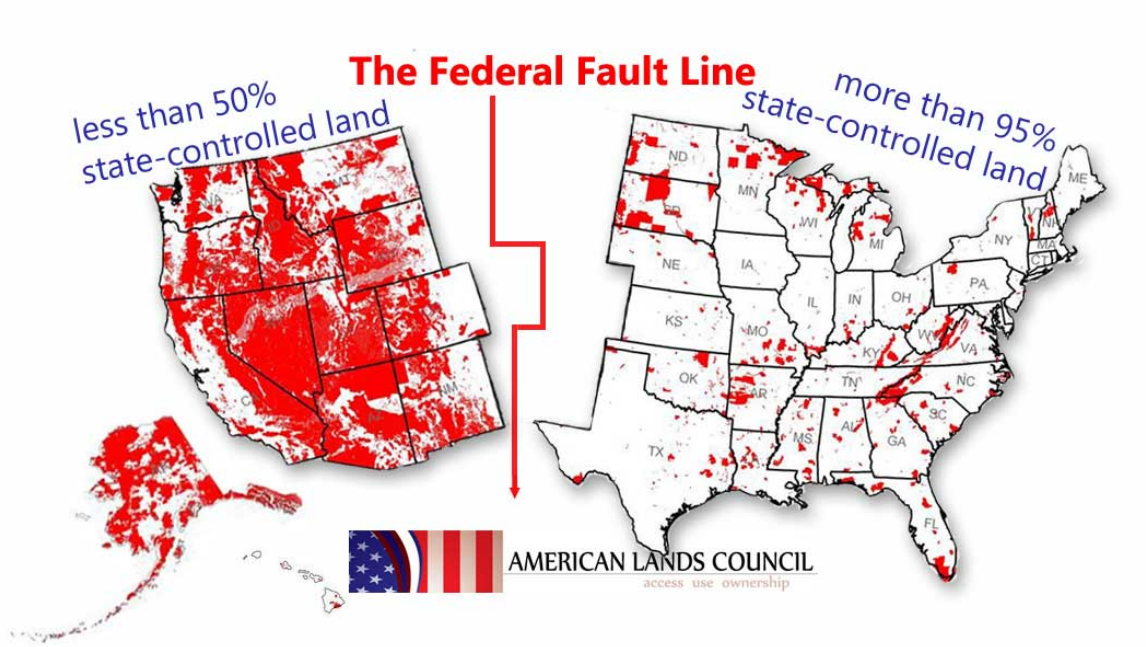
U of U Legal Analysis Ignores "Stubborn Facts" on the Transfer of Public Lands Movement



John Adams famously said once that "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."

The recent Legal Analysis of the Transfer of Public Lands Movement by professor Robert Keiter and his research associate John C. Ruple, of the Wallace Stegner Center for Land, Resources and the Environment, White Paper No. 2014-2, ignores, avoids and alters basic "stubborn facts" to to reach a conclusion suiting their own "inclinations, dictates and passions" that Utah's claims are somehow "doomed to failure."

In the spirit of John Adams, the Keiter "legal analysis" may more appropriately styled an "Alteration of the Facts and Evidence of the Transfer of Public Lands Movement," for thus it is.

Keiter and Ruple take great pains to completely avoid and ignore the "stubborn fact" that states east of Colorado have the very same statehood terms regarding the disposal of their public lands, including the “disclaimer” language that they claim dooms western states to failure in the public lands movement. Notably, the federal government did dispose of nearly all the public lands in the states east of Colorado notwithstanding this same "disclaimer" language in their statehood enabling acts.

Understandably, Keiter and Ruple make no mention of the "stubborn fact" that these statehood terms are the same for states east and west of Colorado because it entirely undermines their claim that these common statehood terms somehow arbitrarily bar Utah from seeking the same statehood treatment on the same statehood terms regarding its public lands. This is a nation established on the principles of fundamental fairness and equal protection of the laws. Unfortunately, Keiter and Ruple, by their deliberate omission of this material "stubborn fact" alone, appear intent upon clouding the debate to their own "wishes," "inclinations," "dictates" and "passions" rather than furthering a legitimate, fact-based discussion of a very serious problem of federal land management that is restricting access, diminishing health, and depressing productivity of our public lands.

North Dakota **Enabling Act, February 22, 1889** **49.4% Federally controlled in 1896** **3% Federally Controlled Today**	**Utah** **Enabling Act, March 21, 1864** **86% Federally Controlled in 1896** **67% Federally Controlled Today**
"The constitution shall be republican in form, ... and ***not be*** *repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:-"* Section 4, Preamble, ND, SD, MT, WA Enabling Act, February 22, 1889	*"The constitution shall be republican in form, ... and* ***not to be*** *repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State--"* Section 3, Preamble, Utah Enabling Act, July 16, 1894
"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 4, Second, ND, SD, MT, WA Enabling Act, February 22, 1889	*"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 3, Second, Utah Enabling Act, July 16, 1894

As you can see from the comparison above, the statehood terms regarding the public lands are the same for states east and west of Colorado. The purpose for this "disclaimer" language in all the statehood agreements, east and west in one form or another, was merely in the nature of a quitclaim deed from the newly created states, giving the federal government clean, clear title to the public lands for the purpose of disposing of them faster and for the highest possible price to the benefit of the states and the nation as a whole. This "stubborn fact" is addressed in detail in the recent BYU Law Review article, Public Lands and the Federal Government's Compact-Based Duty to Dispose, by Chapman University law professor, Donald Kochan. Keiter and Ruple ignore this "stubborn fact" as well.

Keiter witnessed the evidence of these facts firsthand in the debate Utah Speaker of the House Becky Lockhart and I had with him less than two months ago at Southern Utah University. We presented several slides that directly compared Utah's Enabling Act side-by-side with North Dakota's and South Dakota's Enabling Acts. As you can see, they are virtually word-for-word the same with respect to disposal of the public lands. The federal government did dispose of the public lands in those states but has failed to treat Utah equally. I even provided these slides directly to Mr. Ruple at his request, yet still they failed to address these "stubborn facts."

Keiter and Ruple claim that *all* western states disclaimed their public lands. This is simply not true. California, admitted into the Union 1850, and Oregon, admitted in the Union in 1853, have no such language in their statehood documents. Either Keiter and Ruple are not aware of this important, "stubborn fact," or they chose once again to "alter the state of facts and evidence" to support their personal "inclinations." Given that the statehood terms of California and Oregon do not contain the "forever disclaim" language that Keiter and Ruple cite as dooming western states to failure in being treated equally in the transfer of their public lands, maybe they will at least concede that the public lands in these two states should be transferred.

Keiter and Ruple conveniently ignore substantive language of the Property Clause (U.S. Constitution, Article IV, Sec. 3, cl. 2). In fact, the third subclause to the Property Clause of the U.S. Constitution that they fail or refuse to reference, is the very heart of and purpose behind the inclusion of this clause in the Constitution in the first place. Subclause 3 of the Property Clause states "nothing in this Constitution" – not just this clause or sub clause – shall in any way "**prejudice any claims** of the United States, or **of any particular State**." (Emphasis added). The constitutional debate and the history and course of dealing related to this matter reflect a general understanding and practice that the States retained and defended their "claims" with respect to the western territory. In the constitutional debate, James Madison described these "claims" with particularly insistence that "the Western States neither would nor ought to submit to a union which degraded them from an equal rank with the other States."

Ignoring important, substantive provisions of the Constitution may be convenient when trying to "alter the state of facts and evidence" in order to support of one's particular "inclinations" or "passions," but it should not be confused with real "legal analysis." When Illinois, Missouri, Louisiana and their neighboring states were battling together to compel Congress to transfer the nearly 90% of their lands controlled by the federal government for decades, President Andrew Jackson, the first Western President, deftly recounted the history of the States' "claims" intended to be preserved and protected under the plain language of Property Clause.

"By the facts here collected from the early history of our Republic it appears that the subject of the public lands entered into the elements of its institutions. It was only upon the condition that those lands should be considered as common property, to be disposed of for the benefit of the United States, that some of the States agreed to come into a 'perpetual union.' The States claiming those lands acceded to those views and transferred their claims to the United States upon certain specific conditions, and on those conditions the grants were accepted. These solemn compacts, invited by Congress in a resolution declaring the purposes to which the proceeds of these lands should be applied, originating before the Constitution and forming the basis on which it was made, bound the United States to a particular course of policy in relation to them by ties as strong as can be invented to secure the faith of nations."

"The Constitution of the United States did not delegate to Congress the power to abrogate these compacts. On the contrary, by declaring that nothing in it '*shall be so construed as to prejudice any claims of the United States or of any particular State,*' it virtually provides that these compacts and the rights they secure shall remain untouched by the legislative power, which shall only make all 'needful rules and regulations' for carrying them into effect. All beyond this would seem to be an assumption of undelegated power."

"I do not doubt that it is the real interest of each and all the States in the Union, and particularly of the new States, that the price of these lands shall be reduced and graduated, and that after they have been offered for a certain number of years the refuse remaining unsold shall be abandoned to the States and the machinery of our land system entirely withdrawn. It can not be supposed the compacts intended that the United States should retain forever a title to lands within the States which are of no value, and no doubt is entertained that the general interest would be best promoted by surrendering such lands to the States."

The "stubborn fact" is that the federal government was not granted title by the States to the Western Territory (i.e., the public lands) on its own account as the very sort of land baron they separated from, but rather only to hold bare legal title to the public lands as a trustee for the purpose of creating new states and using the proceeds from any sale of public lands in the process of disposing of them to pay the national debt.

Interestingly, Keiter and Ruple cite the Louisiana Purchase for the proposition that "Federal ownership came first, and states cannot demand that the federal government 'give back' that which never belonged to them." Interestingly, this argument ignores the "stubborn fact" that the federal government controlled for decades as much as 90% of all lands in Louisiana, namesake of the Louisiana Purchase. As referenced above, the federal government also controlled for decades as much as 90% of the lands in the self-described "western states" of Michigan, Indiana, Illinois, Iowa, Missouri, Arkansas, Alabama, Mississippi and Florida as well until they all banded together and compelled Congress to transfer title to their public lands. Many of these states have the same "forever disclaim" terms in their enabling acts. So much for the assertion by Keiter and Ruple that "states cannot demand that the federal government 'give back' that which never belonged to them" – It's already been done!

Keiter and Ruple argue federal disposals continue under FLPMA when in "the national interest." They fail to make the connection that under increasing federal control over public lands access is restricted, health is diminished, and productivity is depressed.

Apparently, Keiter and Ruple seem to claim by inference that it is a "national interest" to mismanage, harm and under-utilize lands and resources, pursuing forest policies that are setting records for catastrophic wildfires that are killing millions of animals, polluting the air, and decimating watershed and habitat for decades; while growing ever more indebted to foreign nations; becoming ever more reliant on foreign sourced materials for our national defense (95% of rare earth minerals essential to defense, renewable energy and electronic technology come from China, while an abundant supply is locked up in federally controlled western lands); and growing ever more dependent on foreign nations for our energy needs.

The argument that the western states were offered the transfer of their public lands but refused them, and therefore, are forever barred from the transfer of their federally controlled lands is historically reckless. As Mark Ward of the Utah Association of Counties wrote earlier this year in the Deseret News:

"First, there was no federal offer of substance. It was a bill Congress never passed.

"Second, Gov. Dern opposed the bill because it gave states only surface rights to land, retaining all mineral rights (oil, gas, coal, etc.), for the federal government. He testified to the U.S. House Committee on Public Lands in February 1932 that he opposed a land transfer with 'everything else taken out that is worth anything at all so that we will have nothing but the skin of a squeezed lemon,' and 'if we cannot get immediate control and rehabilitation of our public domain, we are against this whole proposition.'"

Keiter and Ruple next turn to semantics arguing that frequent use of the word "shall" in Section 9 of the Utah's Enabling Act really only means "may." Section 9 provides as follow:

"Sec. 9. [Five per cent of sales of public lands granted to schools.]

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*." (Emphasis added.)

Interestingly, the word "shall" actually meant the mandatory "shall" in the enabling acts of states like North Dakota that have word-for-word the same language as Utah's Enabling Act. Keiter and Ruple correctly assert the following principle of interpretation for their incorrect conclusion: "The meaning attached to statutory terms at the time of their enactment controls, not the meaning some apply more than a century later." At the time of enactment, the Utah Legislature clearly understood that "shall" meant "shall" and not "may" and that the federal government was obligated to dispose of the public lands just like it had done and was doing with the states east of Colorado with similar enabling-act terms.

In 1915, within the very same generation that adopted Utah Enabling Act, the Utah Legislature passed a resolution demanding the transfer of public lands from the federal government "in conformity with terms of our Enabling Act." Additionally, Wyoming's first governor, Francis E. Warren stated in his inaugural address in 1889, "The State of Wyoming will, after the date of admission, receive 5% of the net receipts from all sales of US lands within its borders, which will continue until all such lands are sold." Utah, and the other western states, clearly understood the federal government was obligated to honor the terms of their statehood enabling acts with equal fidelity to the states east of Colorado.

It is clear that Congress understood its obligation to transfer title to these lands as well. In 1924, the Constitution Annotated ordered by Congress for Congress states as follows:

"Rights Acquired by a New State

On Equal Footing with the Old States

The right of every new State to exercise all the powers of government which belong to and may be exercised by the original States of the Union must be admitted and remain unquestioned *except so far as they are temporarily deprived of control over the public lands*.

Pollard v. Hagan, 3 How. 223

McCabe v. Atchison, etc., R. Co., 235 U.S. 151

Illinois Central R. Co. v. Illinois, 146 U.S. 434

Knight v. U.S. Land Assn. 142 U.S. 183

Escanaba Co. v. Chicago, 107 U.S. 688

Weber v. Harbor Comrs., 18 Wall. 65" (Emphasis added.)

As for the Equal Footing Doctrine, the US Supreme Court, quoting *Pollard v. Hagan* (1845) and *Coyle v. Smith* (1911), reaffirmed just last year (2013) in *Shelby Co. v. Holder* that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." The Court further added "Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States. … Over a hundred years ago, this Court explained that our Nation 'was and is a union of States, equal in power, dignity and authority.'"

How can a state have equal political rights without the opportunity for equal political representation? States were made the size they were based on the opportunity to develop equally in population so as to have roughly equal opportunity for political representation in the U.S. House as well as the electoral college. Federal retention of millions of acres of public lands imposes a governing power other than the State within its boundaries and restricts the opportunity of the State for equal standing in the governing councils of the nation.

The powers of Congress are set forth in Article I of the U.S. Constitution - NOT in Article IV (State Relations). In Article I, Sec 8, cl. 17, Congress is given the power to exert "exclusive legislation," i.e. jurisdiction, over the District of Columbia and other places purchased by Congress with the consent of the State legislature but only for certain specified federal governing purposes enumerated in the Constitution. Article IV records the provisions of the Constitution relating to the States. Why would the Framers give a very limited power in the Article I powers of Congress to own and exercise jurisdiction only over certain limited types of property and only with the consent of the legislature, and yet grant in Article IV – the rights of and obligations to the States – an unlimited right to Congress to assert total dominion over vast areas within the boundaries of those States? Yet another "stubborn fact" ignored by the Keiter legal analysis.

Federal exertion of "exclusive legislation" over lands other than by the express constitutional method of Art. I, Sec. 8, cl. 17, amounts to depriving western states of a republican form and operation of government (Art. IV, Section IV) and, in effect, creates a new governing "State" within and among the western states without the consent of their legislatures, in abrogation of the Admission Clause of Art IV, Section 3, cl 1 as well.

It is interesting and noteworthy that the Legal Analysis cites the case of *United States v. Texas*, 339 U.S. 707 (1950) for the proposition that the equal footing doctrine justifies the federal government treating Utah unequally with respect to the amount of federally controlled lands within its boundaries. In the Texas case, the Supreme Court held that Texas could not claim more territory than the other States because then the various States would not then be on an equal footing. The Court stated:

The "equal footing" clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty (Pollard's Lessee v. Hagan, *supra*) which would produce inequality among the States. *For equality of States means that they are not "less or greater, or different in dignity or power*." See Coyle v. Smith, 221 U. S. 559, 221 U. S. 566. (Emphasis added.)

United States v. Texas, 339 U. S. 707, 720

The Texas case was about the boundaries of territory controlled by a state. If Texas could not claim control over more territory than the other States without violating the principle equal footing, how can the federal government restrict Utah to control over substantially less territory and not also implicate a violation of the equal footing doctrine? "For equality of States means that they are not less or greater, or different in dignity or power." (*Id.*)

Truly, "facts are stubborn things," and when honest and reasonable people look at the basic facts, rather than the "wishes," "inclinations," or "passions," inspiring Keiter and Ruple to "alter the state of facts and evidence" readily available, they come away with the same burning questions: Why the difference? Why is the federal government not treating today's western States fairly and equally, particularly where the statehood enabling act terms regarding the federally controlled lands are the same? Why are today's western States inexplicably "doomed to failure" in seeking to do the very same thing that Illinois, Missouri, and Louisiana, et al., already did?

Why, then, would we blindly tolerate the stark difference in the dignity and power of the States today? It seems this map tells the story and is truly the most "stubborn fact" of all... Equal? You be the judge.

Ken Ivory, an attorney and Utah State Representative, is the president of the American Lands Council.

= Federally Controlled Public Lands