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

By Donald J. Kochan

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federal government oversteps its obligations or fails to fulfill its promises in these compacts. The advocates of laws like the TPLA must employ the power and skill of distinguishing cases and educate the courts and the public about when some seemingly precedential judicial statements are distinguishable or are actually dicta. The next subsection dissects some of the most often touted precedential obstacles to upholding the TPLA.

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

The major legal arguments against the TPLA rest on broad interpretations of the Property Clause in the U.S. Constitution Article IV, Section 3. This constitutional provision provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."[100] 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.

The Property Clause does indeed confer broad powers to Congress, but it is not without limitations. This section accomplishes two main goals. First, it deconstructs the lofty and overbroad language in several cases that opponents of the TPLA claim as dispositive precedent. This section will focus on distinguishing the seemingly broad interpretations of the Property Clause that are claimed to weigh in favor of finding the TPLA invalid or unconstitutional. This section does so by looking at the cherry-picked bits of language offered by opponents within the full context of the cases where the language appears. It will examine these bits of language in light of the limited holdings in the cases where such language appeared but was not necessary to resolve the cases. It also will identify many of these broad "interpretations" as nothing more than non-controlling dicta. Second, this section will reiterate the idea that the UEA and its duty to dispose act as *limitations* on the Property Clause power, the likes of which were never considered or discussed in any of the cases where broad Property Clause powers were heralded.

Much of what is being cited as "precedent" against the TPLA is not precedent at all. Instead, much of this claimed precedent resides in categories of excessive dicta. At times, courts say in a case opinion more than is necessary to resolve the case. They can be verbose and sometimes they overstate background principles. And sometimes in the process they use excess language that is susceptible to interpretations beyond what the judges would have meant to say had they been able to fully predict the misuse of their words. Critics of the TPLA have been focused on making largely conclusory statements that the TPLA is invalid,[101] and where they cite to cases, such critics have often relied on nothing more than distinguishable dicta.

Consider, for example, a research note attached to H.B. 148. On February 4, 2012, the Utah Office of

100 U.S. Const., Art. IV, Sec. 3.

101 Consider, for example, one of the only major national news articles to cover the TPLA that makes some bold statements about the law's chances of being upheld if challenged. *See* Johnson, *supra* note 3, at A9. Johnson's article reports on failures of past efforts by States to restrain federal power over Western lands in light of broad precedent in favor of the federal government's Property Clause powers. *Id.* He also then claims that "[m]any legal experts say they expect the same result this time." *Id.* Furthermore the article proceeds to claim that "Legal experts said the problem for the new state claims was that Congressional authority over federal land had been upheld over and over by the United States Supreme Court. If property rights are the issue being raised, many experts said, proponents of the new land drive are facing traditions and precedents that run deep in the law and culture." *Id.*

I do not doubt that many legal experts will rely on the breadth of dicta in sometimes seemingly relevant case precedent and find that Utah faces an uphill battle. However, opponents should not rely too much on the Johnson article for their claim of legal illegitimacy. That article proceeds to identify and quote only one expert, Professor Charles F. Wilkinson of the University of Colorado. *Id.* As there seem to be very few experts publicly weighing in on the issue so far in any manner, I think the "most experts" claim in the article is probably unsupported (although I make no claim to know how many legal academics will line up against the law should it start to receive more attention and therefore cause such legal commentators to form an opinion).

Legislative Research and General Counsel appended its "Legislative Review Note" to the introduced version of H.B. 148 "as required by legislative rules and practice."[102] Despite the near conclusive effect some opponents of the legislation have tried to give the Legislative Review Note, the authors specifically explain that the Note is designed to "provide information relevant to legislator's consideration of this bill" and not to "influenc[e] whether the bill should become law" and it is "not a substitute for the judgment of the judiciary" on the constitutionality of the TPLA.[103]

After citing the Property Clause, the Legislative Review Note relies on statements in *United States v. Gratiot*,[104] *Kleppe v. New Mexico*,[105] and *Gibson v. Chouteau*.[106] 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."[107]

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

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

These quotations from case law are valueless for the interpretation of the TPLA and certainly create no controlling precedent to be applied in any challenge to the TPLA.

Gratiot, for example, does little to inform an interpretation of the TPLA. Its holding was that the Property Clause "authorize[s] the leasing of the lead mines on the public lands, in the territories of the United States" the terms of which would be enforceable and it also stands for the proposition that property rights created prior to statehood could not be upset by a new state.[108] 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.

Similarly, *Kleppe* has limited value in any TPLA dispute and the Note's reliance on it is misplaced. *Kleppe* simply holds that a state law allowing the state to come onto federal land and rustle up and later auction burros is unconstitutional because it interferes with federal management policies while the federal government is an owner of public lands.[109] The holding says nothing either in favor of or against giving Congress a power to ignore other commitments to dispose of property like it made in the UEA.

The *Kleppe* holding simply maintains that *while* the federal government is an owner, states have a type of "duty of noninterference" with federally controlled lands (including refraining from passing laws that conflict with the federal policies while the federal government occupies such lands).[110] If a state passes a

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

103 *Id.*

104 39 U.S. 526, 537 (1840).

105 426 U.S. 529 (1976).

106 80 U.S. 92 (1872).

107 H.B. 148 Legislative Review Note, *supra* note 102.

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

109 *Kleppe*, 426 U.S. at 546.

110 *Id.* at 540-41. *See also* Touton, *supra* note 36, at 825 (discussing Kleppe and concluding with yet another argument

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.[111] But again, there was no need to grant Congress some truly "unlimited" Property Clause power to reach this holding in *Kleppe*. In the *Kleppe* case, unlike in a challenge to the TPLA, there were no other relevant laws (comparable to, for example, the UEA) to consider other than the interfering municipal law that was invalidated.

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.[112] But that holding says nothing of whether the state can demand that the federal government honor its promises and perform its duties. And it says nothing about when and whether, if the state is the beneficiary of those promises, there can be an enforceable demand for adherence.

The Legislative Review Note also quoted at length from the U.S. Supreme Court's 1872 decision in *Gibson v. Choutou*:

> The Supreme Court of the United States has ruled that "[w]ith respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted to the Union, that such interference with the primary disposal of the soil of the United States shall never be made." *Gibson v. Chouteau*, 80 U.S. 92 (1872).[113]

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."[114] *Gibson* does not, however, resolve the issue of whether the TPLA violates the Property Clause.

Gibson only held that a state cannot interfere with a disposal and 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."[115] 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."[116] While *Gibson* demonstrates that a state may not 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[117] – it does not speak to whether a state may nonetheless demand that the federal government follow through on promises made to the state to eventually dispose in some manner or another the property it holds rather than to retain it.

Consider also another case, *Irvine v. Marshall,* not discussed in the Legislative Review Note but nonetheless could be claimed to support opponents of the TPLA.[118] While *Irvine* indicated broad authority for the federal government over its property in the Territories "to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem

that "[a]lthough the *Kleppe* decision was unanimous, its assertion that the property power is "without limitations" should not be accepted uncritically. The property power, like all other congressional powers, is circumscribed by external limitations found in the Bill of Rights and elsewhere in the Constitution.")

111 *Kleppe*, 426 U.S. at 539-40.

112 *Id.* at 546.

113 Legislative Review Note, *supra* note 102.

114 *Gibson*, 80 U.S. at 99.

115 *Id.* at 100.

116 *Id.*

117 *Id.*

118 61 U.S. 558 (1857).

most advantageous to the public fisc, or in other respects most politic,"[119] all of that language *still anticipates* disposal and merely constrains State power to interfere with the government *while it owns* the public lands or *in the legally effective transfer* of such lands. The focus in *Irvine* was on questions regarding "in what mode, and by what title, the public lands shall be conveyed" – 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.

The holdings in all of these cases relied upon in the Legislative Review Note (or in those cases similar to these selected cases that 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. 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.

A similar legislative review memorandum was written in the State of Wyoming designed to inform the Wyoming Legislature about the consequences of adopting legislation in that state similar to Utah's TPLA.[120] This is one of the few other legal analyses that this Author has found regarding the constitutional validity of the TPLA. It is a very short and conclusory analysis, relying (like the Utah Legislative Review Note) on overbroad and inapplicable dicta to make its point. The memorandum quotes *United States v. Gratiot* and it also relies upon broad Supremacy Clause language in *Kleppe* and *Gibson*.[121] The flaws in those analogies are described above.

But the Wyoming memo also uses a few cases not discussed in the Utah Legislative Review Note[122] – most important among these are *Shannon v. United States*,[123] *Utah Power & Light Co. v. United States*,[124] *United States v. Gardner*,[125] and *Light v. United States*.[126] In addition, the case cited in *Light – Camfield v. United States*[127] – must be discussed as it serves as the origin for one of the most often used claims of plenary retention power for Congress vis-à-vis the public lands.

Each of these cases, like the others discussed above, can be distinguished from any arguments related to the TPLA. *Shannon* had only a 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.[128] 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.[129] 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 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

119 *Id.* at 561-562.

120 Memorandum from Josh Anderson and Matt Obrecht, Wyoming Legislative Service Office Staff Attorneys, to Members of State of Wyoming Legislature Minerals Committee, *Utah Land Transfer of Public Lands Act, Utah 2012 HB 148*, October 9, 2012 (on file with Author) [hereinafter "Wyoming Legislative Memo"]("memorandum discusses likely conflicts with the United States Constitution and the Constitution of the State of Wyoming if a similar piece of legislation [to H.B. 148] were introduced and passed in Wyoming.").

121 *Id.*

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

123 *Id.* (citing 160 F. 870, 874 (9th Cir. 1908)).

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

125 107 F.3d 1314, 1318 (9th Cir. 1997).

126 220 U.S. 523, 536 (1911).

127 167 U.S. 524 (1897).

128 *Shannon*, 160 F. at 875.

129 *Id.*

invalid.[130]

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."[131] 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*.[132]

In *Light* too, the Court there made a few seemingly broad statements about the reach of the Property Clause.[133] The following paragraph is the one from which *Gardner* quotes and the one most likely to be cited by TPLA critics:

> But 'the nation is an owner, and has made Congress the principal agent to dispose of its property. . . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.' *Butte City Water Co. v. Baker*, 196 U.S. 126, 49 L. ed. 412, 25 Sup. Ct. Rep. 211. 'The government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.' *Canfield v. United States*, 167 U.S. 524, 42 L. ed. 262, 17 Sup. Ct. Rep. 864.[134]

The *holding* in *Light*, however, is quite limited. The *Light* opinion used that broad rhetorical language only as dicta in reaching a far narrower and unexceptional holding that the federal government had the power – like any owner – to expel trespassers.[135] *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.'"[136]

Similarly, in *Camfield* where the Court first used the unnecessarily verbose language of "may sell or withhold them from sale,"[137] that 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.[138] The *Camfield* holding can be summarized loosely as saying the following: The fact that the federal government has not yet sold (or, to phrase it differently, has currently withheld from sale) a parcel does not mean that a private individual can just step in 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.[139] That hardly amounts to a holding that creates a precedent for a sweeping and plenary power on the part of the federal government to withhold from sale any public lands it wishes to retain. And of even further importance, the *Camfield* Court had absolutely no occasion to consider the powers of the United States in light of independently existing duties or commitments to dispose like what the federal government entered into with the states like Utah.

Other Property Clause cases are similar to those discussed here – with almost nothing to say about a duty-to-dispose theory and instead focusing on what a state may do while the federal government is an owner.[140] There is a difference between interference with administration of federal holdings or interference with

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

131 Wyoming Legislative Memo, *supra* note 120.

132 *Gardner*, 107 F.3d at 1318.

133 *Light*, 220 U.S. at 536-37.

134 *Id.* at 536.

135 *Id.* at 537.

136 *Id.*at 536.

137 *Camfield*, 167 U.S. at 524.

138 *Id.* at 528.

139 *Id.* at 525-26.

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

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

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. 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.

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.

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

The State of Utah may have some additional theories to defend the TPLA beyond the compact-based duty to dispose. Primary among these theories would be those that rely on the Equal Footing Doctrine and general Federalism principles,[141] along with a narrow interpretation of the Property Clause power envisioned in language from the U.S. Supreme Court's 1845 decision in *Pollard v. Hagan*.[142]

The Equal Footing Doctrine and Federalism principles can serve two purposes for those advocating for the TPLA's validity. First, these principles could simply be employed as background principles that color an interpretation of the Enabling Act that finds the existence of a compact-based duty to dispose. These principles could help support efforts to resolve any ambiguities in the Enabling Act. These policies generally weigh in favor of greater state autonomy and can therefore be used to assist distinguishing the inapposite cases where broad federal powers were stated to exist (when litigating compact-based *duties of noninterference*) from a compact-based *duty to dispose*. That distinction is discussed in the previous subsection. Such a duty to dispose is designed, like these principles, to limit federal power. Importantly, these Equal Footing and Federalism doctrines may not be necessary to find a duty to dispose on a compact theory of the Enabling Act, but these principles could help tip that theory towards the State's position if there is some reluctance to accept an interpretation finding a compact-based duty to dispose.

Separately and independently, the Equal Footing Doctrine and/or basic tenets of Federalism might create independent duties for the federal government requiring it to dispose of public land holdings wholly apart from

141 For a summary of these doctrines, see generally Touton, *supra* note 36. Consider also the Northwest Ordinance, proclaiming that:

> to provide also for the establishment of States,… and for their admission to a share in the federal councils on an equal footing with the original States … … The legislatures of those … new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers …"

The Northwest Ordinance (1787), *reprinted in* 2 Documents of American History 130 (Henry Steele Commanger ed., 8th ed. 1968); *see also* Utah Code Ann., Enabling Act, *available at* http://archives.utah.gov/research/exhibits/Statehood/1894text.htm. ("AN ACT to enable the People of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States.").

142 44 U.S. (3 How.) 212 (1845) ("Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever.").

(and perhaps in addition to) a compact-based duty to dispose arising from the Enabling Act. There are strong arguments from the original understanding and purpose of the Equal Footing and Federalism Doctrines to support the State.[143] However, the State will need to distinguish the TPLA from the broad precedents that seem to reject a narrower reading of the Property Clause adopted in *Pollard* – in much the same way this White Paper has described they should be distinguished in relation to the compact-based duty to dispose. Moreover, they will need to overcome the limitations on the breadth of the Equal Footing doctrine recognized in some courts.[144]

This White Paper will not fully analyze the strengths and weakness of these additional theories, but the argument in favor of the TPLA from *Pollard* will be *briefly* introduced here nonetheless. *Pollard* involved a question of whether the United States had the power to grant title to certain tidelands in the Mobile Bay in Alabama.[145] The Court was required to evaluate the effect of Georgia's cession of the Alabama territory to the United States which was done in the first instance to help the United States satisfy Revolutionary War debts.[146] The Court's discussion of the issues lead to a very limited interpretation of the Property Clause – what one scholar has called "breathtaking in its scope" if it were to be controlling.[147] The Court reasoned that the federal government acted as a mere proprietor in relation to these lands, and it would have a duty to sell its holdings in Alabama if that state was to be on an equal footing with other states, and that the Property Clause merely "authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation."[148]

The *Pollard* opinion includes broad language that federal land holdings were always meant to be temporary and that the Property Clause gives no separate authority for the federal government to retain ceded Western lands.[149] The Court explained:

> [T]he United States never held any municipal sovereignty, jurisdiction or right of soil in and for the territory, of which Alabama or any of the new States were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana.[150]

As Rasband describes it, according to *Pollard*, the Property Clause:

> was not intended to give the United States authority to keep and regulate public lands. Instead, the Property Clause was something like temporary management authority pending the final sale and disposition of the public lands that would make Alabama a full sovereign. According to *Pollard*, the Constitution provided only one way for the United States to obtain complete authority over public land and that way was the Enclave Clause.[151]

However, many cases after *Pollard* have taken a broad view of the Property Clause that is contrary to

143 *See generally, e.g.*, Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 Pac. L.J. 693, 696 (1981); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 Tex. L. Rev. 43, 43 (1949) ("[The landholding relation] is one of the most basic foundations of our federalism, if, indeed, it is not the corner stone."); Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 Mich. L. Rev. 239, 254 (1976) ("Every expansion of the property clause increases the power of the federal government at the expense of the states' authority, and by the traditional jurisprudence of federalism that is cause for unease.").

144 *See, e.g.*, Nevada v. United States, 512 F.Supp. 166, 171-72 (D. Nev. 1981) (in suit challenging constitutionality of FLPMA provisions, court holds equal footing doctrine does not cover economic equality of states, different impacts in different states is acceptable under doctrine, broad language to the contrary in *Pollard* was dicta, and citing *Light* that it may sell or withhold from sale).

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

146 *Id.*

147 Rasband et al., *supra* note 12, at 99.

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

149 *Id.*

150 *Id.*

151 Rasband et al., *supra* note 12, at 98.

Pollard's language. Rasband contends in part correctly that courts "were so easily able to dismiss *Pollard*'s narrow view of federal power to retain and regulate land within the states [because] it was dicta."[152] Another argument, however, is that most courts even when taking a broad view of the Property Clause have not had to confront the issues of federal duties that exist to constrain its powers discussed in *Pollard* and instead those courts have only had to resolve issues of state interference with clear and non-duty-constrained federal powers. Any *Pollard*-based argument will need to distinguish those subsequent cases discussed in previous parts that call for a near-limitless Property Clause power.

There may be several ways to accomplish this task of differentiation and this White Paper leaves the bulk of that research to future projects. For now, consider just one example. A reasonable case for reconciling *Pollard* and cases like *Kleppe* can be made based on the following methodology:

> The inconsistency between *Pollard* and *Kleppe* may best be resolved by recognizing the equal footing doctrine as a continuing limitation on the exercise of the property power, not merely as a limit on Congress's power to impose conditions on the admission of states. *Pollard* clearly indicates that the federal government may not retain land when such retention gives it plenary power to displace state autonomy. Accordingly, Congress may not use the property power to infringe the municipal sovereignty of the Western states, because such infringement would be the direct result of federal usurpation of a prerogative of the original states: ownership of unappropriated lands.

Under this reasoning, *Pollard*'s broad language would still be operable even in a post-*Kleppe* world. The student-note author of this reconciliation theory continues:

> While courts have no power to force congressional disposal of lands, they should not allow Congress to use the property power in such a way as to destroy "the constitutional equality of the States . . . essential to the harmonious operation of the scheme upon which the Republic was organized." This view, while imposing definite limits on the property power, need not unduly hamper legitimate federal programs in the Western states. Congress can, of course, purchase land anywhere in the nation for governmental purposes and, under *Kleppe*, exercise broad powers over that land.[153]

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

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

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

Id. at 101.

153 Touton, *supra* note 36, at 837-38. Touton continues that such a theory would leave the federal government with substantial opportunities to still own and control land if it wishes:

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

Id.

available case law.

Alternatively, the State (rather than distinguishing seemingly contrary case law from the wisdom of *Pollard*) may simply need to convince the courts to re-embrace the historical findings and dicta from *Pollard* that led to a narrow reading of the Property Clause in that case and lead the *Pollard* Court to describe a broad mandate for federal disposal of its land holdings; and, if that is the situation, the State will need to convince the court to reject some otherwise controlling precedents, if any, that embrace a broader Property Clause power. This approach, as well as a full assessment of its strength as a matter of law, would require a substantial amount of additional legal investigation and research beyond the scope of this White Paper.

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

D. A Few Thoughts on Justiciability Concerns

Aside from the arguments on the merits, should the Federal government fail to comply with Utah's demand in the TPLA and the State of Utah wishes to sue on the theories that support that demand, the State will need to evaluate potential justiciability hurdles that might preclude enforcement in the courts.[154] Further analysis of this issue would be necessary should such a lawsuit come to pass.

However, even if the TPLA's enforceability were determined non-justiciable, the inability to use the federal courts to enforce a duty does not eviscerate the existence of the duty itself. The federal government would still have an independent obligation to live up to its commitments, but it would require political will on the part of legislators and pressure applied and accountability demanded by the electorate. There are many obligations in our constitutional scheme that require self-enforcement by political actors out of their oath and constitutional duties, irrespective of whether a court order can compel the action.

Conclusion

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

This White Paper has provided 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. Other theories may also

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

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

Light, 220 U.S. at 537; *Kleppe*, 426 U.S. at 536 ("we must remain mindful that, while courts must eventually pass upon them, determinations under the Property Clause are entrusted primarily to the judgment of Congress."). Nevertheless, the courts have adjudicated disputes involving alleged state violations of compact terms and *Kleppe* does recognize that "courts must eventually pass upon" Property Clause disputes. Without further research and analysis, this White Paper takes no position on how the courts might or should deal with these justiciability issues.

support the TPLA demand. 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.

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