federal lands to be transferred to the state."[69] Further, it "appears to be in conflict or not reconcilable with U.S. Constitution Article IV, Section 3, Clause 2 [the Property Clause] and Article VI, Clause 2 [the Supremacy Clause], as well as the Enabling Act."[70] Further, the Governor was skeptical of the claim that the bill would have "no fiscal impact."[71] The Governor noted that the state would be responsible for additional maintenance costs on the approximately twenty-three million acres of land that would, theoretically, be transferred by the Federal government, including costs associated with the administration of Federal environmental legislation.[72]

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61. Mori Kessler, *Gov. Herbert signs public lands transfer act*, ST. GEORGE NEWS (March 23, 2012), http://www.stgeorgeutah.com/news/archive/2012/03/23/gov-herbert-signs-public-lands-transfer-act/.

62. Amy Joi O'Donoghue, *Gov. Gary Herbert tells Washington committee: Let us manage our land*, DESERET NEWS (May 21, 2013 11:20 AM), http://www.deseretnews.com/article/865580408/Gov-Gary-Herbert-tells-Washington-committee-Let-us-manage-our-land.html?pg=all.

63. S.B. 1332, 2012 Regular Session (Ariz. 2012), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SB1332&Session_ID=107.

64. *Id.*

65. *Id.*

66. *Id.* § 1.

67. *Id.*

68. Letter from Governor Janice K. Brewer to Secretary of State Ken Bennett (May 14, 2012), *available at* http://www.azleg.gov/govlettr/50leg/2R/SB1332.pdf.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

Following Governor Brewer's veto of Senate Bill 1332, the Arizona House of Representatives passed a resolution proposing a constitutional amendment that would remove language from the Arizona Constitution that disclaims the state's rights to public domain land within the state and adding language according to which "the state of Arizona declares its sovereign and exclusive authority and jurisdiction over the air, water, public lands, minerals, wildlife and other natural resources within its boundaries," except for "Indian reservations" and land explicitly ceded to the United States government in accordance with Arizona law.[73]

The proposed amendment was sent to the voters as Proposition 120 in the November 6, 2012, election.[74] It was defeated by a vote of sixty-seven percent against the measure.[75]

V. FEDERAL PUBLIC LANDS IN IDAHO

The Territory of Idaho was established on March 3, 1863 and initially encompassed land that now makes up the states of Idaho, Montana, and much of Wyoming.[76] The portion of the territory that is now the State of Idaho had previously been part of the Oregon Territory, land acquired by the United States by exploration and a series of treaties with Great Britain. Much of the territory was ceded to the newly created Territory of Montana and to the Territory of Dakota in May of 1864. The Territory of Idaho came to have the boundaries of the present State of Idaho in July of 1868 when it ceded a small portion of land to the new Territory of Wyoming. Idaho was admitted to the Union by an act of Congress—the Idaho Admission Bill—on July 3, 1890.[77]

The Federal government currently retains possession of 32, 635, 835 acres of land within Idaho, approximately 61.7% of the land within Idaho's borders.[78] Only in Nevada (81.1%), Utah (66.5%), and Alaska (61.8%) does the Federal government retain a higher percentage of the land within a state's borders.[79] The Federal government has retained more acreage in five states—Alaska (225,848,164), Nevada (56,961,778), California (47,797,553), Utah (35,033,603), and Oregon (32665,430)—than it retains in Idaho.[80]

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73. H.R. Res. 2004, 2012 Second Regular Session (Ariz. 2012), *available at* http://www.azleg.gov/legtext/50leg/2r/bills/hcr2004h.pdf.

74. Arizona Proposition 120, *available at* http://www.azsos.gov/election/2012/info/PubPamphlet/english/prop120.htm.

75. 2012 Ballot Measure Election Results: Arizona, BALLOT NEWS (Nov. 9, 2012), http://ballotnews.org/2012/11/09/2012-ballot-measure-election-results-arizona/.

76. Act of March 3, 1863. Pub. L. 37-96, 12 Stat. 808.

77. 26 Stat. 215, ch. 656; am. 1998, P.L. 105-296

78. ROSS W. GORTE ET AL., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA, CONGRESSIONAL RESEARCH SERVICE 4 (2012).

79. *Id.*

80. *Id.*

A. **The Idaho Admission Bill (Exhibit E)**

The Idaho Admission Bill is similar in important respects to other congressional acts admitting western states.

First, the Idaho Admission Bill provides that Idaho "is admitted into the union on an equal footing with the original states in all respects whatever . . . ."[81]

Second, the Bill provides for certain land grants to the state of Idaho for purposes of supporting schools,[82] public buildings,[83] an agricultural college,[84] and other purposes. Apart from these specific grants, however, the Bill provides that "[t]he state of Idaho shall not be entitled to any further or other grants of land for any purpose other than as expressly provided in this act."[85]

Third, the Bill includes a section governing the sale of public land by the United States. It provides that "[f]ive per cent of the proceeds of the sale 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 . . . shall be paid to the state," to be placed into a permanent fund for the support of schools.[86]

B. **The Idaho Constitution**

The Idaho Constitution was approved by Congress when the Idaho Admission Bill was passed. It includes two particularly relevant sections.

1. **IDAHO CONST., art. IX, § 8:**

> It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to or acquired by the state by or from the general government, under such regulations as may be prescribed by law, and in such manner as will secure the maximum long term financial return to the institution to which granted or to the state if not specifically granted; provided, that no state lands shall be sold for less than the appraised price. No law shall ever be passed by the legislature granting any privileges to persons who may have settled upon any such public lands, subsequent to the survey thereof by the general government, by which the amount to be derived by the sale, or other disposition of such lands, shall be diminished, directly or indirectly. The legislature shall, at the earliest practicable period, provide by law that the general grants of land made by congress to the state shall be judiciously located and carefully preserved and

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81. *Id.* § 1.

82. *Id.* § 4.

83. *Id.* § 6.

84. *Id.* § 10.

85. *Id.* § 12.

86. *Id*. § 7.

held in trust, subject to disposal at public auction for the use and benefit of the respective object for which said grants of land were made, and the legislature shall provide for the sale of said lands from time to time and for the sale of timber on all state lands and for the faithful application of the proceeds thereof in accordance with the terms of said grants; provided, that not to exceed one hundred sections of state lands shall be sold in any one year, and to be sold in subdivisions of not to exceed three hundred and twenty acres of land to any one individual, company or corporation. The legislature shall have power to authorize the state board of land commissioners to exchange granted or acquired lands of the state on an equal value basis for other lands under agreement with the United States, local units of government, corporations, companies, individuals, or combinations thereof.

2. **IDAHO CONST., art. XXI, § 19:**

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.

C. **Legislative Materials**

1. House Concurrent Resolution No. 21 (Exhibit F)

2. House Concurrent Resolution No. 22 (Exhibit G)

3. Federal Lands Task Force, *New Approaches for Managing Federally Administered Lands; A Report to the Idaho State Board of Land Commissioners* (July 1998) (Exhibit H)

4. Federal Lands Task Force, *Breaking the Gridlock; Federal Land Projects in Idaho; A Report to the Idaho State Board of Land Commissioners* (December 2000) (Exhibit I)

VI. SURVEY OF PUBLICATIONS ON TRANSFER OF FEDERAL PUBLIC LANDS TO THE STATES

A. Donald J. Kochan, *A Legal Overview of Utah's H.B. 148—the Transfer of Public Lands Act* (The Federalist Society, Jan. 2013) (Exhibit J)

B. Louis Touton, Note, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817 (1980)

C. Utah Legislative Review Note, H.B. 148 (2012) (See Exhibit A)

D. Utah State Legislature Interim Committees, Report on Utah's Transfer of Public Lands Act, H.B. 148 (Nov. 14, 2012) (Exhibit K)

VII. OTHER PUBLISHED MATERIALS

A. *THE* FACTS *ABOUT HB 148: Unconstitutional, Bad Public Policy and Won't Help Utah Schools*, SOUTHERN UTAH WILDERNESS ALLIANCE (Mar. 23, 2012), http://www.suwa.org/2012/03/23/the-facts-about-hb-148-unconstitutional-bad-public-policy-and-won%E2%80%99t-help-utah-schools/ (Exhibit L)

B. Kirk Johnson, *Utah Asks U.S. to Return 20 Million Acres of Land,* N.Y. TIMES, Mar. 23, 2012, at A9 (Exhibit M)

C. Randal O'Toole and Chris Edwards, *Reforming Federal Land Management*, Cato Institute Series on Downsizing Federal Government (Feb. 2012) (Exhibit N)

D. Randal O'Toole, *Should Congress Transfer Federal Lands to the States?* Cato Policy Analysis No. 276 (July 1997) (Exhibit O)