**No. _____, Original**

In the
# Supreme Court of the United States

STATE OF UTAH,

*Plaintiff*,

v.

UNITED STATES OF AMERICA,

*Defendant*.

## MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BILL OF COMPLAINT, AND BRIEF IN SUPPORT


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August 20, 2024

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## MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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The State of Utah respectfully moves this Court for leave to file the attached bill of complaint. The grounds for this motion are set forth in the accompanying brief.

Respectfully submitted,


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## BILL OF COMPLAINT

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The State of Utah, by and through its attorneys, brings this suit against the United States of America, stating as follows:

1. The United States currently owns about 69 percent of the land in the State of Utah—roughly 37.4 million of Utah's 54.3 million acres. Nearly half of that federal land—roughly 18.5 million acres—is "unappropriated" land that the United States is simply holding, without formally reserving it for any designated purpose or using it to execute any of its enumerated powers. Those 18.5 million acres are administered by the federal Bureau of Land Management ("BLM"), which earns significant revenue by leasing those lands to private parties for activities such as oil and gas production, grazing, and commercial filmmaking, and by selling timber and other valuable natural resources that the federal government retains for its own exploitation.

2. As a direct consequence of the United States' indefinite retention of unappropriated public lands within its borders, Utah is deprived of basic and fundamental sovereign powers as to more than a third of its territory. It cannot tax the federal government's land holdings. It cannot exercise eminent domain over them as needed for critical infrastructure like public roads and transportation and communications systems. It cannot even exercise legislative authority over the purposes for which they may be used. In short, throughout much of Utah it is the federal government, not Utah, that wields the general police power.

3. This state of affairs is no accident on the federal government's part. It is the express policy of the United States to indefinitely retain its millions of acres of unappropriated land in Utah, regardless of whether it needs them for any enumerated purpose or how doing so impacts the interests of the State and its citizens. *See* 43 U.S.C. §1701(a)(1). Utah's elected leaders have repeatedly urged the United States to relinquish ownership of its unappropriated lands, *see, e.g.*, Utah Code §63L-6-103, but to no avail.

4. The time has come to bring an end to this patently unconstitutional state of affairs. Nothing in the Constitution authorizes the United States to hold vast unreserved swathes of Utah's territory in perpetuity, over Utah's express objection, without even so much as a pretense of using those lands in the service of any enumerated power. On the contrary, Article I carefully limits the United States' power to hold land, granting the federal government exclusive control over only the District of Columbia and other

federal "enclaves" purchased with state approval, and authorizing additional property ownership only to the extent necessary and proper for the exercise of an enumerated power. The Property Clause of Article IV likewise authorizes the federal government only to regulate and "dispose of" public lands—not to indefinitely *retain* lands within a State—as both the plain constitutional text and historical context make clear.

5. The United States' perpetual retention of unappropriated lands in Utah, over the State's express objection, thus exceeds its constitutional authority and disrupts the constitutionally prescribed balance of power between the federal government and the States. Making matters worse, it contravenes the foundational principle that all States enjoy equal sovereignty, as it improperly aggrandizes federal power at the expense of Utah's sovereign authority over the land within its own borders, diminishing Utah's sovereignty as compared to its sister States.

6. This egregious federal overreach cannot continue. To restore the balance that the Constitution requires, Utah seeks a judgment declaring that the federal policy embodied in 43 U.S.C. §1701(a)(1) of perpetual federal retention of unappropriated public lands in Utah is unconstitutional and ordering the United States to begin the process of complying with its constitutional obligation to dispose of those lands.

## JURISDICTION

7. The Court has original jurisdiction over this suit under Article III, §2, clause 2 of the Constitution of the United States and 28 U.S.C. §1251(b)(2).

## STATEMENT

### I. The Federal Government Has No Power To Indefinitely Retain Ownership Of Unappropriated Public Lands Within The State Of Utah.

#### A. The Federal Government Is One of Limited and Enumerated Powers.

8. It is a core principle of our federal system that "the National Government possesses only limited powers," while "the States and the people retain the remainder." *Bond v. United States*, 572 U.S. 844, 854 (2014). The federal government has no general police power; it "can exercise only the powers granted to it" by the Constitution. *Id.* (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)); *see also* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

9. That constitutional balance of power between the federal government and the States "is, in part, an end in itself," as it "preserves the integrity, dignity, and residual sovereignty of the States," ensuring that they "function as political entities in their own right." *Bond*, 564 U.S. at 221. Equally important, by leaving the general power of governing with the States rather than the federal government, the Framers ensured that decisions that, "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" would be made by state governments rather than by a distant federal bureaucracy. The Federalist No. 45, at 293 (James Madison). The federal balance thus "secures to

citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221.

10. The Constitution is concerned not just with the vertical balance of powers between the federal government and the States, but also with the horizontal balance of powers among the States. To that end, it is well established that new States enter the Union "on an 'equal footing' with the original 13 States," *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987), and that all of the States "enjoy equal sovereignty," *Shelby Cnty. v. Holder*, 570 U.S. 529, 534 (2013). That "constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized." *Coyle v. Smith,* 221 U.S. 559, 580 (1911).

### B. The Framers Granted the Federal Government Only Limited Authority to Hold Land.

11. Recognizing the danger that expansive federal land ownership would pose to state sovereignty and individual liberty, the Framers of the Constitution provided the new federal government with only limited powers to hold land. None of those powers includes the power to indefinitely hold unappropriated lands within a State that are not being used to fulfill any of the federal government's enumerated functions.

12. Only one provision in Article I—the Enclave Clause—specifically empowers the United States to take control of particular areas of land. The Enclave Clause grants Congress the power to "exercise exclusive Legislation" over (1) "such District (not exceeding ten Miles square) as may, by Cession of

particular States, and the Acceptance of Congress, become the Seat of Government of the United States," and (2) "all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const. art. I, §8, cl.17. As that careful language indicates, the Framers took pains to limit the authority granted under the Enclave Clause to protect the federal balance, requiring state consent (by "Cession" or "Consent of the Legislature of the State") for land within a State to fall under exclusive federal authority, and restricting the purposes for which that land could be used to specific federal functions ("the Seat of Government" or "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings").

13. The Framers also provided the federal government with residual authority to acquire and hold land under the Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. U.S. Const. art. I, §8, cl.18. The Necessary and Proper Clause accordingly empowers the United States to "acquire and hold real property in any State, whenever such property is needed for the use of the government in the execution of any of its [enumerated] powers." *Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886). But as its text makes clear, the Necessary and Proper Clause authorizes the federal government to hold land only to carry out its constitutionally enumerated powers—not to retain indefinite ownership of unappropriated public lands that are not being used for any such purpose.

14. The only other constitutional provision that grants the United States power over land is the Property Clause of Article IV, which 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.

Article IV, §3, cl.2. By its terms, that Clause empowers the federal government to regulate and "dispose of" land belonging to the United States—not to retain such land indefinitely, without regard to whether it is needed to carry out any enumerated federal function. *See, e.g.*, *Dispose*, Samuel Johnson's Dictionary of the English Language (1755) ("[t]o put into the hands of another"; "[t]o give"; "[t]o give away"; "to bestow"; "to transfer to any other person or use").

15. The historical context in which the Property Clause was drafted and adopted confirms that it authorizes the federal government to sell or transfer away unappropriated public lands, not to keep those lands under permanent federal ownership.

16. During the Continental Congress' debates about the Articles of Confederation, control over western lands was among the most hotly disputed issues. *See* Paul W. Gates, *History of Public Land Law Development* 49-51 (1968). Seven of the nascent States—Connecticut, Georgia, Massachusetts, New York, Virginia, and the Carolinas—had claims to western lands, some of them quite extensive. *Id.* at 49-50. The remaining States—Delaware, Maryland,

New Hampshire, New Jersey, Pennsylvania, and Rhode Island—had no such claims. *Id.* Many in the latter group feared that large States such as Virginia would become too wealthy and powerful if permitted to hold onto their western claims. *See, e.g.*, John Adams' Notes of Debates (Aug. 2, 1776), *in* 4 *Letters of Delegates to Congress, 1774-1789*, at 603-04 (Paul H. Smith ed., 1976); Letter from Thomas Burke to Richard Caswell (Feb. 16, 1777), *in* 6 *id.* at 298-99. The States without western claims also argued that if those western lands could be "wrested from the common enemy by the blood and treasure of the thirteen states," they "should be considered as a common property" of all the States. 14 *Journals of the Continental Congress, 1774-1789*, at 621-22 (May 21, 1779) ("*Journals*") (statement by Maryland delegates).

17. To resolve the issue, the States with western land claims ultimately agreed to cede their claims to the federal government. On October 10, 1780, the Continental Congress resolved "[t]hat the unappropriated lands that may be ceded or relinquished to the United States, by any particular states … *shall be* ~~granted and~~ *disposed of* for the common benefit of all the United States." 18 *Journals* at 915 (strikethrough in original) (emphasis added). But the Articles of Confederation did not authorize the Continental Congress to accept cessions of land or to dispose of such land—an omission that was seen as a major defect. The Property Clause was designed to remedy that defect, supplying authority that had been "overlooked by the compilers" of the Articles but nevertheless exercised by the Continental Congress in the Northwest Ordinance and similar resolutions. The Federalist No. 43 (James Madison).

18. In short, the reasons for granting Congress the power "to dispose of" lands in the Property Clause were well understood by both the Framers and the people at the time. *See, e.g.*, *id.* (referring to "questions concerning the Western territory sufficiently known to the public"). Indeed, during the 1780s, "[n]early all looked hopefully to the sale of western lands as the nation's primary 'fund,' a way to repay [war debts] without taxation." Gregory Ablavsky, *The Rise of Federal Title*, 106 Cal. L. Rev. 631, 645-46 & nn.63-64 (2018) (collecting historical sources); *see also* 1 Stat. 138, 144 (Aug. 4, 1790) (requiring all "proceeds of the sales which shall be made of lands in the western territory" belonging to the United States to be "appropriated towards sinking or discharging the [national] debts").

19. That history—and the narrow understanding of the Property Clause it reflects—explains why the Property Clause was adopted with little debate. *See* 2 *Records of the Federal Convention of 1787*, at 459 (Max Farrand ed. 1911) ("*Farrand's Records*"). Because the Property Clause was understood as simply authorizing the federal government to dispose of western lands that had (or might in the future) come into its possession, rather than to retain those lands in perpetuity, it gave rise to little controversy. By contrast, if the Property Clause had been understood as empowering the new federal government to hold those vast lands forever, without regard to whether they were needed to further any of its enumerated powers, it would have generated extensive and heated opposition to that perceived aggrandizement of the federal power—as illustrated by the public reaction to even the far more limited

grant of authority to hold land under the Enclave Clause, where opponents argued that even a ten-mile-square district for the seat of government and ownership of its own forts, arsenals, and dockyards would give the federal government too much control. *See, e.g.*, 14 *The Documentary History of the Ratification of the Constitution* 9 (John P. Kaminski et al. eds., 1983); 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 62 (Jonathan Elliot ed., 1836); 4 *id.* at 203; 2 Farrand's Records at 510 (objecting that unless the federal government's power to buy land under the Enclave Clause was contingent on state consent, it would empower the federal government "to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience").

### C. Founding-Era Practice Confirms That the Federal Government Has Only Limited Authority to Hold Land.

20. The post-ratification actions of the founding generation confirm that the federal government has no general authority to hold land indefinitely without dedicating it to any enumerated federal function. After ratification, Congress repeatedly exercised its power under the Property Clause to dispose of—i.e., transfer away—western public lands. *See, e.g.*, 1 Stat. tbl. IV, pp. xcviii-ciii (listing over 100 statutes related to the "survey and sale of public lands" from 1791 to 1845); *see also id.* at cvi-cxiv (listing statutes granting lands to recently admitted States, veterans of the American Revolution, and various other groups); 1 Stat. 138, 144 (Aug. 4, 1790) (requiring all "proceeds

of the sales which shall be made of lands in the western territory" belonging to the United States to be "appropriated towards sinking or discharging the [national] debts").

21. By contrast, to the extent the federal government reserved public lands indefinitely for its own purposes during this early period, it did so only in service of its enumerated Article I powers. *See, e.g.*, 3 Stat. 347, 347 (Mar. 1, 1817) (reserving lands producing "timber for the navy of the United States"); 3 Stat. 651 (Feb. 23, 1822) (similar); 5 Stat. 611 (Mar. 3, 1843) (similar). As far as the historical record shows, a plenary federal power to acquire and retain land was as foreign to the Framers as a plenary federal power to legislate.

22. Congress' treatment of the first several new States to join the Union was consistent with the principle that the federal government has a duty to dispose of land that it does not need for one of its enumerated powers. The first and second new States to join the original 13, Vermont and Kentucky, were admitted in 1791 and 1792 respectively with "full ownership of any public lands remaining ungranted," such that "the United States had no land within them." Gates, *supra*, at 287.

23. The next State to enter the Union, Tennessee—which was the first State created out of the federal western lands—demanded the same treatment. Its political leaders, including Andrew Jackson (its first Congressman), maintained that upon statehood Tennessee became owner of all the unappropriated public lands within its borders that had previously been held by the federal government.

*See, e.g.*, Letter from Andrew Jackson to John Sevier (Jan. 18, 1797), *in* 1 *The Papers of Andrew Jackson, 1770-1803*, at 116-17 (Sam B. Smith & Harriet Chappell Owsley eds., 1980). Without the "right of Domain" over public lands, they argued, Tennessee "could not be said to Enjoy all the rights and privileges the original states Enjoy[ed]." *Id.* at 117. That view encountered considerable resistance, however, as federal sales of western lands—including the lands Tennessee sought to claim—were viewed as a key means for the federal government to pay down the huge debts it had incurred during the Revolutionary War. Ablavsky, *supra*, at 645-46 & nn.63-64.

24. Congress created a committee to consider the matter, and the committee rejected Tennessee's position, concluding that Tennessee "acquired the jurisdiction over" public lands within its borders when it became a State but that "the right of sale" remained with the United States. No. 57: Sales of Lands Acquired by the Cession of North Carolina (May 9, 1800), *in* 1 *American State Papers: Public Lands* 98 (Walter Lowrie ed., 1834). The committee emphasized, however, that the federal government was obligated to "faithfully dispose[]" of the lands for the benefit of "the whole Union," and resolved that the United States should "open an office for the sale of the lands to which the United States have the legal right, within the State of Tennessee." *Id.* at 98-99. As that decision confirms, it was well understood in the post-ratification era that the federal government's power over unappropriated lands extended at most to the

right to dispose of those lands by sale or transfer, not to simply retain them indefinitely in federal hands.[1]

25. Ohio was the next State to join the Union. To avoid repeating the then-ongoing fight with Tennessee, Congress imposed conditions on Ohio's admission to the Union that required its constitution to be "not repugnant" to the Northwest Ordinance of 1787, 2 Stat. 173, 174 (Apr. 30, 1802), which provides that "new States[] shall never interfere with the primary disposal of the Soil by the United States in Congress assembled," 32 *Journals* at 341; *see also* 11 Annals of Cong. 1097-99 (1802) (congressional proceedings regarding admission of Ohio). In exchange, Congress agreed that 5% of the proceeds from all future sales of federal land within Ohio's borders would be devoted toward improvements in the new State. 2 Stat. at 175; *see* 11 Annals of Cong. 1124-26 (1802). Once again, Congress never asserted any power to indefinitely *retain* public lands within a State's borders; instead, it just insisted that the federal government, rather than Ohio, would have the power to sell or otherwise transfer away those public lands.

26. "After Ohio, every state admitted from territorial status had to either acknowledge the supremacy of the Northwest Ordinance or specifically 'for ever disclaim all right or title to the waste or unappropriated lands, lying within the said territory.'" Ablavsky, *supra*, at 672-73 (quoting the

[1] In fact, Tennessee refused to accept even that degree of federal control over Tennessee land, and Congress ultimately ceded to Tennessee all remaining federal lands within its borders several decades later. *See* 9 Stat. 66, 66-67 (Aug. 7, 1846).

Louisiana Enabling Act, 2 Stat. 641, 642 (Feb. 20, 1811)). "Nearly identical language appeared in each new state's enabling act, right through Alaska's in 1958." *Id.* And as in Ohio's case, new States were often compensated by provisions entitling them to 5% of the proceeds from future federal sales of land within their boundaries. *See, e.g.*, 2 Stat. at 643 (Louisiana); 11 Stat. 383, 384 (Feb. 14, 1859) (Oregon). But even as Congress pushed the limits of its constitutional authority by denying new States ownership of their public lands, it insisted only on the authority to dispose of those lands itself, never asserting that it could simply keep those lands in perpetuity without using them to carry out any of its enumerated powers.

### D. The Utah Enabling Act Underscores the Federal Government's Obligation to Dispose of Unappropriated Land.

27. The history of the State of Utah is of a piece with that tradition. The United States first acquired title to the land that now lies within the State of Utah in 1848 under the Treaty of Guadalupe Hidalgo, which ended the Mexican American War. *See* 9 Stat. 922 (July 4, 1848). Two years later, Congress designated that land as part of the Utah Territory and established a territorial government. 9 Stat. 453 (Sept. 9, 1850).

28. In doing so, Congress made clear that it was obligated to dispose of the federal lands in Utah, not retain them in perpetuity. Congress specifically prohibited the territorial legislature from passing any law "interfering with the primary disposal of the soil," and instructed that "when the lands in the said Territory shall be surveyed … preparatory to bringing the same into market," two sections in each township

would be reserved for schools. *Id.* at 454, 457-58. Congress thus plainly understood in organizing the Utah Territory that (as the Constitution requires) the federal government would hold the unappropriated public lands in that territory only on a temporary basis, not as a permanent federal fiefdom.

29. The Utah Enabling Act, which authorized the formation of the State of Utah and set forth the terms of its admission to the Union, expresses the same view. *See* 28 Stat. 107 (July 16, 1894). Section 3 of that Act, like similar provisions in the enabling acts of the other States admitted to the Union since Ohio, provides that the people of Utah disclaim any title to the unappropriated public lands lying within its boundaries, but specifically contemplates that the federal government will proceed to dispose of those unappropriated lands:

> 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 hereof … 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* ….

28 Stat. at 108 (emphasis added).

30. The same understanding is apparent in Section 9 of the Act, which guarantees that the new State of Utah will receive 5% of the proceeds from the sale of those lands to support its schools:

> [F]ive 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 … 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.

28 Stat. at 110 (emphasis added).

31. The terms of the Utah Enabling Act thus confirm that when Utah was admitted to the Union, all understood that the federal government's authority over unappropriated public lands within the new State was limited to the power to *dispose of* those lands, and Congress accordingly committed to do just that—not to keep those unappropriated lands under permanent federal ownership and control.

### E. Basic Principles of Federalism Reinforce the Conclusion That the Federal Government Cannot Retain Unappropriated Land Within a State.

32. The mandate that the federal government must "dispose of" (rather than retain) unappropriated public lands, U.S. Const. art. IV, §3, cl.2, flows not only from constitutional text and historical context, but from basic principles of federalism. Especially in light of the substantial expansion of federal power over federally owned land since the Founding Era, expansive and permanent federal landholdings within a State, over the State's objection, cannot be squared either with the federal-state balance of power or with the principle of equal sovereignty among the States.

33. In the early days of the Republic, the federal government's ownership of unappropriated land within new States was justified on the ground that the federal government merely owned the land, while the

State possessed full sovereignty over it to the same extent as over privately owned land. *See* No. 57: Sales of Lands Acquired by the Cession of North Carolina, *supra*, at 98 (distinguishing Tennessee's "jurisdiction" over the public lands within its borders from the United States' "right of the soil").

34. This Court's early cases likewise embraced the view that when the federal government temporarily held unappropriated land within a State (until it could dispose of that land as required by the Property Clause), it held that land as a "mere proprietor," not as a sovereign. *United States v. City of Chicago*, 48 U.S. (7 How.) 185, 194 (1849). "[U]nless used as a means to carry out the purposes of the [federal] government," federal lands were considered "subject to the legislative authority and control of the states equally with the property of private individuals." *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 531 (1885). For instance, States had the power to exercise "rights of eminent domain" against federal land "like the land of other proprietors," *City of Chicago*, 48 U.S. at 194, and could tax federal land unless they agreed to give up that power, *see United States v. R.R. Bridge Co.*, 27 F. Cas. 686, 692 (C.C.N.D. Ill. 1855); *cf.* 2 Stat. at 642 (Louisiana Enabling Act) (providing that "no taxes shall be imposed on lands the property of the United States").

35. All of that made the debate over whether new States would own public lands within their borders at least somewhat less consequential, as each State retained the same sovereignty over its territory regardless of whether that territory was in federal or private hands. Over time, however, the federal

government's power over unappropriated public lands has been interpreted more expansively—with a corresponding decrease in the sovereign authority of the States in which those lands are located. States are no longer permitted to tax *any* federally owned land within their boundaries absent the federal government's consent, *see Van Brocklin*, 117 U.S. at 167-68, 180; *Stearns v. Minnesota*, 179 U.S. 223, 243 (1900); States no longer have general authority to regulate federally owned lands within their boundaries, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 403 (1917); and the federal government "exercises the powers both of a proprietor and of a legislature" over all the lands it owns, *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976).

36. As a result of that expansion of federal power, federal ownership of unappropriated public lands within a State today imposes substantial and disproportionate burdens that disrupt both the federal-state balance and the balance of power among the States. States in which the federal government owns little or no unappropriated land—including all of the original 13 States and all of the States east of the Rocky Mountains, *see* App-2—retain full sovereign control over practically all of their territory. States in which the federal government holds vast unappropriated lands, by contrast, are deprived of the ability to exercise sovereign authority over wide swathes of the land within their borders, leaving their sovereignty and treasuries diminished as compared to their sister States and aggrandizing the federal government and its treasury at their expense.

37. That untenable incongruity among the States cannot be reconciled with the balance of power adopted in the plan of the Convention. While the Framers were willing to allow the original States with western land claims to cede those claims to the new federal government, that was decidedly not because they intended to permanently convert the federal government into the nation's largest landholder. On the contrary, those western land claims were transferred to the federal government on the express understanding that the lands would be *disposed of*, whether by being opened to settlement or transferred to state control. Those lands were not meant to be permanently retained in federal hands to the detriment of the new States within whose borders they fell. Given the widespread skepticism of the new federal government during the Founding Era, and the strong sentiment that it should be strictly limited to specific enumerated powers, it is difficult to fathom that the Framers would have countenanced perpetual federal retention of vast expanses of real property within a State (and over the State's objection, no less) without any basis in any enumerated federal function.

## II. The Federal Government Nevertheless Continues To Indefinitely Retain Ownership Of Vast Unappropriated Public Lands In The State Of Utah.

38. Despite the absence of any constitutional authority empowering the federal government to indefinitely retain unappropriated land within the bounds of a State—and despite the serious conflict between expansive federal land ownership within a State and basic principles of state sovereignty and

federalism—the federal government today continues to indefinitely hold vast swathes of land across Utah. The federal government currently owns some *37.5 million acres* of land in Utah, making up approximately *69%* of all the land lying within Utah's borders. *See* App-4. That includes some *18.5 million acres* of unappropriated public land—land that the federal government is not reserving or using to carry out any of its enumerated functions, and instead is simply holding as a permanent federal fiefdom inside Utah. *See id.* Utah's elected leaders have repeatedly urged the federal government to relinquish ownership of its unappropriated lands in Utah, *see, e.g.*, Utah Code §63L-6-103, but to no avail.

39. The federal government's failure to dispose of those millions of acres of unappropriated public land in the 128 years since Utah became a State is bad enough. But the problem is much worse: The federal government not only has failed to dispose of its unappropriated lands in Utah, but has declared by statute that it has no intention of ever doing so.

40. Under the Federal Land Policy and Management Act of 1976 ("FLPMA"), it is the formal "policy of the United States" that "the public lands be retained in federal ownership," except in the rare case where BLM determines that "disposal of a particular parcel will serve the national interest." 43 U.S.C. §1701(a)(1); *see id.* §1713(a) (setting out very limited criteria for disposal). FLPMA expressly applies to unappropriated lands like the 18.5 million acres at issue in this case, which are simply being held by the federal government without designation or use for any specific federal purpose.

41. In short, it is now the official policy of the federal government—enacted into federal law—that the United States will continue to retain vast unappropriated public lands in Utah in perpetuity, notwithstanding Utah's express objection. That policy cannot be squared with the limited authority that the Framers provided the federal government to hold land, with post-ratification practice, or with basic principles of federalism.

42. Nor can the federal government justify this policy on the ground that unappropriated lands in Utah were made available for sale and settlement during parts of the 19th and 20th centuries, *see, e.g.*, 12 Stat. 392 (May 20, 1862), but no one purchased them. Regardless of any past efforts to dispose of these unappropriated lands, the State of Utah is (and, for well over a decade, has been) actively seeking to gain ownership and full sovereign jurisdiction over them so that it may responsibly manage these vast lands for the benefit of all Utah citizens, on terms of constitutional equality with States east of the Rockies. In short, there is no practical barrier preventing the federal government from complying with its constitutional obligation to dispose of unappropriated lands in Utah, as it could simply transfer those lands to the State's ownership and control—as Utah has expressly requested, and the federal government has done in several other States (such as Tennessee).

43. To be clear, this lawsuit does not challenge the federal government's retention of specific parcels of land that have been reserved by Congress or the President (under authority granted by Congress) for designated purposes, e.g., as National Parks, National

Conservation Areas, and the like. Nor does it challenge the federal government's constitutional authority to retain lands that it is using to carry out its enumerated powers, such as the more than 1.8 million acres in Utah that are devoted to federal military installations, lands held in trust for Indian tribes, federal courthouses and office buildings, and the like. But whatever power the Constitution may grant the federal government to hold land in service of one of its enumerated functions, that power emphatically does not include keeping 18.5 million acres of unappropriated federal land in Utah under permanent federal ownership for no designated federal purpose and over Utah's express objection.

## III. The Federal Government's Unconstitutional Retention Of Vast Unappropriated Lands In Utah Imposes Serious Harms On The State.

44. The federal government's unconstitutional retention of permanent ownership of more than 18.5 million acres of unappropriated land in Utah imposes grave and irreparable injuries on the State.

45. Across those 18.5 million acres of land—more than one-third of its total land area—Utah is deprived of its most basic and fundamental sovereign powers, including the power to tax and the power of eminent domain. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 429 (taxation power is an "incident of sovereignty"); *Kohl v. United States*, 91 U.S. 367, 371-72 (1875) (eminent domain power is "inseparable from sovereignty"). Utah is likewise largely deprived of its legislative authority over those lands, as the federal government holds "full power … to protect its lands, to control their use, and to prescribe in what manner

others may acquire rights in them," all without any need to tie policy judgments to any enumerated power. *Utah Power & Light*, 243 U.S. at 404; *see Kleppe*, 426 U.S. at 539 (describing the federal power to regulate federal land as "without limitations"). Indeed, the intrusion on Utah's sovereignty stretches even further than that, as the federal government may regulate even activities "on private land adjoining public land when the regulation is for the protection of the federal property." *Kleppe*, 426 U.S. at 528 (citing *Camfield v. United States*, 167 U.S. 518 (1897)). Put simply, throughout much of Utah it is the federal government, not Utah, that wields the general "police power." *Id.* at 540.

46. That invasion of Utah's sovereign authority has serious real-world effects. Across vast expanses of Utah, it is federal officials from the Bureau of Land Management—not state or local officials elected by Utah citizens—who develop the plans that dictate how land may be used. *See* 43 U.S.C. §1712. These federal plans define the extent to which millions of acres in Utah are open to livestock grazing, oil and gas extraction, forestry, mining, filmmaking, hunting, camping, recreation, and more, all without any need to tether decisions to enumerated powers. *See, e.g.*, BLM Moab Field Office, *Record of Decision and Approved Resource Management Plan* (Oct. 2008), https://tinyurl.com/2s3hvyxy. As a result, while other States have wide latitude to make their own judgments about land use and related issues, federal officials have broad authority to override Utah's legislative judgments across wide swathes of Utah's territory.

47. For instance, while States generally "have broad trustee and police powers over wild animals within their jurisdictions," the federal government can override Utah's laws regarding animal control across millions of acres within Utah's borders. *See Kleppe*, 426 U.S. at 545-56. Likewise, although States "can ordinarily exercise [their] police powers to mitigate fire danger within [their] territorial boundaries," federal officials can block Utah from exercising that power if they deem "protection of the habitat of an endangered or threatened species" more important than "protection of human life and home." *United States v. Bd. of Cnty. Comm'rs of Cnty. of Otero*, 843 F.3d 1208, 1211-12, 1215 (10th Cir. 2016). And because federal land is not subject to Utah's eminent domain power, the federal government's expansive holdings limit the State's ability to obtain lands needed for public roads and transportation, infrastructure, and communications systems. In sum, the federal government's indefinite land-retention policies block Utah from facilitating accountable, locally driven stewardship of the public lands within its borders.

48. Utah also suffers concrete financial harms from the federal government's unconstitutional retention of millions of acres of land within Utah's borders. As the federal government itself recognizes, state and local governments suffer "losses in property taxes due to the existence of nontaxable Federal lands within their boundaries," owing to their "inability … to collect property taxes on federally owned land." U.S. Dep't of Interior, *Payments in Lieu of Taxes*, https://www.doi.gov/pilt (last visited Aug. 20, 2024). And while the federal government provides payments

to the State to help offset those losses, *see id.*, those payments by the grace of the federal government are no substitute for the deprivation of Utah's sovereign right to tax real estate within its own borders. Moreover, these federal payments are orders of magnitude lower than what Utah could expect to obtain through property taxes if the federal government honored its constitutional obligations.

49. Utah is likewise deprived of significant revenue that the federal government earns from its unlawful retention of the unappropriated public lands in Utah. That federal revenue includes substantial revenue from mineral development; in fact, "[t]he amount of annual revenue that Federal mineral development provides to the U.S. Treasury is second only to that provided by the Internal Revenue Service." BLM, *About the BLM Oil and Gas Program*, https://tinyurl.com/37ue8mn9 (last visited Aug. 20, 2024). The federal government also collects fees from private parties engaged in livestock grazing and commercial filmmaking on unappropriated Utah lands and sells timber grown on those lands. *See* 43 U.S.C. §1905 (grazing fees); Exec. Order No. 12548 (Feb. 14, 1986) (grazing fees); 43 C.F.R. §5.8 (commercial filmmaking); 43 C.F.R. §§5401.0-6 (timber sales). While some of this revenue is shared with the State and its political subdivisions, much of it is simply deposited in the U.S. Treasury.

50. In sum, Utah has suffered and is suffering serious and ongoing injuries on account of the federal government's unconstitutional retention of millions of acres of unappropriated land within Utah's borders, over Utah's express objection and Utah's express

request to transfer those lands to State control, *see* Utah Code §63L-6-103. The federal government cannot be allowed to continue its unlawful policy of retaining those vast expanses of unappropriated public land in perpetuity, thereby usurping the State's otherwise plenary authority to care for the health, safety, and welfare of its people, and to manage wildlife, watersheds, and land usage across these millions of acres. The United States must instead dispose of these unappropriated lands, as the Constitution requires.

**COUNT I**

**Declaratory Judgment**

51. Utah re-alleges and incorporates by reference the preceding allegations as though fully set forth herein.

52. The federal government has no constitutional authority to retain in perpetuity unappropriated lands within a State, over the State's objection, without reserving or using those lands to carry out any enumerated federal power.

53. The federal government has nevertheless continued to retain 18.5 million acres of unappropriated land in Utah under federal ownership, over Utah's objection, with no intent to dispose of that land or use it to carry out any enumerated federal function.

54. Indeed, the federal government has declared by statute in 43 U.S.C. §1701(a)(1), as implemented in 43 U.S.C. §1713(a), that as a matter of federal law, it is the official policy of the United States to continue to maintain federal ownership of all unappropriated

public lands that are currently in federal hands unless the federal government determines that disposal of a particular parcel will serve the national interest.

55. Utah has suffered and is suffering serious and irreparable harm, including the diminution of its sovereign authority and ongoing economic injuries, as a result of the federal government's unconstitutional retention of millions of acres of unappropriated land within Utah over Utah's objection.

56. For the foregoing reasons, Utah respectfully seeks a declaratory judgment that the federal government has no constitutional authority to indefinitely retain lands within a State, over the State's objection, without reserving or using those lands to carry out any enumerated federal power, and that 43 U.S.C. §1701(a)(1) and 43 U.S.C. §1713(a) are accordingly unconstitutional.

**COUNT II**

**Injunctive Relief**

57. Utah re-alleges and incorporates by reference the preceding allegations as though fully set forth herein.

58. The federal government has no constitutional authority to indefinitely retain the 18.5 million acres of unappropriated land that it holds within Utah over Utah's objection without reserving or using those lands to carry out any of its enumerated powers. Yet the federal government has no evident intention of reserving or using those lands to carry out any of its enumerated powers.

59. The federal government therefore has a clear and indisputable obligation to begin the process

of disposing of those 18.5 million acres of unappropriated public land.

60. Utah has suffered and is suffering serious and irreparable harm, including the diminution of its sovereign authority and ongoing economic injuries, as a result of the federal government's unconstitutional failure to endeavor to dispose of those millions of acres of unappropriated land within Utah.

61. For the foregoing reasons, Utah respectfully seeks an order directing the United States to begin the process of disposing of its unappropriated lands within Utah, consistent with existing rights and state law.

## PRAYER FOR RELIEF

WHEREFORE, the State of Utah respectfully requests that this Court issue the following relief:

A. Declare that the United States' policy and practice of indefinitely retaining its unappropriated lands in Utah over Utah's objection is unconstitutional.

B. Declare that 43 U.S.C. §1701(a)(1), which expresses the United States' official policy of indefinitely retaining unappropriated public lands, and 43 U.S.C. §1713(a), to the extent it implements that policy, are unconstitutional.

C. Order the United States to begin the process of disposing of its unappropriated federal lands within Utah, consistent with existing rights and state law.

D. Grant the State of Utah such other relief as the Court deems just and proper.

Respectfully submitted,

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August 20, 2024

**No. _____, Original**

In the
# Supreme Court of the United States

STATE OF UTAH,

*Plaintiff*,

v.

UNITED STATES,

*Defendant*.

## BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT


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August 20, 2024

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## INTRODUCTION

In keeping with the foundational principle that our federal structure of government protects the integrity, dignity, and residual sovereignty of the States, the Constitution vests this Court with original jurisdiction over all cases in which a State is a party, *see* U.S. Const. art. III, §2, cl.2, and Congress has vested this Court with original jurisdiction over all controversies between the United States and a State, 28 U.S.C. §1251(b)(2). Those grants of jurisdiction, which this Court has a virtually unflagging obligation to exercise, are designed to ensure that cases involving States—and especially those implicating the balance of power between the States and the federal government—will be heard in a forum of the gravity and stature to which they are entitled.

This is just such a case. By its bill of complaint, the State of Utah seeks to challenge the United States' open and unapologetic policy of retaining in perpetuity some 18.5 million acres of unappropriated land within Utah's borders. The United States is not holding or using these lands in service of any of its enumerated powers; it simply has declared as a matter of federal policy that it will no longer seek to dispose of *any* lands it owns within a State unless it concludes that doing so "will serve the national interest." 43 U.S.C. §1701(a)(1). In other words, the United States has adopted an explicit policy of depriving Utah and its residents of the ability to own, tax, or even regulate roughly a third of the land within their own borders. Whether that state of affairs comports with the Constitution, and the careful vertical and horizontal balances of power it strikes, is a question of profound

importance not just to Utah, but to all the States in the Nation.

All of that makes this precisely the type of case over which this Court should exercise its original jurisdiction. Utah's claims to unconstitutional diminution of its sovereignty are of undeniable "seriousness and dignity." *Mississippi v. Louisiana*, 506 U.S. 73, 76-77 (1992). Whether the Constitution countenances the federal government's policy and practice of holding vast swaths of land within Utah in perpetuity is a pure question of law, obviating any need to engage in "the task of factfinding." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971). And little would be gained by forcing Utah to litigate this legal dispute in the lower courts first, especially when the Tenth Circuit has already indicated that it considers itself bound by this Court's precedent to leave this dubious state of affairs undisturbed—even as it acknowledged that doing so appears to deny both logic and historical tradition.

In short, this case presents precisely the type of "weighty controvers[y]" between sovereigns that led both the Framers and Congress to grant this Court the original jurisdiction within which it falls. *See South Carolina v. North Carolina*, 558 U.S. 256, 278 (2010) (Roberts, C.J., concurring in part and dissenting in part). The Court should grant Utah leave to file its bill of complaint.

## STATEMENT

1. Nearly 69 percent of the territory within Utah's borders—approximately 37.5 million out of 54.3 million acres—is owned by the United States. Compl. ¶38; *see* App-4. Roughly 18.5 million acres of that land

is "unappropriated," meaning that the federal government neither has formally reserved it for any specific purpose (such as a National Park or National Conservation Area) nor is using it to execute any of its constitutionally enumerated powers. Compl. ¶¶38, 43; *see* App-4.

These 18.5 million acres are controlled by the federal Bureau of Land Management ("BLM"). Compl. ¶2. BLM also administers a staggering 220 million acres of land across nine other western States and Alaska. *See* App-2; Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data* 7-10 (updated Feb. 21, 2020), https://tinyurl.com/3k3b9ktu (indicating that BLM controls about 67% of Nevada; 60% of Wyoming, 55% of New Mexico, 49% of Oregon, 43% of Arizona, 36% of Idaho, 35% of Colorado, 33% of California, 30% of Montana, and 20% of Alaska). The United States earns significant revenue from unappropriated BLM lands, including by leasing them to private parties for activities such as oil and gas production, grazing, and commercial filmmaking, and by selling timber and other natural resources. Compl. ¶49.

Under the Federal Land Policy and Management Act of 1976 ("FLPMA"), it is the formal "policy of the United States" that "the public lands be retained in federal ownership," except in the rare case where BLM determines that "disposal of a particular parcel will serve the national interest." 43 U.S.C. §1701(a)(1); *see id.* §1713(a) (setting out very limited criteria for disposal). FLPMA expressly applies to unappropriated lands such as the 18.5 million acres at issue in this case. *See id.* §1713(a). Utah's elected

leaders have repeatedly urged the federal government to relinquish ownership of its unappropriated lands, but to no avail. Compl. ¶38.

2. The federal government's unconstitutional retention of vast swathes of Utah's territory imposes grave and irreparable injuries on the State. *See id.* ¶¶44-50. Utah is deprived of core sovereign powers over the unappropriated federal lands within its borders. It lacks the power of eminent domain—which this Court has described as "inseparable from sovereignty," *Kohl v. United States*, 91 U.S. 367, 371-72 (1875)—over these 18.5 million acres, limiting its ability to obtain land for public roads, communications systems, and other critical infrastructure. And it lacks the power to tax—another crucial "incident of sovereignty," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819)—with respect to these vast lands.

Utah is also deprived of a large measure of legislative authority over these unappropriated federal lands, as "Congress exercises the powers both of a proprietor and of a legislature over [them]." *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976). Of course, the "'power to create and enforce a legal code'" is "one of the quintessential functions of a State." *Diamond v. Charles*, 476 U.S. 54, 65 (1986) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez,* 458 U.S. 592, 601 (1982)). Yet the federal government wields the general "police power" over *the majority* of the land in Utah, with the State wielding only a "residual state police power" that the federal government can "override[]" at will. *Kleppe*, 426 U.S. at 540, 542-43; *see also id.* at 539 (describing the

federal power to regulate federal land as "without limitations").

This invasion of Utah's sovereign authority has serious real-world effects. Across vast expanses of Utah, it is unelected and unaccountable federal officials from BLM—not state or local officials elected by Utah citizens—who develop the plans that dictate how land may be used. *See* 43 U.S.C. §1712. These federal plans define the extent to which millions of acres in Utah are open to livestock grazing, oil and gas extraction, forestry, mining, filmmaking, hunting, camping, recreation, and more. *See, e.g.*, BLM Moab Field Office, *Record of Decision and Approved Resource Management Plan* (Oct. 2008), https://tinyurl.com/2s3hvyxy.

As a result, while other States have wide latitude to make their own judgments about land use and related issues, federal officials call the shots for millions and millions of acres within Utah—even when the federal government's retention of the land is totally unrelated to any enumerated federal power. *See* Compl. ¶47. Utah is likewise deprived of significant revenue that the federal government earns from its unlawful retention of the unappropriated public lands in Utah, including from oil, gas, and mineral production, and from collecting fees for activities such as livestock grazing and commercial filmmaking. *See id.* ¶49.

In sum, the federal government's policy of indefinite land retention, enshrined in FLPMA at 43 U.S.C. §1701(a)(1) and implemented by 43 U.S.C. §§1712-13, unconstitutionally aggrandizes the federal government's power at Utah's expense and causes

Utah serious and ongoing sovereign injuries by diminishing its sovereignty both in absolute terms and by comparison with its sister States.

## ARGUMENT

This Court has original jurisdiction over controversies between a State and the United States. 28 U.S.C. §1251(b)(2); *see* U.S. Const. art. III, §2, cl.2. Although that jurisdictional grant is couched in absolute rather than discretionary terms, and federal courts have a "virtually unflagging obligation … to exercise the jurisdiction given them," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), this Court has interpreted §1251 as affording it "substantial discretion" to determine whether to exercise its original jurisdiction, *Mississippi*, 506 U.S. at 76-77. In exercising that discretion, the Court examines (1) "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim,'" and (2) "the availability of an alternative forum in which the issue tendered can be resolved." *Id.* at 77 (citation omitted). The latter consideration is rooted in the Court's awareness that it is "structured to perform as an appellate tribunal" and "ill-equipped for the task of factfinding," and that liberally exercising its original jurisdiction would reduce the Court's bandwidth to resolve "those matters of federal law and national import as to which [it is] the primary overseer[]." *Wyandotte Chems.*, 401 U.S. at 498; *see also South Carolina*, 558 U.S. at 278 (Roberts, C.J., concurring in part and dissenting in part).

Those considerations weigh heavily in favor of granting Utah leave to file its bill of complaint in this

case. Indeed, it is hard to imagine a controversy implicating weightier sovereign interests than the interest Utah asserts here: an ongoing deprivation of its basic sovereign powers over roughly a third of the land within its borders. That diminution of Utah's sovereignty violates not only the balance that the Constitution strikes between federal and state power, but also the equally fundamental constitutional principle that all States enjoy equal sovereignty. The seriousness and dignity of these claims accordingly weighs strongly in favor of exercising this Court's original jurisdiction.

The remaining considerations tilt in the same direction. There is no need for this Court to "play the role of factfinder" here, *Wyandotte Chems.*, 401 U.S. at 498, because this case presents only pure (and highly consequential) questions of constitutional law. Exercising original jurisdiction thus would facilitate rather than impair this Court's central function of resolving "matters of federal law and national import." *See id.* And while this case could theoretically be heard in the first instance in a federal district court, followed by an inevitable appeal and subsequent petition for certiorari, that would be an exceedingly poor use of time and effort for all involved. The far better course is for this Court to take original jurisdiction and resolve the weighty constitutional issues at stake.

## I. The Seriousness And Dignity Of Utah's Claims Warrant The Exercise Of This Court's Original Jurisdiction.

It is well established that disputes over territorial sovereignty—including those "between a State and

the United States"—are sufficiently grave and dignified to merit exercise of this Court's original jurisdiction. *California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 277 & n.6 (1982) (dispute regarding ownership and sovereignty over oceanfront land on the coast of California); *see also, e.g.*, *United States v. Maine*, 420 U.S. 515, 516-17 (1975) (dispute regarding the extent of the United States' power "to exercise sovereign rights over the seabed and subsoil underlying the Atlantic Ocean" beyond a three-mile strip adjacent to a State's coastline); *Utah v. United States*, 403 U.S. 9, 9-10 (1971) (dispute regarding sovereign authority over "shorelands around the Great Salt Lake"); *United States v. Texas*, 339 U.S. 707, 709 (1950) (dispute regarding the extent of the United States' "dominion and power over[] the lands, minerals[,] and other things underlying [certain portions of] the Gulf of Mexico").

This case presents just such a sovereign dispute, implicating both land ownership and the full complement of core sovereign interests. As detailed in Utah's bill of complaint, the United States' unconstitutional policy of permanently retaining ownership of vast swathes of unappropriated land in Utah deprives Utah of the power to tax, the power of eminent domain, and the general police power with respect to some 30% of its territory. *See* Compl. ¶¶45-48. This case thus plainly involves "high claims affecting state sovereignty" that warrant this Court's original jurisdiction. *South Carolina*, 558 U.S. at 278 (Roberts, C.J., concurring in part and dissenting in part).

The United States' own representations to this Court in other cases underscore the point. The United States has not only invoked this Court's original jurisdiction in similar disputes over territorial sovereignty, *see Maine*, 420 U.S. at 516-17; *Texas*, 339 U.S. at 709, but also filed a recent amicus brief affirming that "the exercise of [original] jurisdiction is paradigmatically appropriate in cases that concern the clash of sovereign interests." Br. for the United States as Amicus Curiae 5, *Texas v. California*, No. 153, Original (U.S. Dec. 3, 2020) (citing *Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 450 (1945)). The United States has also acknowledged that original jurisdiction is appropriate when—as here—a State claims to "have suffered discrimination in violation of the 'doctrine of the equality of States.'" *Id.* at 6 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966)). Given those representations, the United States cannot plausibly deny that the injuries Utah asserts here are sufficiently "serious[]" and "digni[fied]" to merit the exercise of this Court's original jurisdiction. *Mississippi*, 506 U.S. at 77.

## II. This Court Is The Appropriate Forum In Which To Resolve This Dispute.

The serious and weighty sovereign interests at stake in this case, and the exceptional importance of the questions it presents, make this Court the proper forum in which to resolve this dispute. While this Court's original jurisdiction over controversies between a State and the United States is not exclusive, *see* 28 U.S.C. §1251(b)(2), its exercise is "appropriate" for cases involving issues of nationwide significance. *South Carolina v. Regan*, 465 U.S. 367,

382 (1984) (plurality opinion); *see id.* at 384 (Blackmun, J., concurring) (finding original jurisdiction appropriate for dispute between one State and the United States because it raised a "substantial" issue "of concern to a number of States").

In *Regan*, for example, the Court took original jurisdiction over a suit by South Carolina against the federal government that challenged the constitutionality of a federal law that governed federal taxation of state bonds, even though that suit could also have been heard in federal district court. *Id.* at 370-72 (plurality opinion). Because "the manner in which a State may exercise its borrowing power is a question that is of vital importance to all fifty States," this Court found it "appropriate … to exercise its discretion in favor of hearing this case." *Id.* at 382; *accord id.* at 384 (Blackmun, J., concurring).

Here as in *Regan*, the question at hand—whether the federal government has constitutional authority to permanently retain ownership of unappropriated lands within a State—is of nationwide importance. The federal government owns land in every State, and each State has a significant interest in knowing whether the federal government can continue to hold lands that it is not using to carry out any of its constitutionally enumerated powers. The issue is of especially vital importance to the western States and Alaska, where the federal government continues to retain vast unappropriated lands, depriving those States of their sovereign powers across large swathes of their territory and diminishing their sovereignty as compared to their sister States. *See* App-2. As in *Regan*, the nationwide ramifications of the case

warrant the exercise of this Court's original jurisdiction.

This Court has in the past suggested that it is "reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). Of course, any such reluctance sits uneasily with the unequivocal statutory language granting this Court original jurisdiction over such suits, 28 U.S.C. §1251(b)(2), and the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colo. River*, 424 U.S. at 817; *see also Cohens v. Virginia*, 19 U.S. (4 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."); *Texas v. California*, 141 S.Ct. 1469, 1469-72 (2021) (Alito, J., dissenting from denial of motion for leave to file complaint). Indeed, it plainly would be inappropriate for this Court to adopt a *per se* rule against exercising original jurisdiction whenever another forum is available, as such a rule would undermine the Constitution's explicit assignment of original jurisdiction to this Court in "all Cases … in which a State shall be Party." U.S. Const. art. III, §2, cl.2; *see, e.g.*, *Ames v. Kansas*, 111 U.S. 449, 464 (1884) (recognizing the Framers' decision "to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state"). Declining original jurisdiction in any case where an alternative forum is available would also effectively nullify Congress' considered decision to grant this Court "original but not exclusive jurisdiction" in certain particularly important

categories of cases, including "controversies between the United States and a State." 28 U.S.C. §1251(b). In short, "[o]nce a state makes out a case which comes within [this Court's] original jurisdiction, its right to come here is established," and there is "no requirement in the Constitution that it go further and show that no other forum is available to it." *Georgia*, 324 U.S. at 466.

This case also involves none of the various considerations that have animated this Court's "sparing" use of its original jurisdiction in the past. First, this Court has been disinclined to exercise its original jurisdiction in cases involving disputed facts, as it is primarily an appellate court and "ill-equipped for the task of factfinding." *Wyandotte Chems.*, 401 U.S. at 498; *see also South Carolina*, 558 U.S. at 278 (Roberts, C.J., concurring in part and dissenting in part); *Maryland v. Louisiana*, 451 U.S. 725, 761-63 (1981) (Rehnquist, J., dissenting). But that concern is not implicated here, as this case presents only a purely legal issue. Whether the Constitution authorizes the United States to indefinitely hold lands within a State, without reserving or using them to carry out any of its enumerated powers, is a question of law to be resolved by interpreting the Constitution—a task that lies squarely in this Court's domain.

This Court has also been careful to limit the number of original actions it hears to avoid "reducing the attention" it can give to the "matters of federal law and national import" that make up its appellate docket. *Wyandotte Chems.*, 401 U.S. at 498; *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972); *Maryland*, 451 U.S. at 762-63 (Rehnquist, J.,

dissenting). But that concern is likewise absent here, as this case involves precisely the kind of weighty federal question of nationwide importance that *does* warrant this Court's attention. Adjudicating Utah's claims accordingly would *effectuate* rather than undermine this Court's "paramount role" as the supreme arbiter of federal law. *Wyandotte Chems.*, 401 U.S. at 505.

Conversely, forcing Utah to bring this suit in federal district court in the first instance—followed by an inevitable appeal and petition for certiorari—has little to recommend it. Utah's claims do not require factual development through discovery or trial proceedings, and the pure legal question that Utah raises would be reviewed *de novo* on appeal, meaning that little would be gained by litigating it for years in the lower courts before eventually raising it here. That approach would make particularly little sense, moreover, given that the Tenth Circuit has already indicated that its understanding of the scope of federal government's power vis-à-vis public lands within a State is constrained by "dicta" in decisions of this Court—even if those dicta are "based on questionable logic or history." *United States v. Bd. of Cnty. Comm'rs of Cnty. of Otero*, 843 F.3d 1208, 1214 (10th Cir. 2016).

In short, forcing Utah to spend years litigating in the lower courts before the parties eventually seek this Court's final resolution of the weighty issues at stake would be an exceedingly poor use of both judicial and party resources. This "controvers[y] between sovereigns" warrants immediate resolution by this Court. *See* Br. for the United States as Amicus Curiae

4-5, *Texas v. California* (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923)).

## III. Utah's Claims Are Meritorious.

Although whether to exercise jurisdiction is normally a question "separate from the merits," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714 (1996), some Justices have suggested that the merits of a State's claims may be a relevant consideration. *See Alabama v. Texas*, 347 U.S. 272, 278 (1954) (Black, J., dissenting) (noting that the majority denied leave to file a bill of complaint based on its perceived lack of merit); *Regan*, 465 U.S. at 403-04, 419 (Stevens, J., concurring in part and dissenting in part) (arguing that the Court should have denied leave to file because "there is simply no merit to the claim the State has advanced"). To the extent this Court takes the merits into account here, the strength of Utah's claims further supports granting the State's motion for leave to file.

### A. The Constitution Does Not Grant the Federal Government Any Power to Indefinitely Hold Unappropriated Public Lands in Utah.

1. It is a core principle of our federal system that "the National Government possesses only limited powers," while "the States and the people retain the remainder." *Bond v. United States*, 572 U.S. 844, 854 (2014). The federal government has no general police power; it "can exercise only the powers granted to it" by the Constitution. *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 405); *see also* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States respectively, or to the people."). That constitutional balance of power "preserves the integrity, dignity, and residual sovereignty of the States," and "secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221.

The Constitution also preserves the political equality of the States as independent sovereigns, embodied in the principle that new States enter the Union on an "equal footing," *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987), and that all of the States "enjoy equal sovereignty," *Shelby Cnty. v. Holder*, 570 U.S. 529, 534 (2013). That "constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized," guarding against the inevitable political instability that would arise from affording some States a lesser degree of sovereignty than other States enjoy. *Coyle v. Smith*, 221 U.S. 559, 580 (1911).

2. Recognizing the danger that expansive federal land ownership would pose to state sovereignty and individual liberty, the Framers designed the Constitution to provide the new federal government with only limited powers to hold land. None of those powers includes the power to indefinitely hold unappropriated lands within a State that are not being used to fulfill any of the federal government's enumerated functions.

Only one provision in Article I—the Enclave Clause—specifically empowers the United States to take control of particular areas of land. The Enclave Clause grants Congress the power to "exercise exclusive Legislation" over (1) "such District (not

exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States," and (2) "all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const. art. I, §8, cl.17. As that careful language indicates, the Framers took pains to limit the authority granted under the Enclave Clause to protect the federal balance, requiring state consent (by "Cession" or "Consent of the Legislature of the State") for land within a State to fall under exclusive federal authority, and restricting the purposes for which that land could be used to specific federal functions ("the Seat of Government" or "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings").

The Framers also provided the federal government with residual authority to acquire and hold land under the Necessary and Proper Clause, which authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers. U.S. Const. art. I, §8, cl.18. The Necessary and Proper Clause accordingly empowers the United States to "acquire and hold real property in any State, whenever such property is needed for the use of the government in the execution of any of its [enumerated] powers." *Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886). But as its text makes clear, the Necessary and Proper Clause authorizes the federal government to hold land only to carry out its constitutionally enumerated powers—not to retain indefinite ownership of

unappropriated public lands that are *not* being used for any such purpose.

3. The only other constitutional provision that grants the United States power over land is the Property Clause of Article IV, which 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.

Article IV, §3, cl.2. By its terms, that Clause empowers the federal government to regulate and "dispose of" land belonging to the United States—not to retain such land indefinitely, without regard to whether it is needed to carry out any enumerated federal function. *See, e.g.*, *Dispose*, Samuel Johnson's Dictionary of the English Language (1755) ("[t]o put into the hands of another"; "[t]o give"; "[t]o give away"; "to bestow"; "to transfer to any other person or use").

Numerous contemporaneous examples confirm that, as of 1789, the power to "dispose of" land did not include the power to hold onto it in perpetuity. For instance, a statute passed by the First Congress expressly differentiated between the power to "purchase, receive, possess, enjoy, and retain" lands and the power "to sell, grant, demise, aliene, or dispose of" lands. 1 Stat. 191, 192 (Mar. 2, 1791); *see also* 2 Stat. 356 (Mar. 28, 1806) (contrasting the power to "purchase, take, receive, and enjoy, any lands" with the power "to rent, sell, convey and confirm, or otherwise dispose of" lands). Other early federal

statutes likewise use "dispose of" to mean convey away, not keep. *See, e.g.*, 1 Stat. 29, 39 (July 31, 1789) (authorizing vessel owners to sell or otherwise "dispose of" certain goods); 1 Stat. 145, 167 (Aug. 4, 1790) (same); 1 Stat. 452 (Apr. 18, 1796) (authorizing federal agent to "dispose of" goods "in trade, with the Indian nations"); 2 Stat. 171, 172 (Apr. 29, 1802) (making it unlawful to "publish, sell, or expose to sale or otherwise, or in any other manner dispose of" copyrighted works without authorization). Madison used "dispose of" in the same sense during the Constitutional Convention, noting that the eastern States had been unwilling to "dispose of [the western] country" to Spain. 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 346 (Jonathan Elliot ed., 1836); *see* 4 *id.* at 437 (observing that principles of international law dictated that when a new sovereign acquired control of a region, landowners were required to either submit to the new sovereign or "dispose of their landed property within a reasonable time").

The historical context in which the Property Clause was drafted and adopted confirms that it authorizes the federal government to sell or transfer away unappropriated public lands, not to keep those lands under permanent federal ownership. During the Continental Congress' debates about the Articles of Confederation, control over western lands was among the most hotly disputed issues. *See* Paul W. Gates, *History of Public Land Law Development* 49-51 (1968). Seven of the nascent States—Connecticut, Georgia, Massachusetts, New York, Virginia, and the Carolinas—had claims to western lands, some of them quite extensive. *Id.* at 49-50. The remaining States—

Delaware, Maryland, New Hampshire, New Jersey, Pennsylvania, and Rhode Island—had no such claims. *Id.* Many in the latter group feared that large States such as Virginia would become too wealthy and powerful if permitted to hold onto their western claims. *See, e.g.*, John Adams' Notes of Debates (Aug. 2, 1776), *in* 4 *Letters of Delegates to Congress, 1774-1789*, at 603-04 (Paul H. Smith ed., 1976); Letter from Thomas Burke to Richard Caswell (Feb. 16, 1777), *in* 6 *id.* at 298-99. The States without western claims also argued that if those western lands could be "wrested from the common enemy by the blood and treasure of the thirteen states," they "should be considered as a common property" of all the States. 14 *Journals of the Continental Congress, 1774-1789*, at 621-22 (May 21, 1779) ("*Journals*") (statement by Maryland delegates).

To resolve the issue, the States with western land claims ultimately agreed to cede their claims to the federal government. On October 10, 1780, the Continental Congress resolved "[t]hat the unappropriated lands that may be ceded or relinquished to the United States, by any particular states … *shall be* ~~granted and~~ *disposed of* for the common benefit of all the United States." 18 *Journals* at 915 (strikethrough in original) (emphasis added). But the Articles of Confederation did not authorize the Continental Congress to accept cessions of land or to dispose of such land—an omission that was seen as a major defect. The Property Clause was designed to remedy that defect, supplying authority that had been "overlooked by the compilers" of the Articles but nevertheless exercised by the Continental Congress in

the Northwest Ordinance and similar resolutions. The Federalist No. 43 (James Madison).

In short, the reasons for granting Congress the power "to dispose of" lands in the Property Clause were well understood by both the Framers and the people at the time. *See, e.g.*, *id.* (referring to "questions concerning the Western territory sufficiently known to the public"). Indeed, during the 1780s, "[n]early all looked hopefully to the sale of western lands as the nation's primary 'fund,' a way to repay [war debts] without taxation." Gregory Ablavsky, *The Rise of Federal Title*, 106 Cal. L. Rev. 631, 645-46 & nn.63-64 (2018) (collecting historical sources); *see also* 1 Stat. 138, 144 (Aug. 4, 1790) (requiring all "proceeds of the sales which shall be made of lands in the western territory" belonging to the United States to be "appropriated towards sinking or discharging the [national] debts").

That history—and the narrow understanding of the Property Clause it reflects—explains why the Property Clause was adopted with little debate. *See* 2 *Records of the Federal Convention of 1787*, at 459 (Max Farrand ed., 1911). Because the Property Clause was understood as simply authorizing the federal government to dispose of western lands that had (or might in the future) come into its possession, rather than to retain those lands in perpetuity, it gave rise to little controversy. By contrast, if the Property Clause had been understood as empowering the new federal government to hold those vast lands forever, without regard to whether they were needed to further any of its enumerated powers, it would have generated extensive and heated opposition to that perceived

aggrandizement of the federal power—as illustrated by the public reaction to even the far more limited grant of authority to hold land under the Enclave Clause, where opponents argued that even a ten-mile-square district for the seat of government and ownership of its own forts, arsenals, and dockyards would give the federal government too much control. *See, e.g.*, *id.* at 510 (objecting that unless the federal government's power to buy land under the Enclave Clause was contingent on state consent, it would empower the federal government "to enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience").

### B. Founding-Era Practice Confirms That the Federal Government Has Only Limited Authority to Hold Land.

1. The post-ratification actions of the founding generation confirm that the federal government has no general authority to hold land indefinitely without dedicating it to any enumerated federal function. After ratification, Congress repeatedly exercised its power under the Property Clause to dispose of—i.e., transfer away—western public lands. *See, e.g.*, 1 Stat. tbl. IV, pp. xcviii-ciii (listing over 100 statutes related to the "survey and sale of public lands" from 1791 to 1845); *see also id.* at cvi-cxiv (listing statutes granting lands to recently admitted States, veterans of the American Revolution, and various other groups); 1 Stat. at 144 (requiring all "proceeds of the sales which shall be made of lands in the western territory" belonging to the United States to be "appropriated towards sinking or discharging the [national] debts").

By contrast, to the extent the federal government reserved public lands indefinitely for its own purposes during this early period, it did so only in service of its enumerated Article I powers. *See, e.g.*, 3 Stat. 347, 347 (Mar. 1, 1817) (reserving lands producing "timber for the navy of the United States"); 3 Stat. 651 (Feb. 23, 1822) (similar); 5 Stat. 611 (Mar. 3, 1843) (similar). As far as the historical record shows, a plenary federal power to acquire and retain land was as foreign to the Framers as a plenary federal power to legislate.

2. Congress' treatment of the first several new States to join the Union was consistent with the principle that the federal government has a duty to dispose of land that it does not need for one of its enumerated powers. The first and second new States to join the original 13, Vermont and Kentucky, were admitted in 1791 and 1792 respectively with "full ownership of any public lands remaining ungranted," such that "the United States had no land within them." Gates, *supra*, at 287.

The next State to enter the Union, Tennessee—which was the first State created out of the federal western lands—demanded the same treatment. Its political leaders, including Andrew Jackson (its first Congressman), maintained that upon statehood Tennessee became owner of all the unappropriated public lands within its borders that had previously been held by the federal government. *See, e.g.*, Letter from Andrew Jackson to John Sevier (Jan. 18, 1797), *in* 1 *The Papers of Andrew Jackson, 1770-1803*, at 116-17 (Sam B. Smith & Harriet Chappell Owsley eds. 1980). Without the "right of Domain" over public lands, they argued, Tennessee "could not be said to

Enjoy all the rights and privileges the original states Enjoy[ed]." *Id.* at 117. That view encountered considerable resistance, however, as federal sales of western lands—including the lands Tennessee sought to claim—were viewed as a key means for the federal government to pay down the huge debts it had incurred during the Revolutionary War. Ablavsky, *supra*, at 645-46 & nn.63-64.

Congress created a committee to consider the matter, and the committee rejected Tennessee's position, concluding that Tennessee "acquired the jurisdiction over" public lands within its borders when it became a State but that "the right of sale" remained with the United States. No. 57: Sales of Lands Acquired by the Cession of North Carolina (May 9, 1800), *in* 1 *American State Papers: Public Lands* 98 (Walter Lowrie ed., 1834). The committee emphasized, however, that the federal government was obligated to "faithfully dispose[]" of the lands for the benefit of "the whole Union," and resolved that the United States should "open an office for the sale of the lands to which the United States have the legal right, within the State of Tennessee." *Id.* at 98-99. As that decision confirms, it was well understood in the post-ratification era that the federal government's power over unappropriated lands extended at most to the right to dispose of those lands by sale or transfer, not to simply retain them indefinitely in federal hands.

3. Ohio was the next State to join the Union. To avoid repeating the then-ongoing fight with Tennessee, Congress imposed conditions on Ohio's admission to the Union that required its constitution to be "not repugnant" to the Northwest Ordinance of

1787, 2 Stat. 173, 174 (Apr. 30, 1802), which provides that "new States[] shall never interfere with the primary disposal of the Soil by the United States in Congress assembled," 32 *Journals* at 341; *see also* 11 Annals of Cong. 1097-99 (1802) (congressional proceedings regarding admission of Ohio). In exchange, Congress agreed that 5% of the proceeds from all future sales of federal land within Ohio's borders would be devoted toward improvements in the new State. 2 Stat. at 175; *see* 11 Annals of Cong. 1124-26 (1802). Once again, Congress never asserted any power to indefinitely *retain* public lands within a State's borders; instead, it just insisted that the federal government, rather than Ohio, would have the power to sell or otherwise transfer away those public lands.

"After Ohio, every state admitted from territorial status had to either acknowledge the supremacy of the Northwest Ordinance or specifically 'for ever disclaim all right or title to the waste or unappropriated lands, lying within the said territory.'" Ablavsky, *supra*, at 672-73 (quoting the Louisiana Enabling Act, 2 Stat. 641, 642 (Feb. 20, 1811)). "Nearly identical language appeared in each new state's enabling act, right through Alaska's in 1958." *Id.* And as in Ohio's case, new States were often compensated by provisions entitling them to 5% of the proceeds from future federal sales of land within their boundaries. *See, e.g.*, 2 Stat. at 643 (Louisiana); 11 Stat. 383, 384 (Feb. 14, 1859) (Oregon). But even as Congress pushed the limits of its constitutional authority by denying new States ownership of their public lands, it insisted only on the authority to dispose of those lands itself, never asserting that it could simply keep those lands in

perpetuity without using them to carry out any of its enumerated powers.

4. The history of the State of Utah is of a piece with that tradition. The United States first acquired title to the land that now lies within the State of Utah in 1848 under the Treaty of Guadalupe Hidalgo, which ended the Mexican American War. *See* 9 Stat. 922 (July 4, 1848). Two years later, Congress designated that land as part of the Utah Territory and established a territorial government. 9 Stat. 453 (Sept. 9, 1850). In doing so, Congress made clear that it was obligated to dispose of the federal lands in Utah, not retain them in perpetuity. Congress specifically prohibited the territorial legislature from passing any law "interfering with the primary disposal of the soil," and instructed that "when the lands in the said Territory shall be surveyed … preparatory to bringing the same into market," two sections in each township would be reserved for schools. *Id.* at 454, 457-58. Congress thus plainly understood in organizing the Utah Territory that (as the Constitution requires) the federal government would hold the unappropriated public lands in that territory only on a temporary basis, not as a permanent federal fiefdom.

The Utah Enabling Act, which authorized the formation of the State of Utah and set forth the terms of its admission to the Union, expresses the same view. *See* 28 Stat. 107 (July 16, 1894). Section 3 of that Act, like similar provisions in the enabling acts of the other States admitted to the Union since Ohio, provides that the people of Utah disclaim any title to the unappropriated public lands lying within its boundaries, but specifically contemplates that the

federal government will proceed to dispose of those unappropriated lands:

> 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 hereof … 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* ….

28 Stat. at 108 (emphasis added). The same understanding is apparent in Section 9 of the Act, which guarantees that the new State of Utah will receive 5% of the proceeds from the sale of those lands to support its schools:

> [F]ive 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 … 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.

28 Stat. at 110 (emphasis added). The terms of the Utah Enabling Act thus confirm that, when Utah was admitted to the Union, all understood that the federal government's authority over unappropriated public lands within the new State was limited to the power to *dispose of* those lands, and Congress accordingly committed to do just that—not to keep those unappropriated lands under permanent federal ownership and control.

### C. Basic Principles of Federalism Reinforce the Conclusion That the Federal Government Cannot Retain Unappropriated Land Within a State.

The mandate that the federal government must "dispose of" (rather than retain) unappropriated public lands, U.S. Const. art. IV, §3, cl.2, flows not only from constitutional text and historical context, but from basic principles of federalism. Especially in light of the substantial expansion of federal power over federally owned land since the Founding Era, expansive and permanent federal landholdings within a State, over the State's objection, cannot be squared either with the federal-state balance of power or with the principle of equal sovereignty among the States.

In the early days of the Republic, the federal government's ownership of unappropriated land within new States was justified on the ground that the federal government merely owned the land, while the State possessed full sovereignty over it to the same extent as over privately owned land. *See* No. 57: Sales of Lands Acquired by the Cession of North Carolina, *supra*, at 98 (distinguishing Tennessee's "jurisdiction" over the public lands within its borders from the United States' "right of the soil").

This Court's early cases likewise embraced the view that when the federal government temporarily held unappropriated land within a State (until it could dispose of that land as required by the Property Clause), it held that land as a "mere proprietor," not as a sovereign. *United States v. City of Chicago*, 48 U.S. (7 How.) 185, 194 (1849). "[U]nless used as a means to carry out the purposes of the [federal]

government," federal lands were considered "subject to the legislative authority and control of the states equally with the property of private individuals," and so each State retained the same sovereignty over its territory regardless of whether that territory was in federal or private hands. *Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 531 (1885). And to the extent that federal ownership of public lands might prevent the new States from fully "exercis[ing] all the powers of government, which belong to and may be exercised by the original states," this was understood as a "temporar[y]" state of affairs that "was to cease" once the United States disposed of the lands. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845).

But the United States shirked its duty to dispose of unappropriated public lands in the western States. And over time, the federal government's power over unappropriated public lands has been interpreted more expansively—with a corresponding decrease in the sovereign authority of the States in which those lands are located. States are no longer permitted to tax any federally owned land within their boundaries absent the federal government's consent, *see Van Brocklin*, 117 U.S. at 167-68, 180; *Stearns v. Minnesota*, 179 U.S. 223, 243 (1900); States no longer have general authority to regulate federally owned lands within their boundaries, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 403 (1917); and the federal government "exercises the powers both of a proprietor and of a legislature" over all the lands it owns, *Kleppe*, 426 U.S. at 540.

As a result of that expansion of federal power, federal ownership of unappropriated public lands

within a State today imposes substantial and disproportionate burdens that disrupt both the federal-state balance and the balance of power among the States. States in which the federal government owns little or no unappropriated land—including all of the original 13 States and all of the States east of the Rocky Mountains, *see* App-2—retain full sovereign control over practically all of their territory. States in which the federal government holds vast unappropriated lands, by contrast, are deprived of the ability to exercise sovereign authority over wide swathes of the land within their borders, leaving their sovereignty and treasuries diminished as compared to their sister States and aggrandizing the federal government and its treasury at their expense.

That untenable incongruity among the States cannot be reconciled with the balance of power adopted in the plan of the Convention. While the Framers were willing to allow the original States with western land claims to cede those claims to the new federal government, that was decidedly not because they intended to permanently convert the federal government into the nation's largest landholder. On the contrary, those western land claims were transferred to the federal government on the express understanding that the lands would be *disposed of*, whether by being opened to settlement or transferred to state control. Those lands were not meant to be permanently retained in federal hands to the detriment of the new States within whose borders they fell. Given the widespread skepticism of the new federal government during the Founding Era, and the strong sentiment that it should be strictly limited to specific enumerated powers, it is difficult to fathom

that the Framers would have countenanced perpetual federal retention of vast expanses of real property within a State (and over the State's objection, no less) without any basis in any enumerated federal function.

### D. The Federal Government's Ongoing Retention Of Vast Unappropriated Public Lands Within Utah Cannot Be Sustained.

1. Despite the absence of any constitutional authority empowering the federal government to indefinitely retain unappropriated land within the bounds of a State—and despite the serious conflict between expansive federal land ownership within a State and basic principles of state sovereignty and federalism—the federal government today continues to indefinitely hold vast swathes of land across Utah. *See* App-4. It currently owns some *18.5 million acres* of unappropriated public land in Utah—land that it is not reserving or using to carry out any of its enumerated functions, and instead is simply holding as a permanent federal fiefdom with federal officials making land-use and other regulations without any obligation to ground them in any enumerated federal power. *Id.* Still worse, the federal government has declared by statute in FLPMA that it is the formal "policy of the United States" that "the public lands be retained in federal ownership," except in the rare case where BLM determines that "disposal of a particular parcel will serve the national interest." 43 U.S.C. §1701(a)(1); *see id.* §1713(a) (setting out very limited criteria for disposal). That policy cannot be squared with the limited authority that the Framers provided the federal government to hold land, with post-

ratification practice, or with basic principles of federalism.

To be clear, this lawsuit does not challenge the federal government's retention of specific parcels of land that have been reserved by Congress or the President (under authority granted by Congress) for designated purposes, e.g., as National Parks, National Conservation Areas, and the like. Nor does it challenge the federal government's constitutional authority to retain lands that it is using to carry out its enumerated powers, such as the more than 1.8 million acres in Utah that are devoted to federal military installations, lands held in trust for Indian tribes, federal courthouses and office buildings, and the like. But whatever power the Constitution may grant the federal government to hold land in service of one of its enumerated functions, that power emphatically does not include keeping 18.5 million acres of unappropriated federal land in Utah under permanent federal ownership for no designated federal purpose and over Utah's express objection.

2. The federal government's unconstitutional retention of more than 18.5 million acres of unappropriated land in Utah imposes grave and irreparable injuries on the State. Across those 18.5 million acres of land—more than one-third of its total land area—Utah is deprived of its most basic and fundamental sovereign powers, including the power to tax and the power of eminent domain. *Cf. McCulloch*, 17 U.S. (4 Wheat.) at 429 (taxation power is an "incident of sovereignty"); *Kohl*, 91 U.S. at 371-72 (eminent domain power is "inseparable from sovereignty"). Utah is likewise largely deprived of its

legislative authority over those lands, as the federal government holds "full power … to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them," all without any need to tie policy judgments to any enumerated power. *Utah Power & Light*, 243 U.S. at 404; *see Kleppe*, 426 U.S. at 539 (describing the federal power to regulate federal land as "without limitations"). Put simply, for millions of acres within Utah's borders, it is the federal government and not Utah that wields the general "police power." 426 U.S. at 540.

That invasion of Utah's sovereign authority has serious real-world effects. Across vast expanses of Utah, it is federal officials from the Bureau of Land Management—not state or local officials elected by Utah citizens—who develop the plans that dictate how land may be used. *See* 43 U.S.C. §1712. These federal plans define the extent to which millions of acres in Utah are open to livestock grazing, oil and gas extraction, forestry, mining, filmmaking, hunting, camping, recreation, and more, all without any need to tether decisions to enumerated powers. *See, e.g.*, BLM Moab Field Office, *supra*. As a result, while other States have wide latitude to make their own judgments about land use and related issues, federal officials have broad authority to override Utah's legislative judgments across wide swathes of Utah's territory.

For instance, while States generally "have broad trustee and police powers over wild animals within their jurisdictions," the federal government can override Utah's laws regarding animal control across millions of acres within Utah's borders. *See Kleppe*,

426 U.S. at 545-56. As the federal government itself recognizes, state and local governments suffer "losses in property taxes due to the existence of nontaxable Federal lands within their boundaries," owing to their "inability … to collect property taxes on federally owned land." U.S. Dep't of Interior, *Payments in Lieu of Taxes*, https://www.doi.gov/pilt (last visited Aug. 20, 2024). And while the federal government provides payments to the State to help offset those losses, *see id.*, those payments by the grace of the federal government are no substitute for the deprivation of Utah's sovereign right to tax real estate within its own borders. Moreover, these federal payments are orders of magnitude lower than what Utah could expect to obtain through property taxes if the federal government honored its constitutional obligations.

Utah is likewise deprived of significant revenue that the federal government earns from its unlawful retention of the unappropriated public lands in Utah, including substantial revenue from mineral development, the sale of timber, and fees for livestock grazing and other activities. *See* 43 U.S.C. §1905 (grazing fees); 43 C.F.R. §§5401.0-6 (timber sales); BLM, *About the BLM Oil and Gas Program*, https://tinyurl.com/37ue8mn9 (last visited Aug. 20, 2024) (mineral development). While some of this revenue is shared with the State and its political subdivisions, much of it is simply deposited in the U.S. Treasury.

In sum, Utah has suffered and is suffering serious and ongoing injuries on account of the federal government's unconstitutional retention of millions of acres of unappropriated land with Utah's borders,

over Utah's express objection and Utah's express request to transfer those lands to State control, *see* Utah Code §63L-6-103. That ongoing invasion of Utah's sovereignty—enshrined in federal law as the express and official policy of the United States—is not justified by any power granted to the federal government in the Constitution. On the contrary, the federal government's indefinite retention of ownership of vast expanses of unappropriated public land in Utah contravenes the plain constitutional text, the clear lessons of history, and basic principles of federalism. This Court should exercise its original jurisdiction and finally bring an end to the federal government's persistent and extraordinary disregard of the constitutional limits on its powers.

## CONCLUSION

This Court should grant the State of Utah leave to file its bill of complaint.

Respectfully submitted,

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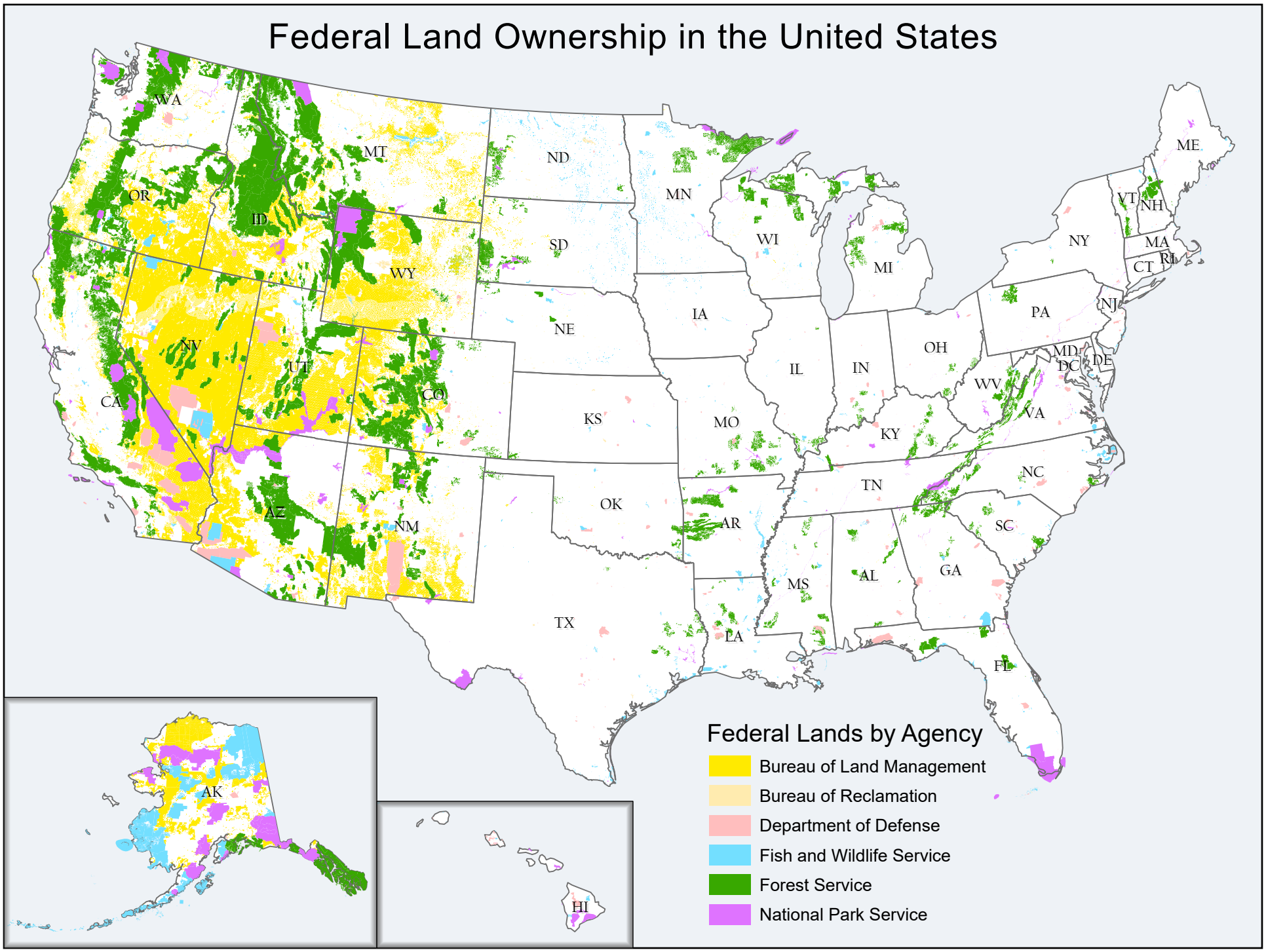
August 20, 2024

# APPENDIX

## TABLE OF APPENDICES

**Map of Federal Land Ownership in the United States**

(See insert on next page)

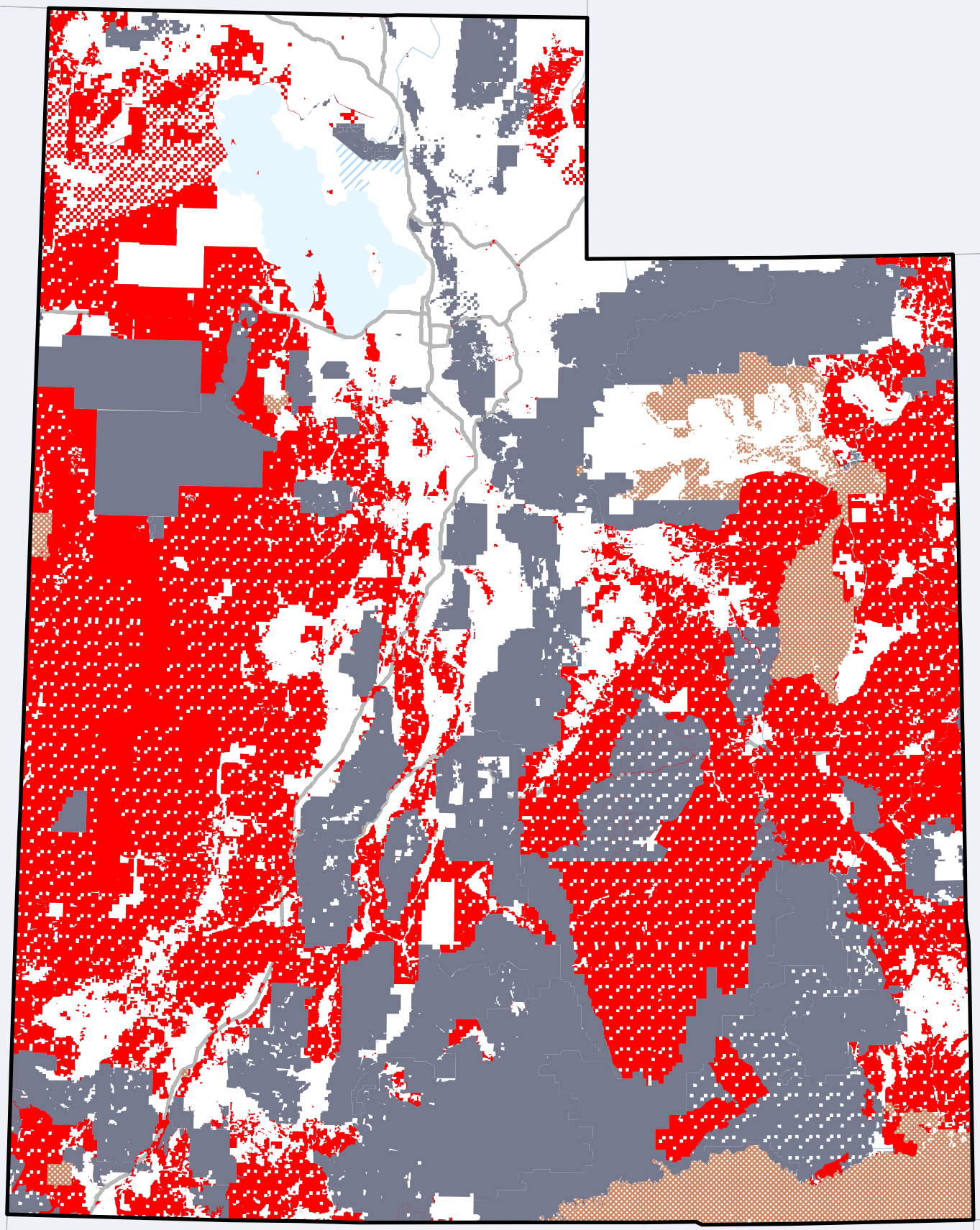



Source: BLM, DoD, USFS, USFWS, NPS, PADUS 3.0

**Map of Federal Land Ownership in Utah**

(See insert on next page)

# Federal Land Ownership in Utah




Source: BLM, DoD, USFS, USFWS, NPS, PADUS 3.0

## Relevant Constitutional Provisions

### U.S. Const. art. I, §8, cl.17

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

### U.S. Const. art. I, §8, cl.18

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

### U.S. Const. art. III, §2, cl.2

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

### U.S. Const. art. IV, §3, cl.2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

## Relevant Statutory Provisions

### 28 U.S.C. §1251(b)(2)

**(b)** The Supreme Court shall have original but not exclusive jurisdiction of:

…

**(2)** All controversies between the United States and a State;

…

### 43 U.S.C. §1701. Congressional declaration of policy

**(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;

**(2)** the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

**(3)** public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

**(4)** the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and

that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

**(5)** in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

**(6)** judicial review of public land adjudication decisions be provided by law;

**(7)** goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

**(8)** the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

**(9)** the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

**(10)** uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

**(11)** regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

**(12)** the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

**(13)** the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

**(b)** The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

## 43 U.S.C. §1712. Land use plans

### (a) Development, maintenance, and revision by Secretary

The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

### (b) Coordination of plans for National Forest System lands with Indian land use planning and management programs for purposes of development and revision

In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.

### (c) Criteria for development and revision

In the development and revision of land use plans, the Secretary shall--

**(1)** use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

**(2)** use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

**(3)** give priority to the designation and protection of areas of critical environmental concern;

**(4)** rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

**(5)** consider present and potential uses of the public lands;

**(6)** consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

**(7)** weigh long-term benefits to the public against short-term benefits;

**(8)** provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

**(9)** to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under chapter 2003 of Title 54, and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of

State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

**(d) Review and inclusion of classified public lands; review of existing land use plans; modification and termination of classifications**

Any classification of public lands or any land use plan in effect on October 21, 1976, is subject to review in the land use planning process conducted under this section, and all public lands, regardless of classification, are subject to inclusion in any land use plan developed pursuant to this section. The Secretary

may modify or terminate any such classification consistent with such land use plans.

**(e) Management decisions for implementation of developed or revised plans**

The Secretary may issue management decisions to implement land use plans developed or revised under this section in accordance with the following:

**(1)** Such decisions, including but not limited to exclusions (that is, total elimination) of one or more of the principal or major uses made by a management decision shall remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate, under the provisions of this section, of the land use plan involved.

**(2)** Any management decision or action pursuant to a management decision that excludes (that is, totally eliminates) one or more of the principal or major uses for two or more years with respect to a tract of land of one hundred thousand acres or more shall be reported by the Secretary to the House of Representatives and the Senate. If within ninety days from the giving of such notice (exclusive of days on which either House has adjourned for more than three consecutive days), the Congress adopts a concurrent resolution of nonapproval of the management decision or action, then the management decision or action shall be promptly terminated by the Secretary. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge

the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the management decision or action. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same management decision or action. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

**(3)** Withdrawals made pursuant to section 1714 of this title may be used in carrying out management decisions, but public lands shall be removed from or restored to the operation of the Mining Law of 1872, as amended (R.S. 2318-2352;

30 U.S.C. 21 et seq.) or transferred to another department, bureau, or agency only by withdrawal action pursuant to section 1714 of this title or other action pursuant to applicable law: Provided, That nothing in this section shall prevent a wholly owned Government corporation from acquiring and holding rights as a citizen under the Mining Law of 1872.

**(f) Procedures applicable to formulation of plans and programs for public land management**

The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

**43 U.S.C. §1713. Land use plans**

**(a) Criteria for disposal; excepted lands**

A tract of the public lands (except land in units of the National Wilderness Preservation System, National Wild and Scenic Rivers Systems, and National System of Trails) may be sold under this Act where, as a result of land use planning required under section 1712 of this title, the Secretary determines that the sale of such tract meets the following disposal criteria:

**(1)** such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not

suitable for management by another Federal department or agency; or

**(2)** such tract was acquired for a specific purpose and the tract is no longer required for that or any other Federal purpose; or

**(3)** disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership.

**(b) Conveyance of land of agricultural value and desert in character**

Where the Secretary determines that land to be conveyed under clause (3) of subsection (a) of this section is of agricultural value and is desert in character, such land shall be conveyed either under the sale authority of this section or in accordance with other existing law.

**(c) Congressional approval procedures applicable to tracts in excess of two thousand five hundred acres**

Where a tract of the public lands in excess of two thousand five hundred acres has been designated for sale, such sale may be made only after the end of the ninety days (not counting days on which the House of Representatives or the Senate has adjourned for more than three consecutive days) beginning on the day the Secretary has submitted notice of such designation to

the Senate and the House of Representatives, and then only if the Congress has not adopted a concurrent resolution stating that such House does not approve of such designation. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other resolution with respect to the designation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same designation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

**(d) Sale price**

Sales of public lands shall be made at a price not less than their fair market value as determined by the Secretary.

**(e) Maximum size of tracts**

The Secretary shall determine and establish the size of tracts of public lands to be sold on the basis of the land use capabilities and development requirements of the lands; and, where any such tract which is judged by the Secretary to be chiefly valuable for agriculture is sold, its size shall be no larger than necessary to support a family-sized farm.

**(f) Competitive bidding requirements**

Sales of public lands under this section shall be conducted under competitive bidding procedures to be established by the Secretary. However, where the Secretary determines it necessary and proper in order (1) to assure equitable distribution among purchasers of lands, or (2) to recognize equitable considerations or public policies, including but not limited to, a preference to users, he may sell those lands with modified competitive bidding or without competitive bidding. In recognizing public policies, the Secretary shall give consideration to the following potential purchasers:

**(1)** the State in which the land is located;

**(2)** the local government entities in such State which are in the vicinity of the land;

**(3)** adjoining landowners;

**(4)** individuals; and

**(5)** any other person.

**(g) Acceptance or rejection of offers to purchase**

The Secretary shall accept or reject, in writing, any offer to purchase made through competitive bidding at his invitation no later than thirty days after the receipt of such offer or, in the case of a tract in excess of two thousand five hundred acres, at the end of thirty days after the end of the ninety-day period provided in subsection (c) of this section, whichever is later, unless the offeror waives his right to a decision within such thirty-day period. Prior to the expiration of such periods the Secretary may refuse to accept any offer or may withdraw any land or interest in land from sale under this section when he determines that consummation of the sale would not be consistent with this Act or other applicable law.