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## Problem of U.S. federal government ownership in western states

DOI: <http://dx.doi.org/10.12775/SIT.2015.012>

### 1. Introduction

Upon briefly analyzing the occurrences of the last 200 years of the U.S. history, the author has found numerous cases of problems, i.e. concerning federal ownership of public lands. The aforementioned dispute is held between two parties which are the federal government and the state governments. Both parties of this dispute have been involved in it for decades. The stakes are high, political and economic consequences could be very significant and have a great impact for the future relations between the rivaling parties.

Furthermore, there were numerous cases that caught the author's attention. In 70s and 80s the problem of the disposal of the public lands seemed to have been finally solved and there no changes to the situation were expected to occur. However, the brilliant Utah legislators have issued a document – Transfer of Public Lands Act and Related Study<sup>1</sup> (from now on abbreviated as TPLA), which will produce news space for the dispute upon going into effect. TPLA is another attempt made by states to take over control on public domains that has previously been taken from them by the federal government. This act tries to force federal government

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<sup>1</sup> The text of TPLA: <http://le.utah.gov/~2012/bills/hbillint/hb0148.htm> (access: 30 July 2014).

to dispose lands itself by remaining about promises made when Utah's admission to the Union. Perhaps, it is time for a significant change in this long-term controversy.

This article describes this briefly pinpointed problem in general, taking into account political, economic and, most of all, legal arguments which have been developed by both sides throughout the dispute.

## 2. History

Treaty of Paris ended the American Revolutionary War and brought peace in 1783. The western border was placed on the Mississippi River. This also meant that thirteen mother-states, which considered themselves as independent countries, had to figure out what to do with the territories beyond western boundaries to which they could not lay claim anymore<sup>2</sup>.

Federal land ownership began when original 13 states decided to cede the rights to western and central territories to the federal government between 1781 and 1803. A new owner was responsible for selling lands to settlers and expanding the country. Thomas Jefferson, one of the founding fathers of U.S., proposed the governance of the Northwestern Territories in 1784. The later President suggested that the considerable western lands had to be divided into new states, which ought to have status and rights equal to the original thirteen states. Even though this proposal had never been passed by Congress, it proved to be a very important indication of the Northwest Ordinance<sup>3</sup> established afterwards.

In 1787 the Northwest Ordinance was enacted by unicameral legislature which the Congress of that time was. This act laid the fundamentals for further adding new lands to the territory of the United States. Regulations of this document stated the way parts of territories between north of Ohio River and west of the Alleghenies

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<sup>2</sup> <http://education-portal.com/academy/lesson/the-northwest-ordinance-definition-summary-quiz.html#lesson> (access: 25 July 2014).

<sup>3</sup> *Ibidem*.

would later become states<sup>4</sup>. It paved the way for new states to be added to the Union with the same rights and status as already existing states. Furthermore, religious freedom, the right of trial by jury and free access to the major rivers of the region were guaranteed. What is extremely significant, from that moment onward slavery has been abolished on these lands. The new state could be created when a particular region obtained 5.000 white male settlers that would vote for creating a statehood<sup>5</sup>.

After 1803 the federal lands had been extending following the purchases of territories or treaties with other countries, including Spain, France, Great Britain and Mexico. Below we can see a list showing major events of the period concerning the problem.

Table 1. U.S. territory expansion in 19<sup>th</sup> century – the own elaboration

<b>Year</b>	<b>Treaty/cession</b>	<b>Lands acquitted (as a today states or part of them)</b>
1803	Louisiana Purchase from France	Arkansas, Colorado, Kansas, Iowa, Louisiana, Minnesota, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota and Wyoming
1818	British Cession	Minnesota and North Dakota
1819	Spanish and Britain Cession	Florida, Louisiana and Colorado
1845	Texas Annexation	Colorado, Kansas, New Mexico, Oklahoma, Texas and Wyoming
1846	Treaty with Great Britain	Washington, Oregon, Idaho, Montana, Wyoming

<sup>4</sup> <http://education-portal.com/academy/lesson/the-articles-of-confederation-and-the-northwest-ordinance.html#lesson> (access: 25 July 2014).

<sup>5</sup> The text of Northwest Ordinance: <http://www.ourdocuments.gov/doc.php?doc=8&page=pdf> (access: 13 August 2014).

Table 1. U.S. territory expansion in 19<sup>th</sup> century

Year	Treaty/cession	Lands acquitted (as a today states or part of them)
1848	Mexican Cession	Arizona, California, New Mexico, Nevada, Utah and Wyoming
1853	Gadsden Purchase from Mexico	Arizona and New Mexico
1867	Alaska Purchase from Russia	Alaska

Detailed conditions concerning including particular states into the territory of the United States were described in each State Enabling Act. Based on these acts, the states are up until today trying to demonstrate the obligation of the federal government to dispose of the public lands.

The initial federal policy was to hand public lands under private and state ownership. The major reason for doing that was coercion to repay the national debt that had surfaced after the Revolutionary War. The federal government allocated money for basic needs of new-formed country. Furthermore, the Congress enacted a lot of legal acts to sell, grant or dispose of public lands using varying ways. Homestead Act of 1862 or General Mining Law of 1872<sup>6</sup> could prove to be sating examples of these. In general, between 1787 and 2012, based on estimated data, it has been disposing more than 60% (1,287 million acres) of 1,841 million acres public lands acquired by federal government between 1781 and 1867<sup>7</sup>. Lands were transferred mostly to private ownership but also to states, railroads corporations or native corporations (especially on Alaska).

<sup>6</sup> Congressional Research Service, *Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal and Retention*, Washington 2007, p. 6–7.

<sup>7</sup> U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics*, 2012, v. 197, Washington 2013, table 1–1 and 1–2.

Despite the major tendency to dispose whole public lands, the Congress has started to modify its policy with the passing of time. The lands were withdrawn from disposal and used for particular national purposes. One of such purposes was certain geographical locations for recreation and preserving them for the future generations. It finally led to establish a National Park System and National Wildlife Refuge System, which nowadays are managed by federal agencies.

The debate over federal retention of the remaining public lands lasted for decades. There were more and more passed statutes which delivered arguments to make a shift toward explicit federal policy to retain these lands. Finally, in 1976 enactment of the Federal Land Policy and Management Act<sup>8</sup> formally ended the previous disposal policy. The document states in section 102(a-1) that: "(a)The Congress declares that it is the policy of the United States that –

(1) 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."

This act repealed most previous disposal laws and amended a lot of management authorities, in statutes concerning homesteading, land sales or transfers.

As a result of this act, the establishing of any additional federal programs for disposal of public lands became very doubtful. There was big annoyance and irritation concerning ownership of most properties in the western states by bureaucrats from Washington D.C. These states, private organizations and citizens started forcing the federal government to deprive itself of federal lands. The whole body of such unsuccessful efforts, including local and state acts, federal administrative changes and court examinations lead to the "Sagebrush Rebellion". More details concerning that issue in further part of the article.

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<sup>8</sup> The text of FLPMA: <http://www.blm.gov/flpma/FLPMA.pdf> (access: 4 August 2014).

### 3. Present situation

As can be seen from the data, this permanent dispute between local and state governments on the one side and Washington D.C. on another, concerns millions of acres. According to Congressional Research Service, the federal government is still a big owner of public lands, especially in 12 western States (including Alaska, excluding Hawaii). It owns roughly 650 million acres, which is more than 28% of the whole territory of the United States. It is important to pinpoint that the exact number of federal public land cannot be precisely measured.

These public lands are mostly owned by 4 agencies: National Park Service (NPS), Fish and Wildlife Service (FWS), Bureau of Land Management (BLM) and U.S. Forest Service (FS). Agencies have right to acquire and dispose lands, some, like BLM, has much broader authority to do that than others<sup>9</sup>. Everything is legal, according to several legal acts issued by Congress in the last decades. The table below shows a visualization of the lands under federal ownership.

Table 2. Federal Lands (in millions of acres)\*

	<b>Alaska</b>	<b>11 Western States**</b>	<b>Other 38 states</b>	<b>Total</b>
U.S. Forest Service	21.97	141.80	29.02	192.79
National Park Service	51.09	20.13	6.92	78.13
Fish and Wildlife Service	76.61	6.32	7.55	90.45
Bureau of Land Management	83.54	174.35	0.39	258.28
Other Federal(estimate)	19.29	10.85	5.25	35.38

<sup>9</sup> Congressional Research Service, *Federal Land Ownership: Current Acquisition and Disposal Authorities*, Washington 2013, p. 1.

Table 2. Federal Lands

	<b>Alaska</b>	<b>11 Western States**</b>	<b>Other 38 states</b>	<b>Total</b>
Federal Total	252.50	353.33	47.47	653.30
Nonfederal Total	112.99	399.62	1.105.44	1.618.04
% Federal	69,1%	46,9%	3,1%	28,8%

\* Congressional Research Service, *Federal Land Ownership: Constitutional*, table 1, p. 9.

\*\* Includes: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.

A lot of people in western states demand disposal of federal lands. They quote few valuable arguments. Montana Governor, Steve Bullock, pointed out that “there is real high degree of frustration when it comes to management of the federal land”. Norton Dunlop, expert in the biggest conservative think-tank in U.S. – Heritage Foundation, emphasizes how the federal ownership brings losses. She claims that central government is an unskilled manager and does not use the full potential of the lands. Had the public territories been returned to states, the natural resources like gas, oil, water, timber would find better use. The positive consequences would be: new jobs, secure energy, lower heating and cooling costs, bigger educational fund, faster development of economy, in summary – the improvement of living standards of each American family in particular state<sup>10</sup>.

The federal estate exceeds the territory of the combined lands of United Kingdom, France, Germany, Poland and Italy – added Robert Gordon, a senior advisor in this same organization. Indeed, the Federal government is the largest owner of Americans Lands. Almost all federal lands are placed in Western states, unlike the Eastern ones.

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<sup>10</sup> <http://dailysignal.com/2014/05/24/turnover-federal-lands-spur-long-term-prosperity> (access: 25 July 2014).

Table 3. States with highest and lowest percentage of federal lands – the own elaboration\*

<b>States with highest % of federal lands</b>		<b>States with lowest % of federal lands</b>	
Nevada	81,1%	Connecticut	0,3%
Utah	66,5%	Iowa	0,3%
Alaska	61,8%	Kansas	0,6%
Idaho	61,7%	New York	0,7%
Oregon	53%	Rhode Island	0,8%
Wyoming	48,2%	Illinois	1,1%
California	47,7%	Maine	1,1%
Arizona	42,5%	Nebraska	1,1%
Colorado	36,5%	Ohio	1,1%
New Mexico	34,7%	Indiana	1,5%
Montana	28,9%	Massachusetts	1,6%
Washington	28,5%	Oklahoma	1,6%

\* Based on data from: Congressional Research Service, *Federal Land Ownership: Overview and Data*, Washington 2010, p. 2–3.

There is no logical justification for such differentiation in treatment between western and eastern states by central government.

A great example of the federal government failure policy, Senator Ken Ivory, the chief of American Land Council, mentions that restricting the harvesting of timber lead to catastrophic wildfires. What is more, forests are suffering from tree illnesses throughout the West. In his opinion, the states legislature certainly conduct forest policy to a further extent, simply because they can react faster and know local needs better than bureaucrats in Washington<sup>11</sup>.

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<sup>11</sup> <http://americanlandscouncil.org/some-men-just-want-to-watch-the-world-burn> (access: 25 July 2014).



There are also voices opposing the transfer rights of public lands into the hands of state governments. Some of them – like former BLM Director, Patrick Shea – has doubts whether the state governors are capable of managing public lands and points out that these supporting the transfer of rights have not enough solid historical and scientific basis<sup>12</sup>.

Sierra Club – one of the biggest and oldest environmental non-governmental organization would rather increase the scale of public ownership than decrease its degree. The major motive behind forming this organization is the long-lasting legacy of protecting America's beautiful wild lands<sup>13</sup>. They claim that public lands are hold in public trust for and by Americans. They seem to be afraid that any acquisitions of wild lands by private individuals would bring an uncontrolled devastation to these territories<sup>14</sup>.

In their opinion, only federal ownership can protect environment from destroying by excessive mining, drilling and climate disruption. This is the only way to save national heritage for further generations.

#### 4. Legal arguments

The economic, political, social and environmental arguments in this dispute are very important and ought to be listed. However, if we want to find an answer whether such disposal of public lands is possible, we should focus on legal arguments.

As it was aforementioned, western states are stressing that the federal government is obliged to make a disposal of public lands. The difference in federal lands between West and East is unacceptable and in fact violets the equal footing doctrine.

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<sup>12</sup> <http://www.washingtontimes.com/news/2014/may/4/this-land-is-whose-land-ranch-standoff-reveals-ext/?page=all> (access: 25 July 2014).

<sup>13</sup> [http://en.wikipedia.org/wiki/Sierra\\_Club](http://en.wikipedia.org/wiki/Sierra_Club) (access: 25 July 2014).

<sup>14</sup> <http://content.sierraclub.org/ourwildamerica/about> (access: 25 July 2014).

American Lands Council has been trying to extinguish an argument that western states – in contrast to eastern ones – continuously disclaimed their rights to these lands and has compared the regulations of the Enabling Acts in particular states from the West side and the East side of U.S<sup>15</sup>. There is juxtaposition of North Dakota and Utah. In the first state, federal government owns 3,9% of state land, in the second one – 66,5%.

Table 4. Juxtaposition of some provisions of North Dakota and Utah Enabling Acts

<b>North Dakota – Enabling Act – 1889*</b>	<b>Utah – Enabling Act – 1864</b>
Section 4, second “That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof [...] and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and [...] no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use.”	Section 3, second “That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof [...] and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and [...] no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use.”
Section 13 “That five per centum of the proceeds of the sales of public	Section 9 “That five per centum of the proceeds of the sales of public

<sup>15</sup> <http://americanlandscouncil.org/myportfolio/4767/> (access: 4 August 2014).

Table 4. Juxtaposition of some provisions

<b>North Dakota – Enabling Act – 1889*</b>	<b>Utah – Enabling Act – 1864</b>
lands lying within said States which shall be sold by the United States subsequent to the admission of said States into the Union, after deducting all the expenses incident to the same, shall be paid to the said States, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said States, respectively.”	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.”

\* It is worth to mention that this Enabling Act was also designed for South Dakota, Montana and Washington, in which federal lands are 5,4%; 28,9% and 28,5%.

Only few regulations are shown above, but whole acts, in general, are similar to each other. Two other examples, mentioned in above document, are The Enabling Acts of Nebraska and Nevada, which were enacted in the same year. These states are on the opposite sides of U.S. Nevada is the state with the highest percentage of public domains – more than 81%, when in Nebraska only around 1% is owned by federal government.

Similar argument, concerning equal footing doctrine, was very important during the *Sagebrush Rebellion*. However, courts rejected such argumentation and concluded that the U.S. Constitution addresses the relation of the federal government to lands. Property Clause, Article IV, section 3, clause 2 provides the Congress the authority over federal property as follows: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as

to Prejudice any Claims of the United States, or of any particular State”<sup>16</sup>.

In the 19th century the Supreme Court has already examined the limits of this Clause. In the very famous *Gibson vs. Chouteau* case, in 1872 was held that: “No State legislation can interfere with this [Property Clause – D. S.] right or embarrass its exercise”<sup>17</sup>.

As we can conclude, this Clause gives the Congress a broad authority to decide what to do with public domains. Such interpretation of the Clause was confirmed in 1976 (*Sagebrush Rebellion*) by U.S. Supreme Court during the *Kleppe vs. New Mexico* case, in which we can read that: “While Congress can acquire exclusive or partial jurisdiction over lands within a State by the State’s consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress’ powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause” and added also that: “when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause”<sup>18</sup>.

Based on this interpretation, all legal acts enacted by states which declared states ownership or tried to deprive the federal government its public lands have to be considered as unconstitutional. Moreover, some courts have challenged another argument made by states – equal footing doctrine. U.S. District Court, D. Nevada in *Nevada vs. United States*<sup>19</sup> explained that equal footing doctrine applies only to political rights and sovereignty and it does not cover economic equality<sup>20</sup>.

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<sup>16</sup> U.S. Constitution, art. 4 sec. 3.

<sup>17</sup> *Gibson vs. Chouteau*, 80 U.S. 92, 99 (1872).

<sup>18</sup> *Kleppe vs. New Mexico*, 426 U.S. 529, 542-543 (1976).

<sup>19</sup> *State of Nevada vs. United States*, 512 F. Supp. 166 (1981).

<sup>20</sup> D.J. Kochan, *Public Lands and the Federal Government’s Compact-Based “Duty to Dispose”: A Case Study of Utah’s H.B. 148-the Transfer of Public Lands Act*, “Brigham Young University Law Review” 2013, p. 1185. It is worth to emphasize that this is the only article that considers the topic of TPLA. Arguments and judgments mentioned in this text come from that.

After summarizing these disputes which happened in 70s and 90s, we can conclude that it is rather a moral or political issue for the federal government to manage public lands equally in each state and does not favor or discriminate some of them. Therefore the Congress is free in making decisions whether or not extinguish rights. States could not have the right to overrule these powers by issuing local or state law.

## 5. Transfer of Public Lands Act and Related Study

The 22<sup>th</sup> of March 2012 was a significant date. That day, State of Utah enacted Transfer of Public Lands Act and Related Study (TPLA) which has opened a new chapter in the long argument between federal government and western states<sup>21</sup>. Another states placed in the West have started the process of considering similar legislations. Some journalist named this movement as a new Sagebrush Rebellion<sup>22</sup>.

Authors of this act claim that when statehood was made, the federal government obtained the land, but also that Congress was obliged to own them for limited time and should have disposed them of after it expired.

The factor distinguishing TPLA from former legal acts is that, it does not declare that public lands are owned by State Utah, later "State", or make an effort to take land away from the federal government but merely remains about promise made when Enabling Act was enforced<sup>23</sup>. Because of that it is believed that this act presents fascinating issues for the area of contract, areas of public lands, natural resources and constitutional law. Its regulations should be interpreted very carefully, because past court cases dealing with public lands controversy could be applied only to some extent<sup>24</sup>.

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<sup>21</sup> Ibidem, p. 1133.

<sup>22</sup> <http://www.redstate.com/2014/04/21/federal-arrogance-fuels-new-sagebrush-rebellion/> (access: 29 July 2014).

<sup>23</sup> D.J. Kochan, *op.cit.*, p. 1148.

<sup>24</sup> Ibidem, p. 1167–1170.

The definition of public lands in TPLA does not include private lands, Indian lands, lands held in trust by public and certain identified, federally controlled areas of the State, including National Parks, National Monuments and Wilderness which are held by federal agencies<sup>25</sup>. These lands have received a heightened status of protection. In fact, the demand for disposal of the public lands is in most cases limited to lands owned by BLM and FS.

TPLA also replicates the same division and school trust commitment that would exist in Utah Enabling Act. They say that if the state transfers rights to any public lands after receiving them from the Congress, it shall retain 5% of the net proceeds and repay 95% to the United States<sup>26</sup>. This same obligation was imposed on federal government in case of selling lands to private ownership in UEA.

One of the strongest arguments made by supporters of the disposal is a contract-base theory which includes compact-based duty to dispose. This theory refers to contractual obligations which arose under bilateral agreement between the federal government and state Utah with Utah Enabling Act of 1894. This contract is not a single-track agreement but has imposed rights and obligations on both parties.

Long-standing precedents support this argument<sup>27</sup>. For instance, in 2009, in *Hawaii vs. Office of Hawaiian Affair* case<sup>28</sup>, the Supreme Court held that regulations of the Enabling Act are serious and enforceable. In *Idaho vs. United States*, the Supreme Court underlines the inability of the Congress to act in a manner that interferes the rights after giving them to the State, explaining: “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”<sup>29</sup>.

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<sup>25</sup> Utah Code Ann. § 63L-6-102.

<sup>26</sup> *Ibidem*, 103(2).

<sup>27</sup> D.J. Kochan, *op.cit.*, p. 1152.

<sup>28</sup> *Hawaii vs. Office of Hawaiian Affair*, 556 U.S. 163 (2009).

<sup>29</sup> *Idaho vs. United States*, 533 U.S. 262, 284 (2001).

Moreover, the Supreme Court explicitly articulates in *Andrus vs. Utah* that: “«solemn agreement» which in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry”<sup>30</sup>. It is obvious that above cases regarded areas other than duty to dispose of public lands, but it is important that the Court considered Enabling Act as an agreement which imposed rights and duties for both parties. Even in *votum separatum* to last cited statement four judges emphasized that: “As consideration for each new State’s pledge not to tax federal lands, Congress granted the State a fixed proportion of the lands within its borders for the support of public education [...] These agreements were solemn bilateral compacts between each State and the Federal Government”<sup>31</sup>.

Based on above arguments we can conclude that Enabling Acts of every state should be treated as a contract. If we want to take a proper attempt, we need to answer a yet unsolved question as how we should interpret the text of each contract.

An interpretation of the contract is based on either words or conduct, and rather objective interpretation. The basic issue is how to understand the proper use of words, but also existing evidences such as conversations between parties. Surrounding circumstances may also be admitted in aid of interpreting the contract<sup>32</sup>. It is an important rule, as was underlined by Supreme Court, that even when we interpret only the content of the contract, in isolation from other circumstances, we should rather “give effect to all its provisions and to render them consistent with each other”<sup>33</sup> than focus on “single sentence”<sup>34</sup> and do hasty conclusions.

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<sup>30</sup> *Andrus vs. Utah*, 446 U.S. 500, 507 (1980).

<sup>31</sup> *Andrus vs. Utah*, 446 U.S. 523 (1980).

<sup>32</sup> M.A. Eisenberg, *Gilbert Law Summaries on Contracts*, Berkeley 2002, 363–369, p. 119–120.

<sup>33</sup> *Mastrobuono vs. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

<sup>34</sup> *Miller vs. Robertson*, 266 U.S. 243, 251 (1924).

While interpreting a contract, it is important to remember additional issues, e.g. the course of performance and its usages, which is a habitual practice when a contract is made. Such things can help to understand what parties thought about consequences of a contract and how they imagined their consideration and duties. We should also observe how parties behave after forming a contract, how they were looking at their policy and how particular actions were seen by another party. These factors help to understand some implied promises, which could not be precisely noted when based only on words<sup>35</sup>. They could also help to interpret the ambiguous meaning of words.

The most important provisions of UEA are placed in Section 3 and 9 which were cited before. After analyzing these regulations we can say that the federal government obtained the public lands temporarily and was entitled to receive 95% of net proceeds from disposal as consideration. Moreover, another privilege was that State could not input taxes on federal lands. The duties imposed on Congress were obliged to help with financing educational fund and dispose public domains.

The State had the “right” to join to the U.S. and was ensured to gain further profits from 5% of net proceeds from the disposal of public lands to private individuals and thereafter would get capacity to tax them<sup>36</sup>.

Voices against TLPA can say that in section 3 of UEA (as well as in similar acts) it is written that: “States forever disclaim” their rights to public lands, but further on we can read that: “until the title thereto shall have been extinguished” and in section 9 which shall be sold”. The commanding word “shall”, as explained Supreme Court, has mandatory meaning<sup>37</sup>.

When the contract was made, both parties tried to maximize its potential profits. So, if the state wanted to receive more money

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<sup>35</sup> M.A. Eisenberg, *op.cit.*, 49, p. 19.

<sup>36</sup> D.J. Kochan, *op.cit.*, p. 1154.

<sup>37</sup> Look at cases: *Lexecon Inc. vs. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) and *Ass'n of Civilian Technicians vs. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994).



(from 5% proceeds of sold lands), it had to ensure potential buyers that the legal status of these lands was clear and assure whether the federal government has the rights over the land. It also meant that State had to honor the duty of noninterference in the process of disposal of public lands<sup>38</sup>. This duty was not obeyed during *Sagebrush Rebellion* and was rightly recognized as illegal.

As a conclusion we should say that harmonization between both sections and the surrounding circumstances creates a “duty to disposal” public lands which have been imputed on the federal government as obligation in UEA in 1894. This inference is applicable in a greater or lesser extent each states Enabling Act because all of them have similar same ground and force.

## 6. Conclusion

Sooner or later, the problem of American Western Lands will reappear in the U.S. courts. This time former cases considering the rights of federal government under Property and Supremacy Clauses will probably prove unsuitable in the context of TPLA.

It is obvious that Enabling Acts should be considered as a contract, which is binding for both signing parties. In previous cases, the states commitments were frequently being underlined by courts (e.g.: noninterference duty). It is hoped that the extent of privileges of the federal government are going to be clarified and that it will be clearly stated whether extinguished rights to the land is one of them. Clarifying whether the Congress has to transfer the rights to public lands into states or private hands, will require a deep and detailed analysis. An analysis of such scale ought to include text of each state enabling act, background doctrines (e.g. Equal Footing and Federalism), circumstances surrounding the admission to Union and federal policy which was conducted over the years.

The Chinese proverb says that: “may you live in interesting times”, and indeed, for people who are involved in this dispute, the future can such be.

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<sup>38</sup> D.J. Kochan, op.cit., p. 1156–1157.

## STRESZCZENIE

### Problem federalnej własności ziem publicznych na zachodzie USA

Rząd federalny USA jest właścicielem ponad 28% powierzchni kraju. Fakt ten ma duży wpływ na życie społeczne i gospodarcze tym bardziej, że jest zauważalna znaczna dysproporcja w traktowaniu przez rząd centralny stanów na Zachodnim i Wschodnim Wybrzeżu. Problem ten trwa od wielu dekad. Własność federalna rozpoczęła się w momencie scedowania przez macierzyste 13 stanów praw do terenów na zachód od rzeki Missisipi po zawarciu traktatu paryskiego w 1783 roku. Początkowa polityka na rzecz przekazywania federalnych ziem nowo utworzonym stanom lub w ręce prywatne formalnie zakończyła się wydaniem przez Kongres *Federal Land Policy and Management Act* w 1976 roku. Od tego momentu trwa wzmożony spór o ziemie publiczne pomiędzy rządem federalnym a władzami stanowymi. W 2012 roku stan Utah wydał *Transfer of Public Lands and Related Study*, który otwiera nowy rozdział sporu poprzez zastosowanie odmiennych argumentów prawnych aniżeli wcześniejsze próby przejęcia ziem publicznych. TPLA opiera się przede wszystkim na teorii dwustronnie zobowiązującego kontraktu, która powinna mieć zastosowanie w stosunku do umowy włączającej stan Utah do Unii w 1894 roku. Niniejszy artykuł przedstawia ogólny zarys federalnej własności ziemskiej w świetle zagadnień natury ekonomicznej, historycznej, ekologicznej i prawnej. Te ostatnie uwzględniają przede wszystkim argumentację zaprezentowaną przez TPLA.

**Słowa kluczowe:** rząd federalny; ziemie publiczne; obowiązek rozdysponowania

## SUMMARY

### Problem of U.S. federal government ownership in western states

U.S. Federal government is an owner of more than 28% of area of the country. This has a big impact on a social and economic life, especially because it is a significant disproportion in treatment between Western and Eastern states by U.S. Congress. This problem has lasted for decades.

The federal ownership of public lands began when 13 mother-states ceded their rights to lands west from the Mississippi River after Treaty of Paris had been enacted in 1783. The initial federal policy to dispose public lands into new-formed states and private individuals was formally ended in 1976 when the Congress enacted *Federal Land Policy and Management Act*. Since this moment it has been the increased dispute between federal government and state governments. In 2012, Utah passed *Transfer of Public Lands and Related Study*, which has opened a new chapter in this controversy because of using different arguments to the advantage of transferring rights to public lands than previous ones. TPLA bases on a contract theory which should be applicable to Utah's Enabling Act of 1894. This article shows a general problem of the federal ownership in lights of economic, historic, ecological and law arguments. These latter ones refer to the arguments from TPLA.

**Keywords:** federal government; public lands; duty to dispose

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