

No. 160, Original

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In the  
Supreme Court of the United States

— ◆ —  
UTAH,

*Plaintiff,*

*v.*

UNITED STATES,

*Defendant*

— ◆ —  
ON MOTION FOR LEAVE TO FILE BILL OF  
COMPLAINT

— ◆ —  
WYOMING LEGISLATORS' BRIEF AS AMICI  
CURIAE SUPPORTING PLAINTIFF'S MOTION  
FOR LEAVE TO FILE A BILL OF COMPLAINT

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## IDENTITIES AND INTERESTS OF AMICI CURIAE<sup>1</sup>

Amici curiae are Wyoming Legislators who care about this case and respectfully ask the Court to take it. Like Utah, Wyoming has—and its Legislators have—long been frustrated by the federal government exercising complete ownership and control over vast expanses of land within the State’s borders. Wyoming Legislators assert that this federal authority is contrary to the actual goals of the United States Constitution. The federal government’s indefinite retention policy, formalized by Congress in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701, *et seq.*, is inconsistent with constitutional mandates. These inconsistencies deny Wyoming the sovereignty to which it is entitled under, among other principles, the equal-footing doctrine. Simultaneously, the inconsistencies inflict grievous economic injuries on the State and its citizens.

Approximately 47% of Wyoming’s surface lands (or ***over 29 million acres***) are allegedly owned or controlled by the federal government; the federal government would also claim that it owns 69% of the

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of this brief.

subsurface minerals within the State.<sup>2</sup> Among these totals, the federal government doubtlessly would allege that it owns or controls millions of surface acres of “unappropriated” lands that are not held for any specific federal purpose, such as a national park or military base. The federal government just wants to hold them in a policy of permanent ownership.<sup>3</sup>

Federal agencies like the Bureau of Land Management (BLM) are wielding an unconstitutional police power over Wyoming’s lands and resources. These lands were committed to the purposes of Wyoming statehood by the terms of its congressional act of admission. The Tenth Amendment, in contrast, provides for the founding principle that States kept full police powers that were not to be delegated to the federal government under the Constitution.

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<sup>2</sup> Vincent, Cong. Research Serv., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 8 (2020), <https://crsreports.congress.gov/product/pdf/R/R42346> (surface ownership) (*Federal Land Ownership*); BLM, What We Manage in Wyoming, <https://www.blm.gov/about/what-we-manage/wyoming> (mineral ownership) (visited Oct. 21, 2024).

<sup>3</sup> To be clear, these Wyoming Legislators respectfully would prefer that the Court address in this or a future case all former federal territorial lands now held by the United States within the several States, rather than just “unappropriated” lands. Such a challenge might encompass former federal territorial land that *has been* “appropriated” to some particular federal use including such uses as parks, monuments, wilderness, etc. And by filing this brief, these Wyoming Legislators, of course, do not intend to waive any ability to challenge the constitutional propriety of any particular decision to “appropriate” lands.

So these Wyoming Legislators<sup>4</sup> write separately to help the Court understand that this is not just a Utah problem; it is a problem facing other Western States. And these Wyoming Legislators would be grateful (respectfully) for the Court to grant Utah's motion and take this case for review.

### **SUMMARY OF THE ARGUMENT**

Wyoming and its compatriot Western States entered the Union on an equal footing with all the other States. Wyoming expected that the Congress would "dispose of" the unappropriated lands within its borders just as it had with unappropriated lands in other States. But the promise of congressional disposal set out in the Constitution's Property Clause has been broken. The original States enjoy full sovereignty over nearly all the lands within their borders, while Wyoming's sovereignty is either denied entirely or substantially impaired by the federal government's assertion that it can both own and govern, with complete and supreme authority, nearly half of the State's total surface and more than half of its mineral estate.

This disparate treatment offends the fundamental constitutional principle that, upon their admission into the union of States, all States enjoy an "equal sovereignty" that cannot be abridged by federal overreach.

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<sup>4</sup> The list of Wyoming Legislators submitting this brief is produced at the end of the brief.

## ARGUMENT

### **I. The Federal Government's Policy of Retaining Unappropriated Lands in Wyoming Is Not an Enumerated Power.**

The Constitution sets up a balance of power between the federal government and the States. U.S. Const. Art. I, § 8, cl. 17.; U.S. Const. Art. IV, § 3, cl. 2.; U.S. Const. amend. X. To that end, it acknowledges—and has always acknowledged—that when a new state would come under the federal umbrella, the federal government would, in due course, dispose of the residual, unappropriated lands remaining in the new State. U.S. Const. Art. I, § 8, cl. 17.; U.S. Const. Art. IV, § 3, cl. 2. Our Nation is one of several sovereign republics joined together under a Constitution that limits the powers of federal government to specific, enumerated powers. Permanent retention of unappropriated lands and supreme governing authority of those lands now situated within the States, including the State of Wyoming, are not constitutionally enumerated powers. States keep complete sovereignty, ownership, and control over lands within their State boundaries.

The authority of the Federal Government is limited under the Constitution. The Enclave Clause of Article I, for example, allows the federal government to buy state lands, with state consent, for the specific and limited purposes of establishing the seat of the national government, military installations, and other needful public buildings. U.S. Const., Art. I, § 8, cl. 17. Under the Enclave Clause, any such federal lands

stay subject to state sovereignty except where expressly ceded to exclusive federal jurisdiction. *Id.*

So where does the federal government get its supposed authority? The federal government’s assertion of power to permanently keep and exercise control over more than 29 million acres<sup>5</sup> of land within Wyoming’s sovereign borders relies on an untenable reading of the Property Clause of Article IV. The Property Clause grants Congress the “power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” *Id.*, Art. IV, § 3, cl. 2. That is good! Congress should have the power to do what it must do—by its plain terms, this provision requires Congress to “dispose of,” ***not perpetually keep***, any unappropriated lands it thinks it possesses within the States.

The Wyoming Legislators agree with Utah that this was the uniform understanding of Congress’s Property Clause power throughout most of our Nation’s history. Bill of Compl. 7–10, ¶¶ 15–19 (Aug. 20, 2024). The original understanding of the Property Clause as a ***divestiture*** mandate is confirmed by the consistent practice of Congress from the Nation’s founding through the 19th century of promptly disposing of unappropriated lands within the States, whether by grants to settlers and railroads, cessions to the States, sales to private interests, or other

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<sup>5</sup> *Federal Land Ownership* 8.



means.<sup>6</sup> This understanding is also confirmed by the equal-footing doctrine, under which new states are admitted to the Union on an equal sovereign footing with the original states and succeed to ownership of all unappropriated lands within their borders upon statehood. *See, e.g., Pollard v. Hagan*, 44 U.S. 212 (1845) (“Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever.”).

The equal-footing doctrine rests on the premise that as new States are formed, the federal government will give unappropriated “federal” lands to those States—as it did for the original States—thereby perfecting state sovereignty over the entirety of the states’ territories. The consequences of this federal usurpation of power over Wyoming’s sovereignty have been severe. This “equal footing” with other States is an essential element of statehood. A State, in the American conception, does not exist where this element is lacking.

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<sup>6</sup> *See* Alexander & Gorte, Cong. Research Serv., RL34267, FEDERAL LAND OWNERSHIP: CONSTITUTIONAL AUTHORITY AND THE HISTORY OF ACQUISITION, DISPOSAL, AND RETENTION 4–5 (2007). While the Wyoming Legislators cite the CRS Report for this point, as should be obvious in this brief, the Wyoming Legislators respectfully disagree with some of the analytical conclusions in the report. *E.g., id.* at 2–3.

Congress broke sharply from this original understanding when it enacted FLPMA in 1976 and declared that unappropriated public lands would henceforth be kept in permanent federal ownership. 43 U.S.C. § 1701(a)(1). This remarkable assertion of power finds no warrant in the Property Clause, which speaks only of the power to “dispose of” federal lands, not to keep them in perpetuity, and to make such “rules and regulations” as are “needful” to that purpose. *See* Art. IV, § 3, cl. 2.

## **II. This Constitutional Violation Hurts Wyoming.**

The consequences of this usurpation of Wyoming’s sovereignty have been severe. FLPMA has enabled federal agencies like BLM to assert a complete and permanent dominion over nearly 47% of the State’s total surface. *See Federal Land Ownership* 7–8. On these expansive lands, the federal government exercises all the powers of a sovereign, including supposed “federal” police powers, taxation, land use control, condemnation, and more. None of those are enumerated powers under the United States Constitution. But as a result, Wyoming has been barred from exerting sovereign authority over its own territory.

This extraordinary displacement of state sovereignty in favor of federal control violates the fundamental constitutional balance of state and federal power. It cannot be justified within the Framers’ design or under the Property Clause, which confers only a power of disposal, not permanent

retention. Nor can it be reconciled with the equal-footing doctrine’s promise of equal state sovereignty over public lands. It reduces Wyoming to a second-class sovereign within its own boundaries.

The injury to Wyoming’s sovereign interests is not just abstract but tangible and acute. Consider the impact on Wyoming’s sovereign power of taxation—“one of the most essential and extensive” of all state powers. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819). Federal lands are exempt from state taxation, depriving Wyoming of vital revenue to fund schools, infrastructure, and other essential public services. So long as unappropriated lands<sup>7</sup> stay within the State and under federal dominion, Wyoming must forgo that critical sovereign revenue.

The federal government’s mistaken assertion of dominion over nearly half of Wyoming also compromises the State’s sovereign authority to regulate land use, natural-resource development, and economic activity within its borders. Wyoming is rich in natural resources like coal, oil, and natural gas, and the State’s economy depends heavily on the development of these resources. But some of the richest and most abundant resources lie beneath

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<sup>7</sup> No doubt, the federal government would allege that it owns or controls millions of surface acres of “unappropriated” lands in Wyoming. *See Richards*, Wyo. Legis. Serv. Office, Issue Brief: Federal Land Ownership and Restrictions 2–3 (2003), <https://wyoleg.gov/LSOResearch/2003/03ib002.pdf> (last visited Oct. 21, 2024).

lands where Wyoming allegedly has no authority to regulate development.

The economic consequences of this federal chokehold on Wyoming's economy are undoubtedly severe. Developing natural resources in Wyoming could create thousands of jobs, generate billions of dollars in economic activity, and significantly boost the State's economy. But as long as those lands are still under a clouded claim of federal ownership or control, then Wyoming will be unable to fully realize the economic benefits and chart its own economic destiny. Instead, it will remain beholden to the shifting policy whims of federal land managers—federal *regulators*—who are unaccountable to the citizens of Wyoming.

### **III. The Unequal Distribution of Federal Land Ownership Between Eastern and Western States Demonstrates the Violation.**

It's simply untenable that Wyoming and other Western States must suffer unconstitutional landownership or control by the federal government. Just how lopsided is the balance of federal land ownership in the West compared to the East? In the States east of the Rocky Mountains, the federal government owns on average only 4.1% of the total land mass. *See Federal Land Ownership* 19. The percentages are even smaller for States along the Atlantic seaboard, many of which have less than 1% federal land ownership. *See id* at 7–8, 19. But in the eleven “lower-48” Western States, including Wyoming, a staggering 45.9% of the land is under

federal ownership. *Id.* at 19. And in Wyoming, the federal government lays claim to ***nearly half*** the State's total surface. *Id.* at 8. The disparities could hardly be more glaring or geographically skewed.

### CONCLUSION

The problem at the heart of this case is not just a Utah problem, it is a Wyoming problem too. For the reasons explained in this brief, these Wyoming Legislators respectfully ask the Court to grant Utah's motion for leave to file a bill of complaint.

\*Wyoming Legislators listed on following page\*

## LIST OF WYOMING LEGISLATORS

Sen. Bo Biteman, Dist. 21  
Sen. Brian Boner, Dist. 2  
Sen. Tim French, Dist. 18  
Sen. Larry Hicks, Dist. 11  
Sen. Bob Ide, Dist. 29  
Sen. John Kolb, Dist. 12  
Sen. Dan Laursen, Dist. 19  
Sen. Troy McKeown, Dist. 24  
Sen. Tim Salazar, Dist. 26  
Sen. Cheri Steinmetz, Dist. 3

Rep. Bill Allemand, Dist. 58  
Rep. John Bear, Dist. 31  
Rep. Jeremy Haroldson, Dist. 4  
Rep. Scott Heiner, Dist. 18  
Rep. Ben Hornok, Dist. 42  
Rep. Christopher Knapp, Dist. 53  
Rep. Chip Neiman, Dist. 1  
Rep. Pepper Ottman, Dist. 34  
Rep. Sarah Penn, Dist. 33  
Rep. Rachel Rodriguez-Williams, Dist. 50  
Rep. Daniel Singh, Dist. 61  
Rep. Allen Slagle, Dist. 2  
Rep. Scott Smith, Dist. 5  
Rep. Tomi Strock, Dist. 6  
Rep. Jeanette Ward, Dist. 57  
Rep. John Winter, Dist. 28

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