
In The
Supreme Court of the United States

STATE OF UTAH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

On Motion for Leave to File Bill of Complaint

**BRIEF OF THE STATES OF IDAHO, ALASKA,
WYOMING, AND THE ARIZONA
LEGISLATURE AS *AMICI CURIAE* IN
SUPPORT OF PLAINTIFF**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTERESTS OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT	6
I. Federal Ownership of Unappropriated Land Inverts Federalism and Stymies Western States’ Sovereign Authority.	6
A. Western States’ Power to Regulate Local Land Use Has Been Limited.	6
B. Western States’ Sovereign Powers Are Limited by Federal Ownership of Unappropriated Lands.....	13
II. Federal Ownership of Unappropriated Land Siphons Resources Out of Western States.	17
A. Western States Could Generate Substantial Revenue from Unappropriated Federal Lands.....	18
B. The Federal Government’s Attempts to Compensate Western States for the Shortfall Are Woefully Inadequate.	20
III. This Court’s Intervention Is Necessary.....	25
CONCLUSION.....	27

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adirondack R. Co. v. N.Y. State</i> , 176 U.S. 335 (1900).....	13
<i>Engle v. Isaac</i> , 456 U.S. 107 (1982).....	15
<i>Eubank v. City of Richmond</i> , 226 U.S. 137 (1912).....	15
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982).....	7
<i>Gamble v. United States</i> , 587 U.S. 678 (2019).....	6
<i>Georgia v. Chattanooga</i> , 264 U.S. 472 (1924).....	14
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	17, 26
<i>Irwin v. Wright</i> , 258 U.S. 219 (1922).....	19
<i>Kleppe v. New Mexico</i> , 426 U.S. 529 (1976).....	15
<i>McCulloch v. Maryland</i> , 17 U.S. (4 Wheat.) 316 (1819)	14
<i>Nat’l Fed’n of Indep. Bus. v. Sebelius</i> , 567 U.S. 519 (2012).....	6, 8
<i>PennEast Pipeline Co., LLC v. New Jersey</i> , 594 U.S. 482 (2021).....	25
<i>Shelby Cnty. v. Holder</i> , 570 U.S. 529 (2013).....	26

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers</i> , 531 U.S. 159 (2001).....	7
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983).....	25
<i>United States v. Pheasant</i> , 2023 WL 3095959 (D. Nev. Apr. 26, 2023) ...	15, 16
<i>Utah Power & Light Co. v. United States</i> , 243 U.S. 389 (1917).....	14
<i>Van Brocklin v. Tennessee</i> , 117 U.S. 151 (1886).....	14
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	7
Constitutional Provisions	
U.S. CONST. amend. X.....	5, 6
Statutes and Bills	
43 U.S.C. § 1701	20
43 U.S.C. § 1733.....	16
Idaho Admission Bill, Act July 3, 1890, ch. 656, 26 Stat. 215, §§ 4–5.....	21
H.R. 6064, 118th Cong. (2023).....	9
H.R. Con. Res. 4, 67th Leg., 1st Reg. Sess. (Idaho 2023)	9
Other Authorities	
AeonAI, Idaho Federal Land PILT Analysis Report (Sept. 15, 2022)	21, 22

TABLE OF AUTHORITIES—Continued

	Page(s)
Amy Joi O’Donoghue, <i>What’s up with delays on projects on federal lands?</i> , Deseret News (May 27, 2024)	14
Anne A. Riddle, Cong. Rsch. Serv., R41303, <i>The Secure Rural Schools and Community Self-Determination Act: Background and Issues</i> (2023)	20
Arizona Treasury, <i>Permanent Land Endowment Fund</i>	21
BLM 2021 Budget, Statement of William Perry Pendley to Subcomm. on Energy & Min. Res. of the H. Comm. on Nat. Res., 116th Cong. (2020).....	19
BLM Budget, Statement of Tracy Stone-Manning to Subcomm. on Energy & Min. Res. of the H. Comm on Nat. Res. 118th Cong. (2023)	18
BLM, <i>BLM issues final environmental review for proposed Lava Ridge wind project</i> , (Jun. 6, 2024)	8
BLM, <i>BLM Idaho Forests and Woodlands</i>	11
BLM, <i>Recreation Fee Program</i>	18
BLM, <i>The BLM: Valuing America’s Public Lands 2023</i>	18
BLM, <i>Timber Sales</i>	18
Carney, Timothy P., <i>Why Indefensible Farm Bill Was Backed by Party Leaders and K Street</i> , Washington Examiner (Feb. 4, 2014).....	24

TABLE OF AUTHORITIES—Continued

	Page(s)
Carol Hardy Vincent & Laura A. Hanson, Cong. Rsch. Serv., R42346, Federal Land Ownership: Overview and Data (2020).....	4, 11, 16, 25
Clark Corbin, ‘ <i>Once-in-a-generation investment</i> ’: <i>Idaho state parks receive record funding for improvements</i> , Idaho Capital Sun (Oct. 6, 2023)	12
Clark Corbin, <i>State of Idaho facing \$45.8M in estimated wildfire expenses this year</i> , Idaho Capital Sun (Sept. 17, 2024)	12
Crystal A. Kolden, <i>We’re Not Doing Enough Prescribed Fire in the Western United States to Mitigate Wildfire Risk</i> , Fire (May 29, 2019).....	12
Department of the Interior, Fiscal Year 2023 Payments in Lieu of Taxes National Summary.....	23
Federal Lands of the United States Map, GIS Geography	1
Federal Lands Task Force Working Group, <i>Breaking the Gridlock: Federal Land Pilot Projects in Idaho</i> , (Dec. 2000).....	12
Helen Lober, <i>Constraining Federal Policy Whiplash on Public Lands</i> , 50 Ecology Law Quarterly 449 (2023)	13
Holly Fretwell & Jonathan Wood, <i>Fix America’s Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis</i> , PERC (Apr. 12, 2021).....	11

TABLE OF AUTHORITIES—Continued

	Page(s)
ICT Staff, <i>Cattle theft, vote are double blows to Western Shoshone land rights</i> , ICT News (Sept. 12, 2018)	16
Idaho Department of Lands, 2023 Annual Report	22
Idaho Department of Lands, Endowment Timber Sales	22
Idaho Department of Lands, Leasing Endowment Land.....	19, 22
Idaho Department of Lands, Understanding Endowment Land.....	21
Jay O’Laughlin, et al., <i>Idaho’s Endowment Lands: A Matter of Sacred Trust</i> , Univ. of Idaho (Aug. 2011).....	21
Jeff Selle, <i>Labrador discusses public lands</i> , Coeur d’Alene/Post Falls Press (Apr. 1, 2016).....	24
Katie Hoover, Cong. Rsch. Serv., RL31392, PILT (Payments in Lieu of Taxes): Somewhat Simplified, at Summary (2017).....	20
Katie Klingsporn, <i>Lawmaker: BML Rock Springs plan still doesn’t reflect Wyoming feedback</i> , WyoFile (Sept. 10, 2024).....	10
Logan Finney, <i>Legislators build their case for higher PILT payments</i> , Idaho Reports (Aug. 25, 2023)	21

TABLE OF AUTHORITIES—Continued

	Page(s)
Mike Koshmrl, et al., <i>Final Rock Springs plan seeks development, wildlife balance – Wyoming leaders still unhappy</i> , WyoFile (Aug. 22, 2024)	10
Notes of James Madison from the Constitutional Convention, Tuesday, Sept. 5, 1787	8
Press Release, Idaho Department of Lands, Endowment Beneficiaries to Receive Another Record High Distribution in Fiscal Year 2026 (Aug. 21, 2024)	22
Press Release, James E. Risch, Risch Leads Bill to Stop Widely Opposed Lava Ridge Wind Energy Project (Oct. 25, 2023).....	9
Press Release, Office of Governor Brad Little, Little, Bedke, Crapo, Risch, Simpson comment on BLM decision on massive Lava Ridge wind farm (June 6, 2024).....	8
Press Release, Raúl R. Labrador, Labrador Announces FAA Appeal on Lava Ridge Project (June 7, 2024)	9
Press Release, Sen. Mike Lee, Sens. Lee, Crapo, and Risch Introduce MORE PILT Act (Mar. 25, 2021)	24
Press Release, The White House, FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan. 27, 2021)	10

TABLE OF AUTHORITIES—Continued

	Page(s)
Press Release, Wyoming Department of Education, Superintendent Degenfelder Issues Statement On BLM’s Proposed Rock Springs Resource Management Plan (Aug. 26, 2024).....	10
Raúl Labrador, <i>Labrador explains anti-PILT vote</i> , (April 2015).....	24
Shaun Goodwin, <i>Page loading ... Idaho is among worst states for internet access. Here’s where it ranks</i> , Idaho Statesman (Sept. 7, 2022)	14
State Board of Land Commissioners, <i>OPINION: Idaho’s forests need us as much as we need them</i> , Office of the Governor (Apr. 19, 2019).....	12
Transparent Idaho, <i>Explore Idaho’s Counties</i>	23

INTERESTS OF *AMICI CURIAE*¹

Amici are three States—and one Legislature of a State—with substantial tracts of federal unappropriated lands located within their boundaries. In fact, *Amici* are among the 12 States most significantly affected by federal ownership of unappropriated land. All 12 are located in the western region of the country (excluding Hawaii). See Figure 1.²

Like Utah, *Amici* do not contest all federal ownership of land within their boundaries. See Bill of Complaint at ¶ 43. The federal government may validly own land in the interior as necessary to exercise enumerated powers, as with military bases, federal courthouses, and so on.

But the unappropriated lands at issue here are not being used in the exercise of enumerated powers. They are “land that the United States is simply holding, without formally reserving it for any designated purpose.” *Id.* at ¶ 1.

¹ Pursuant to Rule 37.2, *amici* provided timely notice of their intent to file this brief to all parties.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

² Federal Lands of the United States Map, GIS Geography, <https://gisgeography.com/federal-lands-united-states-map/> (last visited Oct. 16, 2024).

These unappropriated lands are managed by the Bureau of Land Management (BLM), and encompass a significant portion of *Amici's* landmass. The BLM manages 28% of the land within Wyoming's boundaries, 22% of the land in Idaho, 17% of the land in Arizona, and 16% of the land in Alaska. And while not all lands managed by the BLM are unappropriated lands, the vast majority are. In Idaho, for example, roughly 80% of BLM lands (17% of all land in Idaho, more than 9 million acres) are not reserved for any designated purpose.

Amici agree with Utah's legal analysis of the constitutional questions governing these lands. Rather than repeating Utah's analysis, *Amici* submit this brief to explain the tangible harms that federal ownership of unappropriated lands uniquely imposes on western States on a daily basis. In short, western States' sovereign authority to address issues of local concern is curtailed, and billions of dollars are diverted away from western States.

Amici are no less sovereign in law than the older 38 States without substantial federal lands, but—lacking control of much of their territory—they are effectively less sovereign in fact. Granting the relief Utah requests would begin to level the playing field for all western States, and restore the proper balance of federalism between western States and the federal government.

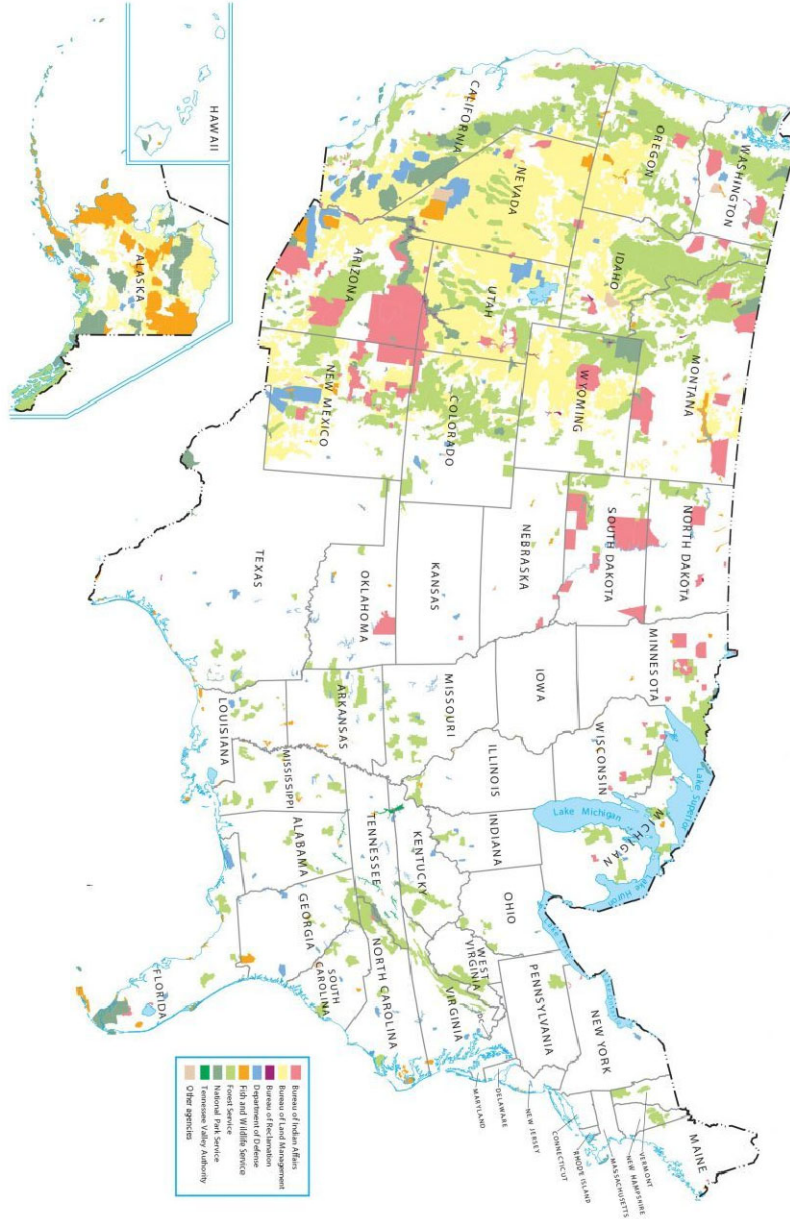


Figure 1 – Map of Federally Owned Lands

SUMMARY OF ARGUMENT

In Washington, D.C., it can be hard to take a selfie without some federal property in the frame. The major tourist sites—museums, memorials, Monument, Mall—are all federally owned. So are all the seats of government: the Capitol, the White House, and the courts; the office buildings for their support staff; and more agency headquarters than anyone outside the GSA can count. The federally owned Tidal Basin takes up over a hundred acres of the District, and military bases cover about a thousand more. All told, the federal government owns 25% of the District of Columbia’s land.³

Western states can only dream of the federal government owning just 25% of their land. In Utah the number is 63%; in Idaho, 61%. In fact, the federal government owns more than 28%—and up to 79%—of the landmass in every State from the Rocky Mountains to the Pacific, including Alaska; in this sense, every western State is literally more federal than D.C.⁴ While much of this federal territory is formally reserved for a designated purpose or used to execute enumerated powers, much of it is not, and these unappropriated lands represent a serious affront to the sovereignty of western States.

The federalist design of the Constitution left intact States’ sovereignty and reserved for States all powers not delegated to the federal government. U.S.

³ Carol Hardy Vincent & Laura A. Hanson, Cong. Rsch. Serv., R42346, Federal Land Ownership: Overview and Data 7 (2020), <https://tinyurl.com/yck9xejr>.

⁴ *Id.* at 7–8.

CONST. amend. X. And the division of authority tended to follow a national/local split—the federal government was empowered to address national issues, while the States generally retained exclusive power over local affairs like land management and land-use decisions. However, by indefinitely retaining unappropriated lands in the western States, the federal government has denied the nation’s younger States their side of the split, retaining total control over land use and management in substantial fractions of each western State’s territory.

While the principles of federalism offended by federal unappropriated lands may be abstract, the harms to western States are anything but. On these lands, the federal government sets the rules and regulations, which now comprise a separate federal criminal code over which local land users have no more say than citizens from Boston or Honolulu. Unappropriated lands cannot be taxed, so States must either hike taxes on their citizens or beg Congress for money to make up the shortfall and fund essential services. The lands are also exempt from States’ power of eminent domain, meaning States hoping to build roads or transmission lines must fight through federal red tape to obtain permits or else choose inefficient routes that avoid federal territory at the cost of wasted energy and driving time. And the revenue States and local governments could generate from unappropriated lands through grazing fees, mineral leases, or timber sales now goes to the U.S. Treasury instead.

This arrangement gets federalism backwards. The federal BLM currently decides whether grazing,

energy production, or modern forest maintenance techniques will take place on unappropriated lands. States—with their local expertise, greater stakes in the outcome, and greater accountability to their citizens—must accept whatever the agency decides.

This case presents an opportunity for the Court to set things straight. Western States are not second-class sovereigns. They have the same right to govern lands that are not used for federal purposes that the other 38 States currently enjoy. The Court should grant Utah leave to file its bill of complaint and order the federal government to begin disposing of its unappropriated lands.

ARGUMENT

I. Federal Ownership of Unappropriated Land Inverts Federalism and Stymies Western States’ Sovereign Authority.

A. Western States’ Power to Regulate Local Land Use Has Been Limited.

When the Founders “split the atom of sovereignty,” States “retained” a portion of sovereignty that is “inviolable.” *Gamble v. United States*, 587 U.S. 678, 688–89 (2019) (cleaned up); U.S. CONST. amend. X. The Founders envisioned that the dual sovereigns would govern in tandem: the federal government would address national issues through its enumerated powers, while States would employ their general police power to regulate anything else—in particular, the “facets of governing that touch on citizens’ daily lives.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

States' retention of sovereign authority "is not just an end in itself"; rather, it plays a crucial role in securing liberty. *Id.* (cleaned up). Citizens' right to self-governance is best served when matters of local concern are "administered by smaller governments closer to the governed" who are "more local and more accountable than a distant federal bureaucracy." *Id.*

These principles are nowhere truer than in the context of land ownership and management occurring within a State. As this Court has repeatedly explained, the "[r]egulation of land use is a function traditionally performed by local governments," not the federal government. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (cleaned up) (narrowly construing federal government's regulatory power to avoid "a significant impingement of the States' traditional and primary power over land and water use"); see *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) ("zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities"). In fact, "regulation of land use is perhaps the quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982).

And the Founders foresaw the threat to liberty that would result if States lost primary control of land management. At the Constitutional Convention, Massachusetts delegate Elbridge Gerry insisted that the Constitution contain a provision requiring that state legislatures consent to the federal government purchasing land within a State because that power otherwise "might be made use of to enslave any particular State by buying up its territory, and [] the strongholds proposed would be a

means of awing the State into an undue obedience to the Genl. Government.”⁵

That threat has been made real through federal ownership of unappropriated land, which flips the ordinary scheme of federalism on its head. Even though no federal purpose or enumerated power is implicated, decisions regarding local land use are made by a “distant federal bureaucracy.” *Sebelius*, 567 U.S. at 536 (cleaned up). State authorities—who are “more local and more accountable”—are relegated to the sidelines. *Id.* And as the Founders forewarned, this diminishment of State sovereign authority has diminished protection from arbitrary power wielded by far-off federal regulators.

Encroachment on State sovereign authority is not merely hypothetical, nor are its consequences imagined. Clashes between State and federal authorities rear their heads every day in western States. Consider a few examples.

The BLM is nearing final approval of the Lava Ridge wind farm project to build hundreds of 660-foot wind turbines, each twice as tall as the State’s highest building, on unappropriated federal land in south-central Idaho.⁶ The turbines will generate electricity primarily for California,⁷ and their operators will pay

⁵ Notes of James Madison from the Constitutional Convention, Tuesday, Sept. 5, 1787, <https://tinyurl.com/39uaunex>.

⁶ BLM, BLM issues final environmental review for proposed Lava Ridge wind project, (Jun. 6, 2024), <https://tinyurl.com/3n9u76te>.

⁷ Press Release, Office of Governor Brad Little, Little, Bedke, Crapo, Risch, Simpson comment on BLM decision on massive Lava Ridge wind farm (June 6, 2024), <https://tinyurl.com/4cdmr8nr>.

land-use fees to the federal government—but Idaho will bear the costs: the eyesores towering over local historic sites, the damaged roads, the reduction of water supply available to ranchers, and an effective no-fly zone for the crop-dusters that local agriculture depends on.⁸

Unsurprisingly, Idahoans vehemently oppose the project, including through a resolution passed by the Idaho Legislature⁹ and a bill proposed by Idaho’s entire Congressional delegation.¹⁰ But the BLM doesn’t have to care; the citizens of Idaho have exactly as much power over this project as the citizens of Illinois or New Jersey—or perhaps less, since there are fewer of them.

This is precisely the sort of local decision that Idaho should have the sovereign authority to address. If any other landowner proposed a 100,000-acre farm of titanic windmills, it would need the State’s approval—it would need to lobby, to adjust the project to reduce local impacts and find ways to compensate its neighbors and Idahoans generally for what it was doing to their State. But because the landowner happens to be the federal government, acting not as a sovereign exercising enumerated powers but merely

⁸ Press Release, James E. Risch, Risch Leads Bill to Stop Widely Opposed Lava Ridge Wind Energy Project (Oct. 25, 2023), <https://tinyurl.com/mvpkevbs>; Press Release, Raúl R. Labrador, Labrador Announces FAA Appeal on Lava Ridge Project (June 7, 2024), <https://tinyurl.com/56se4ncb>.

⁹ H.R. Con. Res. 4, 67th Leg., 1st Reg. Sess. (Idaho 2023), <https://tinyurl.com/y98yamr8>.

¹⁰ H.R. 6064, 118th Cong. (2023), <https://tinyurl.com/ytd4zsww>.

as proprietor, Idaho is powerless. It has no sticks and gets no carrots.

Or consider the BLM's recent resource management plan for its Rock Springs District in southwest Wyoming. The plan sets highly restrictive land-use rules for over 3.6 million acres of unappropriated federal lands; for example, it closes substantial portions of the region to oil and gas drilling and coal mining.¹¹ The plan "ignited intense opposition" from Wyomingites, whose objections spanned more than 35,000 comments to the BLM and touched on matters from the plan's effects on the State's economy to its downstream effects on the State's schools.¹²

But Wyoming, like Idaho, does not have the final say. Two senators and a representative are not enough to stop a presidential administration that subordinates local land-use decisions to its "whole of government" attack on fossil fuels.¹³

¹¹ Mike Koshmrl, et al., *Final Rock Springs plan seeks development, wildlife balance – Wyoming leaders still unhappy*, WyoFile (Aug. 22, 2024), <https://tinyurl.com/prca35zc>.

¹² *Id.*; Katie Klingsporn, *Lawmaker: BLM Rock Springs plan still doesn't reflect Wyoming feedback*, WyoFile (Sept. 10, 2024), <https://tinyurl.com/mr7j65fh>; Press Release, Wyoming Department of Education, Superintendent Degenfelder Issues Statement On BLM's Proposed Rock Springs Resource Management Plan (Aug. 26, 2024), <https://tinyurl.com/2ycjjvwd>.

¹³ Press Release, The White House, FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government (Jan. 27, 2021), <https://tinyurl.com/mue5f3ss>.

Whether conservation in and of itself is a laudable goal is beside the point. Federalism demands that when no proper federal purpose is implicated, States can exercise their plenary sovereign authority to regulate in the best interest of their citizens. Wyoming should have been able to receive the input of the various stakeholders and have those stakeholders' elected representatives vote on such a weighty matter. But because the federal government retains perpetual ownership of the lands at issue, Wyoming will likely be forced to accept the resource management plan handed down to it by the BLM.

Conflicts between State and federal authorities also proliferate in the context of forest land, a chunk of which is unappropriated land managed by the BLM.¹⁴ Federal agencies managing forests have long been backlogged in performing scheduled maintenance.¹⁵ And “federal agencies have not made sufficient policy changes or budgetary allocations” to carry out more prescribed burns to

¹⁴ The BLM manages 1 million acres of forest land and woodland in Idaho, for example. BLM, BLM Idaho Forests and Woodlands, <https://tinyurl.com/bdz9yypj> (last visited Oct. 16, 2024).

¹⁵ Carol Hardy Vincent & Laura A. Hanson, Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data 20–21* (2020), <https://tinyurl.com/yck9xejr>; Holly Fretwell & Jonathan Wood, *Fix America's Forests: Reforms to Restore National Forests and Tackle the Wildfire Crisis*, PERC (Apr. 12, 2021), <https://tinyurl.com/mt5b3xre>.

reduce the risk of devastating fires.¹⁶ This has significantly limited forest health, causing “catastrophic wildfires, destructive outbreaks of forest insects and diseases, and the continued spread of noxious weeds.”¹⁷

Idaho, on the other hand, has made enormous investments to preserve the health and natural beauty of its public lands.¹⁸ The forests are a treasure to Idahoans—campers, hunters, and birdwatchers alike. However, Idaho cannot control federal budgets for maintaining federally owned forests, meaning it must constantly fight diseases and wildfires that spread from federal forests to state-run forests (or even to private lands).¹⁹ If maintenance of current federal unappropriated lands were under Idaho’s control, it could make

¹⁶ Crystal A. Kolden, *We’re Not Doing Enough Prescribed Fire in the Western United States to Mitigate Wildfire Risk*, Fire (May 29, 2019), <https://tinyurl.com/6jx8f8x5>.

¹⁷ Federal Lands Task Force Working Group, *Breaking the Gridlock: Federal Land Pilot Projects in Idaho*, at 20, (Dec. 2000), <https://tinyurl.com/yxknawdw>; State Board of Land Commissioners, *OPINION: Idaho’s forests need us as much as we need them*, Office of the Governor (Apr. 19, 2019), <https://tinyurl.com/srhy26ah> (“There are 21.4 million acres of forests in Idaho. About 10 million acres of federal forests in Idaho are overgrown, unhealthy, and prone to devastating fires.”).

¹⁸ Clark Corbin, *‘Once-in-a-generation investment’: Idaho state parks receive record funding for improvements*, Idaho Capital Sun (Oct. 6, 2023), <https://tinyurl.com/2y69k3sx>.

¹⁹ Clark Corbin, *State of Idaho facing \$45.8M in estimated wildfire expenses this year*, Idaho Capital Sun (Sept. 17, 2024), <https://tinyurl.com/4449yys7>.

flourishing forests a priority—not something to which distant federal administrators dedicate breadcrumbs.

These examples involve matters of intense local concern. States are the ones who experience the economic, aesthetic, and safety threats that accompany federal action on unappropriated lands, and our federalist scheme would assign to them the power to decide whether the benefits outweigh those risks. But on unappropriated lands, federal policy—which unpredictably tends to “whiplash” with each successive administration—is all that matters.²⁰

B. Western States’ Sovereign Powers Are Limited by Federal Ownership of Unappropriated Lands.

Western States also confront several formal limitations on the scope of their sovereign powers due to federal ownership of unappropriated lands.

No eminent domain power. The power of eminent domain is a fundamental attribute of state sovereignty. It is “inherent” in every independent state, “requiring no constitutional recognition,” and is “as indestructible as the state itself.” *Adirondack R. Co. v. N.Y. State*, 176 U.S. 335, 346 (1900). “The taking of private property for public use upon just compensation is so often necessary for the proper performance of governmental functions that the

²⁰ See generally Helen Lober, *Constraining Federal Policy Whiplash on Public Lands*, 50 *Ecology Law Quarterly* 449 (2023), <https://tinyurl.com/r6v2frua> (describing policies that have been issued, rescinded, and reinstated over the last decade on unappropriated federal lands).

power is deemed to be essential to the life of the state.” *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924).

Of course, States cannot use eminent domain to seize land owned by the federal government. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 403–05 (1917). That means western States must plan projects without this “so often necessary” tool as they navigate across terrain checkerboarded by federal unappropriated lands. *Georgia*, 264 U.S. at 480. As a result, projects to improve highways, build transmission lines, convey water, and deploy broadband and high-tension electrical wires used to increase connectivity frequently encounter serious roadblocks and delays.²¹

No taxation power. Taxation is another power of “vital importance” retained by the States. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425 (1819). But once again, it is a power that cannot be used against land owned by the federal government. *Van Brocklin v. Tennessee*, 117 U.S. 151, 180 (1886). As described in more depth below, the loss of taxes deprives western States of revenue that their localities need to provide schools and emergency services.

²¹ Amy Joi O’Donoghue, *What’s up with delays on projects on federal lands?*, Deseret News (May 27, 2024), <https://tinyurl.com/5b4bydnt>; Shaun Goodwin, *Page loading ... Idaho is among worst states for internet access. Here’s where it ranks*, Idaho Statesman (Sept. 7, 2022), <https://tinyurl.com/k43xxk9d> (western States among states with least access to internet).

No police power. “[T]he most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government” is States’ general police power. *Eubank v. City of Richmond*, 226 U.S. 137, 142–43 (1912) (cleaned up). This power is a core aspect of States’ sovereignty, enabling them to enact “regulations which promote the public health, morals, and safety,” as well as “those which promote the public convenience or the general prosperity.” *Id.*

This power too is displaced on federal unappropriated lands within a State’s boundaries. On unappropriated lands, the BLM’s regulations are given precedence. “Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.” *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (citations omitted).

The BLM has used its authority to make rules on federal land to enact an entire criminal code that supersedes State law. *But see Engle v. Isaac*, 456 U.S. 107, 128 (1982) (States ordinarily “possess primary authority for defining and enforcing the criminal law”). BLM-promulgated restrictions touch on fraud, discrimination, homelessness, housing policies, traffic laws, firearm regulations, mining rules, agricultural certifications, and even horse adoptions, to name a few topics. *United States v. Pheasant*, 2023 WL 3095959, at *6–7 (D. Nev. Apr. 26, 2023) (collecting regulations). All of these

regulations were issued pursuant to an impossibly broad delegation of authority to “issue regulations necessary to implement the provisions of [the Federal Land Policy and Management Act of 1976] with respect to the management, use, and protection of the public lands.” 43 U.S.C. § 1733(a); see *Pheasant*, 2023 WL 3095959, at *9 (holding that this delegation violates the non-delegation doctrine).

Non-delegation concerns aside, the decrease in State sovereign authority itself has ushered in the decrease in liberty that always accompanies breaches of federalism. Citizens in western States traversing BLM land are governed by criminal regulations in which their elected representatives had no say—on matters that States traditionally regulate. Their “more local and more accountable” State governments are powerless to prevent, for example, armed BLM agents from seizing cattle accused of illegal grazing and selling them at auction—without a jury trial and before the owners even grasp the gravity of the situation.²²

* * *

Thirty-eight States enjoy near-complete dominion over the lands within their borders. States like Iowa or Connecticut—where only 0.3% of land is owned by the federal government²³—are free to use their territory to create corridors of commerce or

²² ICT Staff, *Cattle theft, vote are double blows to Western Shoshone land rights*, ICT News (Sept. 12, 2018), <https://tinyurl.com/ynsu5c8m>.

²³ Carol Hardy Vincent & Laura A. Hanson, Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data 7–8* (2020), <https://tinyurl.com/yck9xejr>.

undertake other valuable projects, and may invoke their full toolkit of sovereign powers in doing so. They have the final word on land-use decisions and regulations, which allows them to be “more responsive” and more effectively “compet[e] for a mobile citizenry.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). Their citizens have a representative voice in important decisions about how the States’ natural resources should be used and managed.

The same cannot be said for western States. Federal autocrats—acting in their capacity as landlords—retain authority over which projects go forward, which economic activities will be permitted, and what conduct will be criminalized on substantial swaths of land within western States’ boundaries. The federal government can certainly make these sorts of decisions when exercising powers enumerated by the Constitution. But when it comes to unappropriated lands serving no federal purpose, the federal government has no legitimate claim to continue supplanting western States’ sovereignty.

Granting the relief Utah seeks in its bill of complaint would restore federalism and the individual liberty it protects to their proper place in all States. Local decisions would once again be made by more local and more accountable officials, as the Founders intended.

II. Federal Ownership of Unappropriated Land Siphons Resources Out of Western States.

In addition to wresting away a measure of western States’ sovereign authority, federal ownership of unappropriated lands also diverts

significant revenues and resources away from western States. The federal government has openly acknowledged this fact, and has made nominal efforts to offset the damage. But those efforts have been woefully inadequate and have simply reinforced federal dominance over western States.

A. Western States Could Generate Substantial Revenue from Unappropriated Federal Lands.

Even though no federal power or purpose is implicated, the federal government derives significant revenue from its use of unappropriated lands. It sells the timber from unappropriated lands.²⁴ It receives royalties and other payments from leases with private parties to extract oil and gas, coal, and other minerals on unappropriated lands.²⁵ It charges fees for animals to graze on unappropriated lands.²⁶ It even collects fees to visit some recreation sites on unappropriated land.²⁷ Together, these revenues sum to billions of dollars each year.²⁸

²⁴ BLM, Timber Sales, <https://tinyurl.com/49mvjdpa> (last visited Oct. 16, 2024).

²⁵ BLM, The BLM: Valuing America’s Public Lands 2023, <https://tinyurl.com/34hszhea> (last visited Oct. 16, 2024).

²⁶ *Id.*

²⁷ BLM, Recreation Fee Program, <https://tinyurl.com/mwnfc425> (last visited Oct. 6, 2024).

²⁸ BLM Budget, Statement of Tracy Stone-Manning to Subcomm. on Energy & Min. Res. of the H. Comm on Nat. Res. 118th Cong. 6 (2023), <https://tinyurl.com/2rsu3ac5> (“public lands managed by the BLM generated more than \$8 billion for the U.S. Treasury and States in FY 2022”).

Most of this revenue, however, does not benefit the State where it was generated. While a portion of the proceeds are paid to the States, the majority of the money is deposited in the U.S. Treasury, where it becomes fungible money that can be put towards any federal purpose nationwide and “benefit” “all Americans.”²⁹

In other words, federal ownership of State land is funneling billions of dollars away from States annually. If the federal government were required to dispose of these lands, the States could own and manage them and conduct the same sorts of activities that the federal government currently does. They already carry out these activities on other State-owned land.³⁰ As it stands, however, those revenues are siphoned away from the States. States can’t even recoup a portion of the land’s earning capacity through property taxes since “no state can tax the property of the United States within its limits.” *Irwin v. Wright*, 258 U.S. 219, 228 (1922).

²⁹ *Id.*; BLM 2021 Budget, Statement of William Perry Pendley to Subcomm. on Energy & Min. Res. of the H. Comm. on Nat. Res., 116th Cong. (2020), <https://tinyurl.com/5vhwj68u> (“Approximately half of this revenue [from energy and mineral extraction] was shared with the state where production activities occurred, while the rest went to the U.S. Treasury.”).

³⁰ *E.g.*, Idaho Department of Lands, Leasing Endowment Land, <https://tinyurl.com/5chb46ap> (last visited Oct. 16, 2024) (discussing leasing opportunities on Idaho endowment lands).

B. The Federal Government's Attempts to Compensate Western States for the Shortfall Are Woefully Inadequate.

In an attempt to offset States' lost revenue from federally owned lands (including unappropriated federal lands) and compensate States "for burdens created as a result of the immunity of Federal lands from State and local taxation," the federal government makes payments to States through a welfare program called Payment in Lieu of Taxes, or PILT. 43 U.S.C. § 1701.³¹ Created in 1976, the program uses a "complex formula" to calculate how much money each county should receive annually based on factors like federally owned acreage, population, and the Consumer Price Index.³² The program does not automatically renew; Congress must vote to authorize PILT funding each year.³³

But PILT pays pennies on the dollar compared to what States would receive if they could manage the land themselves or tax the land directly. Two years ago, Idaho commissioned a study to assess whether PILT was adequately compensating the

³¹ To a lesser extent, Congress also attempts to offset the loss through the Secure Rural Schools program. But that program does not concern unappropriated federal land, so it will not be discussed here. Anne A. Riddle, Cong. Rsch. Serv., R41303, *The Secure Rural Schools and Community Self-Determination Act: Background and Issues 8* (2023), <https://tinyurl.com/ycshunp3>.

³² Katie Hoover, Cong. Rsch. Serv., RL31392, *PILT (Payments in Lieu of Taxes): Somewhat Simplified*, at Summary (2017), <https://tinyurl.com/yyp4upfy>.

³³ *Id.*

State for lost tax revenue.³⁴ The study analyzed federal land in three Idaho counties and concluded that PILT paid *nine times less* than what the State would receive from taxing the land, reaching a shortfall of more than \$16 million across just those counties.³⁵

The same result holds true when compared to revenue generated by State-run public lands. Idaho owns more than 2.5 million acres of endowment lands—that is, land the federal government granted to Idaho when it became a State to be used and managed to benefit public schools.³⁶ Other western States were granted land on similar terms.³⁷

Idaho endowment lands look a lot like federal unappropriated lands—they are located in similar parts of the State,³⁸ and Idaho uses its endowment lands for grazing, timber, oil and gas, and other

³⁴ AeonAI, Idaho Federal Land PILT Analysis Report (Sept. 15, 2022), <https://tinyurl.com/ydknansf>.

³⁵ Logan Finney, *Legislators build their case for higher PILT payments*, Idaho Reports (Aug. 25, 2023), <https://tinyurl.com/3a3psw7r>.

³⁶ Idaho Department of Lands, Understanding Endowment Land, <https://tinyurl.com/58jt9p68> (last visited Oct. 16, 2024); Idaho Admission Bill, Act July 3, 1890, ch. 656, 26 Stat. 215, §§ 4–5.

³⁷ Arizona Treasury, Permanent Land Endowment Fund, <https://tinyurl.com/ycx5ru5j> (last visited Oct. 16, 2024).

³⁸ See Jay O’Laughlin, et al., *Idaho’s Endowment Lands: A Matter of Sacred Trust*, Univ. of Idaho (Aug. 2011), <https://tinyurl.com/yyf7jtca>.

mineral extraction purposes just like the BLM.³⁹ Idaho earned \$60.8 million in net income through its endowment lands this fiscal year, a little more than \$24 an acre.⁴⁰ PILT, on the other hand, pays Idaho about \$1.10 per acre.⁴¹ That's a 95% decrease in revenue to the State due to the federal government's continued ownership of lands it has no constitutional authority to own.

Stated differently, PILT comes nowhere close to bridging the gap. States would generate *far* more if the federal government allowed them to own or tax the land.

Yet even at PILT's meager rates, many counties in western rural areas are highly dependent on PILT due to high amounts of federally owned land and low population levels or alternative tax bases.⁴² In some counties in Idaho, PILT makes up

³⁹ Idaho Department of Lands, Leasing Endowment Land, <https://tinyurl.com/5chb46ap> (last visited Oct. 16, 2024); Idaho Department of Lands, Endowment Timber Sales, <https://tinyurl.com/pnbc8ytu> (last visited Oct. 16, 2024).

⁴⁰ Press Release, Idaho Department of Lands, Endowment Beneficiaries to Receive Another Record High Distribution in Fiscal Year 2026 (Aug. 21, 2024), <https://tinyurl.com/4hdkrxep>; Idaho Department of Lands, 2023 Annual Report, <https://tinyurl.com/k5vt7fj3> (more than \$52 million of net income last fiscal year).

⁴¹ AeonAI, Idaho Federal Land PILT Analysis Report (Sept. 15, 2022), <https://tinyurl.com/ydknanfs>.

⁴² Ironically, because population factors into the PILT formula, these rural counties that are *most* dependent on federal funding often receive the *least* amount of money per acre from PILT. See Department of the Interior, Fiscal Year 2023 Payments in Lieu of Taxes National Summary,

20% or more of the county's budget.⁴³ Without PILT, these counties would not have enough money to fund vital services such as firefighting and police protection, construction of public schools and roads, and search-and-rescue operations.

This PILT dependency enhances western States' subordinate relationship with the federal government. States' ability to fix the problem themselves has been kneecapped. They cannot use or develop the federal lands to cover the counties' tax shortfall, and they cannot tax the federal lands to bring in the much-needed revenue. Nor can they realistically raise taxes on these struggling rural communities to make up the difference. Western States are therefore forced to come hat-in-hand to Congress to ask for PILT.

Other States know of western States' predicament, and routinely exploit it to their advantage. As the undersigned witnessed first-hand while serving as a representative in Congress, renewed funding for PILT is often bundled with completely unrelated proposals—like expanded Medicare or the federal sugar program—to make it a

<https://tinyurl.com/y9ytj266> (90% of Custer County is owned by the federal government, but it received just \$0.29 per acre in 2023).

⁴³ These counties include Owyhee County, Lincoln County, and Power County. Department of the Interior, Fiscal Year 2023 Payments in Lieu of Taxes National Summary, <https://tinyurl.com/y9ytj266> (listing PILT payments); Transparent Idaho, *Explore Idaho's Counties*, <https://tinyurl.com/5n67kyj5> (last visited Oct. 16, 2024) (listing county budgets).

“tougher vote[]” for western States to oppose the proposals.⁴⁴ The stratagem puts western States to a choice—vote for proposals they don’t support, or run the risk that their rural counties lack the funds needed to operate essential services.

Nor have western States been able to fix the problem legislatively. They have certainly tried—they’ve introduced proposals in Congress to replace PILT with a program allowing States to manage the land themselves,⁴⁵ or to change the PILT formula to increase the size of the payments.⁴⁶ Because federal land ownership uniquely and disproportionately affects only 12 western States, these proposals lack the broad political support needed to gain traction in Congress.

Ordering the federal government to dispose of unappropriated lands will not completely resolve this problem. A significant portion of federal land is not at issue in this case, including land controlled by the Forest Service, Fish and Wildlife Service, and National Parks Service. But given the high proportion of unappropriated land—nearly 1/3 of all federal land in Idaho—requiring the federal government to dispose of that land would go a long

⁴⁴ Carney, Timothy P., *Why Indefensible Farm Bill Was Backed by Party Leaders and K Street*, Washington Examiner (Feb. 4, 2014), <https://tinyurl.com/b6dns3yp>; see also Raúl Labrador, *Labrador explains anti-PILT vote*, (April 2015), <https://tinyurl.com/yc3uc8ss>.

⁴⁵ Jeff Selle, *Labrador discusses public lands*, Coeur d’Alene/Post Falls Press (Apr. 1, 2016), <https://tinyurl.com/5kcat553>.

⁴⁶ Press Release, Sen. Mike Lee, Sens. Lee, Crapo, and Risch Introduce MORE PILT Act (Mar. 25, 2021), <https://tinyurl.com/2s38en7y>.

way towards ameliorating the problem. It would reduce States' dependency on PILT, increase their sovereign authority to use and develop land within their boundaries, and allow them to retain and reinvest more of the revenue generated by land within their boundaries.

III. This Court's Intervention Is Necessary.

Amici believe the Court is required to exercise its jurisdiction in this case. *See* Utah Br. ISO Bill of Complaint at 6, 11 (the Court's "jurisdictional grant is couched in absolute rather than discretionary terms"). But even if it weren't, this is precisely the sort of "serious[]" case that this Court's jurisdiction is designed for. *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983).

This case presents a classic sovereign dispute—in essence, competing claims to ownership of land between two sovereigns. *Cf. PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482 (2021) (using certiorari jurisdiction to hear case regarding state sovereign immunity from suits employing federal eminent domain). And while the question before the Court concerns only the 18.5 million acres of unappropriated federal land in Utah, the Court's decision would affect hundreds of millions of acres nationwide, particularly across 12 western States.

The BLM manages more than 244 million acres of land, roughly 10% of the Nation's land.⁴⁷

⁴⁷ Carol Hardy Vincent & Laura A. Hanson, Cong. Rsch. Serv., R42346, *Federal Land Ownership: Overview and Data 1* (2020), <https://tinyurl.com/yck9xejr>.

Most of that land is unappropriated federal land.⁴⁸ This case presents the Court with an opportunity to resolve a purely legal issue in a nationwide, uniform manner rather than having it litigated piecemeal in each State.

Indeed, the stakes in this case reach not only the relationship between the federal government and western States, but also western States' status in relation to other States. In a nation where each State uses its sovereign powers for "innovation and experimentation in government," western States have been unnecessarily forced to "compet[e] for a mobile citizenry" with one hand tied behind their back. *Gregory*, 501 U.S. at 458. The Court can reduce that inequality by declaring that the federal government must let go of the millions of acres of unappropriated land it currently holds in the western States, which would then have a fair chance to develop the land to attract prospective citizens. See *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013) (States should "enjoy equal sovereignty").

Without a ruling from this Court, there is no realistic hope that the problem will be solved through the political process. The States affected by federal ownership of unappropriated land are a minority in Congress, and because unappropriated land brings in revenue to the U.S. Treasury that other States can use, those States have no incentive to change the status quo.

⁴⁸ Roughly 80% of BLM land in Utah and Idaho, for example, is unappropriated federal land.

That's why this Court's intervention is necessary. Granting the relief requested in Utah's bill of complaint would make clear that western States are not second-class sovereigns. They have not ceded power to the federal government to own and regulate their territory in perpetuity, and they have the same right as other States to manage land within their boundary that the federal government is not using for enumerated purposes.

CONCLUSION

Amici respectfully request that this Court grant Utah's Motion for Leave to File Bill of Complaint.

Respectfully submitted,

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