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# State Management of Federal Lands: Frequently Asked Questions

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November 12, 2015

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R44267

## Summary

The federal government owns roughly 640 million acres of land, about 28% of the 2.27 billion acres in the United States. This land is managed by numerous agencies, but four agencies administer about 95% of federal land, with somewhat differing management emphases. These agencies are the Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), and National Park Service (NPS) in the Department of the Interior (DOI), and the Forest Service (FS) in the Department of Agriculture. Most federal land is in the West, including Alaska. The total amount of money the federal government spends managing land is not readily available.

Federal land ownership began when the original 13 states ceded title to more than 40% of their “western” lands to the central government. Subsequently, the federal government acquired lands from foreign countries through purchases and treaties. The Property Clause of the U.S. Constitution, Article IV, Section 3, Clause 2, gives Congress authority over the lands, territories, or other property of the United States. This provision provides Congress broad authority over lands owned by the federal government. The U.S. Supreme Court has described this power as “without limitations.” When Congress exercises its authority over federal land, federal law overrides conflicting state laws under the Supremacy Clause of the U.S. Constitution, Article VI, Clause 2.

States can obtain authority to own and manage federal lands within their borders only by federal, not state, law. Congress’s broad authority over federal lands includes the authority to dispose of lands, and Congress can choose to transfer land to states. When Congress does so, the transferred lands are no longer federally owned. For lands for which the federal government retains ownership, Congress can also give federal agencies authority to delegate or assign responsibility for aspects of federal land management. States have legal authority to manage federal lands within their borders to the extent Congress has given them such authority. For example, Congress has to a large extent left management of wildlife to the states as a traditional area of state concern.

Currently, some states are seeking more state and local control over lands and resources. Accordingly, some are considering measures to provide for or express support for the transfer of federal lands to states, to establish task forces or commissions to examine federal land transfer issues, and to assert management authority over federal lands. A collection of efforts from the late 1970s and early 1980s, known as the Sagebrush Rebellion, sought to foster divestiture of federal lands. However, this effort did not succeed. State efforts to claim control of federal lands, without express approval of Congress, are likely to run afoul of the Constitution.

Opinions differ about the extent to which the federal government should own and manage land. The extent to which Congress should transfer ownership and management of land to states is a policy choice for Congress. The 114<sup>th</sup> Congress and recent Congresses have considered, and in some cases enacted, measures related to disposal, acquisition, and management of federal lands. A variety of bills sought to provide for ownership and management of particular parcels by states, individuals, and other entities. At the same time, diverse proposals sought to provide for acquisition of lands for federal ownership and management. Still other proposals focused on establishing or amending agency authorities to dispose of or acquire land.

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## Introduction

This report provides responses to frequently asked questions about federal land ownership and state efforts to foster control of federal lands within state borders. It first addresses questions on the extent and cost of federal land ownership and how the federal government came to manage land. It next discusses questions on the constitutional basis for federal land ownership and whether the federal government has authority to delegate management of federal lands. It then responds to questions related to the legal authority of states to manage federal lands within their borders and reviews current and past actions by states to foster divestiture of federal lands. Finally, it addresses how Congress exercises its authority to determine the extent of federal land ownership through consideration of legislative proposals.

## How Much Land Does the Federal Government Manage, and Where Is It?

The federal government owns roughly 640 million acres, about 28% of the 2.27 billion acres of land in the United States. Four agencies administer 608.9 million acres (95%) of this land: the Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), and National Park Service (NPS) in the Department of the Interior (DOI), and the Forest Service (FS) in the Department of Agriculture. BLM manages 247.3 million acres of public land under a multiple-use, sustained-yield mandate that supports a variety of uses and programs, including energy development, recreation, livestock grazing, wild horse and burro management, and conservation. FS manages 192.9 million acres also for multiple uses and sustained yields of various products and services, including timber harvesting, recreation, livestock grazing, watershed protection, and fish and wildlife habitat. FWS manages 89.1 million acres, primarily to conserve and protect animals and plants. NPS manages 79.6 million acres in diverse units to conserve lands and resources and make them available for public enjoyment. In addition, the Department of Defense administers 14.4 million acres consisting of military bases, training ranges, and more. Numerous other agencies administer the remaining federal acreage.<sup>1</sup>

Federal land ownership is concentrated in the West. Specifically, the five agencies identified here manage 61.2% of Alaska and 46.9% of the 11 coterminous western states.<sup>2</sup> By contrast, these agencies manage 4.0% of lands in the other states.<sup>3</sup>

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<sup>1</sup> Figures for the five agencies—the Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), National Park Service (NPS), Forest Service (FS), and Department of Defense (DOD)—reflect federal land ownership as of September 30, 2013.

<sup>2</sup> These states are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

<sup>3</sup> For additional information on the amount and location of federal land over time, including maps depicting federal land in the United States, see CRS Report R42346, *Federal Land Ownership: Overview and Data*, by Carol Hardy Vincent, Laura A. Hanson, and Jerome P. Bjelopera.

## **How Much Money Does the Federal Government Spend to Manage Federal Lands?**

The total amount of money the federal government spends managing federal lands is not readily available. However, approximately 95% of federal lands are managed by four agencies: BLM, FWS, NPS, and FS. Their FY2013 appropriations were \$2,048.1 million for BLM, \$2,591.6 million for FWS, \$3,305.8 million for NPS, and \$5,709.8 million for FS. These figures reflect new budget authority<sup>4</sup> and both mandatory and discretionary appropriations (including for wildland fire management). They also include appropriations to the agencies that are not used on agency lands, ranging from little in the case of BLM to roughly two-thirds for FWS.<sup>5</sup> In addition, allocations of funding from outside the agencies supplement these appropriations. A major allocation, for example, is from the Federal Highway Administration for federal lands highway programs.

Each agency disburses its appropriations differently among states. Various factors influence the allocation of appropriations among states, including the acreage of federal land; land resources, conditions, availability, uses, and impacts; demographics; and fire activity.<sup>6</sup>

## **How Did the Federal Government Come to Manage Land?**

At its inception, the federal government did not own land in the original states of the Union. Federal land ownership began when the original 13 states ceded title to more than 40% of their “western” lands (237 million acres between the Appalachian Mountains and the Mississippi River) to the central government between 1781 and 1802. Additional states were formed from those lands.

West of the Mississippi River (except Texas), lands were primarily acquired by the U.S. federal government from foreign governments, as was Florida (which was acquired from Spain). Federal land acquisition from foreign countries began with the Louisiana Purchase (530 million acres) in 1803 and continued through treaties with Great Britain and Spain (76 million acres) in 1817 and 1819, respectively. Other substantial acquisitions (620 million acres), through purchases and treaties, occurred between 1846 and 1853. The last major North American land acquisition by the U.S. federal government was the purchase of Alaska (378 million acres) in 1867. When western states joined the United States, their statehood acts gave up rights to claim lands retained by the federal government within their boundaries as a condition of joining the United States.<sup>7</sup>

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<sup>4</sup> Thus, these figures generally do not include appropriations carried over from prior fiscal years.

<sup>5</sup> In addition to managing the National Wildlife Refuge System, FWS has diverse other responsibilities. These responsibilities include a number of grant programs, migratory bird management, endangered species, and international programs.

<sup>6</sup> For additional information on appropriations for managing federal lands and revenues collected on lands managed by the federal agencies, see CRS Report R43822, *Federal Land Management Agencies: Appropriations and Revenues*, coordinated by Carol Hardy Vincent.

<sup>7</sup> See below, “Have There Been Past Efforts to Transfer Ownership and Management of Federal Lands to States?”

## What Is the Authority for the Federal Government to Manage Land, and What Are the Constitutional Limitations on That Authority?

The Property Clause of the U.S. Constitution, Article IV, Section 3, Clause 2, gives Congress authority over the lands, territories, or other property of the United States. It reads as follows: “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” This provision provides Congress broad authority to manage the lands owned by the federal government, including authority to dispose of those lands. The Supreme Court has held that the Property Clause, “in broad terms, gives Congress the power to determine what are ‘needful’ rules ‘respecting’ the public lands” and has “repeatedly observed that ‘[the] power over the public land thus entrusted to Congress is without limitations.’”<sup>8</sup> When Congress exercises its authority over federal land, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause of the U.S. Constitution, Article VI, Clause 2.

Congress has given individual federal agencies specific authorities for federal land management through a number of statutes. These authorities include the Federal Land Policy and Management Act (FLPMA),<sup>9</sup> the Multiple-Use Sustained-Yield Act of 1960,<sup>10</sup> the National Park System Organic Act,<sup>11</sup> the National Wildlife Refuge System Administration Act,<sup>12</sup> the Mineral Lands Leasing Act of 1920,<sup>13</sup> and the Wilderness Act.<sup>14</sup> Although the scope of authority differs by agency and by topic, these statutes generally have exercised authority short of the “furthest reaches of the power granted by the Property Clause,”<sup>15</sup> leaving certain aspects of management to the states. For example, Congress has to a large extent left management of wildlife on most federal lands to the states as a traditional area of state concern,<sup>16</sup> although certain wildlife-related statutes have been enacted (for example, the Migratory Bird Treaty Act and the Endangered Species Act).<sup>17</sup> Like laws, federal agency regulations for federal land issued under these or other statutory authorities are the “supreme Law of the Land” under the Supremacy Clause<sup>18</sup> and therefore override any conflicting state laws.

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<sup>8</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (citations omitted) (upholding application of the Wild Free-Roaming Horses and Burros Act, P.L. 92-195, 85 Stat. 649, codified at 16 U.S.C. §§1331-1340).

<sup>9</sup> P.L. 94-579, 90 Stat. 2744 (1976), codified at 43 U.S.C. §§1701-1771.

<sup>10</sup> P.L. 86-517, 74 Stat 215 (1960), codified at 16 U.S.C. §§528-531.

<sup>11</sup> P.L. 64-235, 39 Stat. 535 (1916), recodified at 54 U.S.C. subtit. I.

<sup>12</sup> 16 U.S.C. §§668dd-668ee.

<sup>13</sup> P.L. 66-146, 41 Stat. 4373 (1920), codified at 30 U.S.C. §§181-287.

<sup>14</sup> 16 U.S.C. §§1131-1136.

<sup>15</sup> See *Kleppe*, footnote 8, at 539.

<sup>16</sup> “[L]and use and wildlife preservation are traditional areas of state concern ... [although] ‘this authority is shared with the Federal Government when [it] exercises one of its enumerated constitutional powers.’” *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 639 (5<sup>th</sup> Cir. 2003) (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999)); see also, e.g., *Wyoming v. United States*, 279 F.3d 1214, 1231 (10<sup>th</sup> Cir. 2002); *Gibbs v. Babbitt*, 214 F.3d 483, 499-500 (4<sup>th</sup> Cir. 2000).

<sup>17</sup> The Migratory Bird Treaty Act is codified at 16 U.S.C. §§703-712. The Endangered Species Act is codified at 16 U.S.C. §§1531-1544.

<sup>18</sup> U.S. Const. art. VI, cl. 2.

## Do Federal Agencies Have Authority to Delegate Management of Federal Land?

Federal agencies cannot delegate management of federal land to states or other outside entities unless there is express statutory authority to do so.<sup>19</sup> Determining whether an agency has authority to delegate its management of federal land to a state requires examination of the applicable statutes for the particular agency and the particular management topic. For the most part, statutory provisions prescribe the federal-state relationship in ways that retain the federal agencies' primary responsibility and do not authorize delegation. As an illustration, the Mineral Lands Leasing Act requires DOI to "take into consideration and to the extent practical comply with State standards for right-of-way construction, operation, and maintenance" for pipelines through federal lands.<sup>20</sup> However, DOI is not required to comply with state standards if it finds it impractical to do so, and it is not authorized to delegate pipeline oversight to states.

In some cases, however, statutes give federal agencies authority to delegate or assign responsibility for aspects of federal land management. For instance, statutory provisions authorize DOI to delegate aspects of oil and gas royalty management on federal lands to states. Specifically, the Federal Oil and Gas Royalty Management Act (FOGRMA) allows DOI to delegate royalty collection and enumerated related activities to a state.<sup>21</sup> Other aspects of oil and gas development besides royalty management, such as environmental oversight, are not included in the scope of FOGRMA's authorization of delegation.

What constitutes a "delegation" can also be a fact-specific inquiry, requiring examination of how much authority the federal agency has given away and how much it has retained.<sup>22</sup> Courts have found that an agency delegates its authority when it shifts to another party "almost the entire determination of whether a specific statutory requirement ... has been satisfied"<sup>23</sup> or when the agency abdicates its "final reviewing authority."<sup>24</sup>

Under various statutes,<sup>25</sup> federal agencies are required to cooperate, consult, or coordinate with states (and other entities/individuals) in ways that stop short of full delegation. Moreover, a

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<sup>19</sup> See *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) ("[S]ubdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.... When an agency delegates authority to its subordinate, responsibility—and thus accountability—clearly remain with the federal agency. But when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. Also, delegation to outside entities increases the risk that these parties will not share the agency's "national vision and perspective...."). See also *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1246-1247 (D. Colo. 2006) (similar, citing *U.S. Telecom*).

<sup>20</sup> 30 U.S.C. §185(v).

<sup>21</sup> 30 U.S.C. §§1732, 1735.

<sup>22</sup> See, e.g., *Forest Serv. Emps. For Envtl. Ethics v. United States Forest Serv.*, 689 F. Supp. 2d 891, 903-05 (W.D. Ky. 2010) (finding that certain conservation agreements delegated too much authority to a private organization, with too little oversight by FS, where the agreement provided for a private organization to issue permits for farming on federal land where there were no FS-issued special-use permits providing for such farming).

<sup>23</sup> *U.S. Telecom*, footnote 19, at 567. In *U.S. Telecom*, the court also held that agencies may seek advice and policy recommendations from outside parties, but they may not "'rubber-stamp' decisions made by others under the guise of seeking their 'advice.'" *Ibid.*, 568.

<sup>24</sup> *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 19 (D.D.C. 1999). The court also found that if all an agency reserves for itself is "the extreme remedy of totally terminating [a delegation agreement]," an agency abdicates its "final reviewing authority." *Ibid.*, 19-20.

<sup>25</sup> Examples include the Federal Land Policy and Management Act, codified at 43 U.S.C. §§1701-1771, and the Multiple-Use Sustained-Yield Act of 1960, codified at 16 U.S.C. §§528-531.

federal rule or action allowing state input into federal land management could be permissible (even without a statutory requirement) if the rule or action were found not to constitute a delegation of the agency's authority.<sup>26</sup>

## **Do States Have Legal Authority to Manage Federal Lands Within Their Borders?**

Although Congress has ultimate authority over federal lands under the Property Clause, states have legal authority to manage federal lands within their borders to the extent that Congress has chosen to give them such authority. The existence and extent of any such authority is determined by looking to the statutes applicable to the federal agency and management topic in question.

For example, a number of land-management statutes recognize states' traditional authority to allocate water rights and to manage fish and resident wildlife. The National Wildlife Refuge System Administration Act, for instance, states

(m) State authority. Nothing in this Act shall be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System. Regulations permitting hunting or fishing of fish and resident wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws, regulations, and management plans.<sup>27</sup>

States' ability to license and otherwise manage hunting and fishing therefore generally extends to federal lands within their borders, barring specific preemptions.<sup>28</sup> In contrast, states do not have legal authority to regulate certain aspects of grazing, wild horse management, or oil and gas development on federal lands, where federal statutes entrust that management to federal agencies.<sup>29</sup>

Even where Congress has left certain aspects of federal land management to the states, unless Congress has enacted an exemption, otherwise-applicable federal laws or regulations override any contrary state laws under the Supremacy Clause of the U.S. Constitution.<sup>30</sup> Thus, in the above example, state hunting and fishing laws and regulations do not apply to the extent that they conflict with applicable federal laws, including wildlife-related laws such as the Endangered

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<sup>26</sup> See, for example, U.S. Telecom, footnote 19, at 567; *Fund for Animals v. Kempthorne*, 538 F.3d 124, 130-134 (2<sup>nd</sup> Cir. 2008) (upholding a FWS order authorizing state fish and wildlife agencies and others to exercise "discretion to determine what constitutes a 'depredation' within a localized context" and to kill, trap, or otherwise take certain migratory birds without Migratory Bird Treaty Act permits, finding that the order was not a delegation).

<sup>27</sup> 16 U.S.C. §668dd(j)-(m). Similarly, the Federal Land Policy and Management Act provides that "[N]othing in this Act shall be construed as authorizing the Secretary concerned to require Federal permits to hunt and fish on public lands or on lands in the National Forest System and adjacent waters or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife." 43 U.S.C. §1732(b).

<sup>28</sup> For example, hunting is not allowed in most National Park System units or when it would violate a wildlife statute such as the Endangered Species Act. See above, "What Is the Authority for the Federal Government to Manage Land, and What Are the Constitutional Limitations on That Authority?"

<sup>29</sup> See, for example, Public Rangelands Improvement Act of 1978, P.L. 95-514, 92 Stat. 1803, codified at 43 U.S.C. §§1901-1908 (committing certain responsibilities, including charging grazing fees, to BLM and FS); Wild Free-Roaming Horses and Burros Act, P.L. 92-195, 85 Stat. 649, codified at 16 U.S.C. §§1331-1340 (declaring unbranded and unclaimed horses and burros on BLM and FS lands to be under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture, respectively); Energy Policy Act of 2005, tit. III, P.L. 109-58, 119 Stat. 594 (updating DOI management of oil and gas leases and drilling permits).

<sup>30</sup> U.S. Const. art. VI, cl. 2.

Species Act<sup>31</sup> or the Migratory Bird Treaty Act,<sup>32</sup> as well as federal restrictions on uses of certain areas of public lands.<sup>33</sup>

## **How Can States Obtain Authority to Manage Federal Lands Within Their Borders?**

States can obtain authority to own and manage federal lands within their borders only by federal, not state, law. As discussed above,<sup>34</sup> Congress determines the scope of states' authority to manage federal lands within their borders, pursuant to Congress's plenary authority over federal lands under the Property Clause of the U.S. Constitution.<sup>35</sup> States are precluded from appropriating authority over federal lands beyond the scope of congressional authorization under the Supremacy Clause.<sup>36</sup>

States could obtain authority to manage what are now federal lands if Congress transferred ownership of those lands to states. In the past, the federal government has at times conveyed parcels of land to states (and other governmental units) under general authorities provided by Congress, such as the FLPMA, as well as statutes enacted for specific areas.<sup>37</sup> In addition, on lands to which the federal government retains title, Congress does not have to exercise its authority to the "furthest reaches of the power granted by the Property Clause"<sup>38</sup> and could potentially legislate to direct that certain topics be managed by states.<sup>39</sup> Congress also could authorize, and in some instances has authorized, federal agencies to delegate or assign management of certain topics to states.<sup>40</sup>

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<sup>31</sup> 16 U.S.C. §§1531-1544.

<sup>32</sup> 16 U.S.C. §§703-712.

<sup>33</sup> 43 U.S.C. §1732(b) ("However, the Secretary concerned may designate areas of public land and of lands in the National Forest System where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law."); 43 C.F.R. §24.4(c) (setting forth agency interpretation of 43 U.S.C. §1732(b) as a power to close areas to particular activities for particular reasons that "does not in and of itself constitute a grant of authority ... to manage wildlife or require or authorize the issuance of hunting and/or fishing permits or licenses.").

<sup>34</sup> See above, "What Is the Authority for the Federal Government to Manage Land, and What Are the Constitutional Limitations on That Authority?" and "Do Federal Agencies Have Authority to Delegate Management of Federal Land?"

<sup>35</sup> U.S. Const. art. IV, §3, cl. 2.

<sup>36</sup> U.S. Const. art. VI, cl. 2.

<sup>37</sup> See generally CRS Report RL34273, *Federal Land Ownership: Acquisition and Disposal Authorities*, by Carol Hardy Vincent et al.

<sup>38</sup> *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

<sup>39</sup> Congress also can legislate that particular federal sites or areas be managed by states or other entities. For instance, under P.L. 106-291, §145, the National First Ladies Library operates and manages, under a cooperative agreement with the National Park Service, the First Ladies National Historic Site. The historic site is a federally owned unit of the National Park System. P.L. 106-291, §145(b)(3).

<sup>40</sup> See, for example, Federal Oil and Gas Royalty Management Act, 30 U.S.C. §§1732, 1735 (allowing DOI to delegate oil and gas royalty collection and enumerated related activities to a state).

## What Actions Have Been Taken by States in Support of State Management of Federal Lands?

In the past several years, roughly 20 states have taken actions to obtain or foster more state and local control over lands and resources. Supporters of such efforts have expressed concerns about the efficiency of federal land management, accessibility of federal lands for certain types of recreation, and limitations on development of federal lands, among other issues. These states have considered measures to provide for or express support for transfer of federal lands to states, to establish task forces or commissions to examine federal land transfer issues, and to assert management authority over federal lands. Some of these measures have been adopted. For example, in 2012, Utah enacted the Transfer of Public Lands Act.<sup>41</sup> This law sought to require the federal government to transfer title to certain types of federal lands<sup>42</sup> within Utah's borders to the state of Utah by the end of 2014.<sup>43</sup> If Utah thereafter transferred title to the lands, the law would require Utah to pay 95% of its net proceeds to the United States.<sup>44</sup> The state statute's deadline passed without transfer of federal land to the state, because states cannot obtain ownership of federal lands by state law.

Efforts in western states to reduce federal land ownership typically have had opponents as well as supporters. In addition to constitutional and statutory concerns, some supporters of continued or expanded federal land ownership have asserted that state and local resource constraints, other economic considerations, or environmental or recreational priorities weigh against state challenges to federal land ownership.

Efforts by a state to claim control of federal lands within its borders are likely to run afoul of the Constitution. As described above, under the Property Clause,<sup>45</sup> Congress has plenary authority to regulate and manage federal lands, and under the Supremacy Clause,<sup>46</sup> federal statutes and regulations override conflicting state laws. In general, only an act of Congress may expand states' authority over federal lands beyond the current scope of state authority under various federal statutory frameworks.

## Have There Been Past Efforts to Transfer Ownership and Management of Federal Lands to States?

There have been efforts in recent decades to compel or foster divestiture of federal lands. These efforts have often focused on BLM and FS lands. One of the most concerted efforts occurred in the late 1970s and early 1980s and became known as the Sagebrush Rebellion. The Sagebrush Rebellion took the form of state and local legislation, court challenges, federal administrative changes, and proposals for federal legislation.<sup>47</sup> As with current, similar efforts, a primary goal

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<sup>41</sup> Utah H. 148, 59<sup>th</sup> Utah Legis., Gen. Sess. (Feb. 14, 2012); Utah Code §§63L-6-101 to 63L-6-105.

<sup>42</sup> Exceptions included national park units and wilderness areas. Utah Code §63L-6-102.

<sup>43</sup> Utah Code §63L-6-103(1); see also Andrea Collins, *To Transfer or Not to Transfer, That Is the Question: An Analysis of Public Lands Title in the West*, 76 Mont. L. Rev. 309 (2015).

<sup>44</sup> Utah Code §63L-6-103(2). The law also called for an Interstate Compact on the Transfer of Public Lands. *Ibid.*, §63L-6-105.

<sup>45</sup> U.S. Const. art. IV, §3, cl. 2.

<sup>46</sup> U.S. Const. art. VI, cl. 2.

<sup>47</sup> See generally, e.g., *Sagebrush Rebellion: Impacts on Energy and Minerals, Hearing before the H. Comm. on Interior and Insular Affairs, Subcomm. on Mines and Mining*, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Hrg. No. 96-39 (1980).

was more state and local control over lands and resources. Examples of actions included enactment of laws in several states asserting state authority over public lands.<sup>48</sup>

These efforts did not accomplish broad divestiture for a number of reasons. A fundamental obstacle was that, as a condition of statehood, western states generally had agreed to disclaim forever “all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States.”<sup>49</sup> This language generally was incorporated in federal enabling acts creating western states.<sup>50</sup> It also was incorporated into western state constitutions; therefore, subsequent state laws asserting title to federal lands appear to contravene the constitutions of western states.<sup>51</sup> States do not appear to have attempted to enforce these laws.<sup>52</sup>

## What Has Been Congress’s Role in Determining the Size of the Federal Estate?

The extent of federal land ownership is a policy choice for Congress. The 114<sup>th</sup> Congress and recent Congresses have considered, and in some cases enacted, bills related to acquisition and disposal of land. Numerous proposals sought to authorize and govern federal acquisition of specific land parcels or groups of parcels. Some proposed protective designations or established new federal land units, such as national monuments, national conservation areas, and national parks. Other proposals sought to enhance acquisitions through increased funding and mandatory rather than discretionary appropriations for the Land and Water Conservation Fund.<sup>53</sup> Still other bills promoted acquisitions for specific purposes, such as to secure access for hunting, fishing, and other recreation.

By contrast, numerous bills proposed to transfer particular federal parcels or groups of parcels to individuals or other governmental entities—for instance, local governments—for public purposes. Other disposal bills have been broader. Some proposals sought to reauthorize expired disposal authorities or establish new ones, such as to require BLM and FS to offer for competitive sale a certain percentage of their lands annually for each of several years. Other bills would have accelerated currently authorized land sales, such as BLM lands identified as candidates for disposal under Section 203 of FLPMA. Other measures would have allowed western states to select from the unappropriated federal lands a percentage of the federal land acreage in the state,

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<sup>48</sup> See *Ibid.*; Nev. Rev. Stat. §§ 321.596 - 321.599; Nevada State Board of Agriculture v. United States, 512 F. Supp. 166 (D. Nev. 1981), *aff’d on other grounds*, 699 F.2d 486 (9<sup>th</sup> Cir 1983) (rejecting constitutional challenge to FLPMA’s federal land retention policy).

<sup>49</sup> See, for example, Nevada Enabling Act, 13 Stat. 30, ch. XXXVI, §4, 38<sup>th</sup> Cong. (1864); Utah Enabling Act, §3, 28 Stat. 107, 53<sup>rd</sup> Cong. Ch. 138 (1894).

<sup>50</sup> *Ibid.*

<sup>51</sup> See, for example, Idaho Const. Art. XXI, §19; Nev. Const. Ordinance; N.D. Const. Art. XIII, §1; Utah Const. Art. III, §2; Richard M. Mollison and Richard W. Eddy, Jr., *The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management*, 19 Harv. J. Legis. 97 (Winter 1982); John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. Davis L. Rev. 317, 325 (1980).

<sup>52</sup> See, for example, Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 Neb. L. Rev. 1043, 1057 (2006) (“The federal government did not turn over ownership of federal lands to state governments. Nine western states did pass their own state legislation asserting ownership over such lands, but those states have not enforced the statutes.”).

<sup>53</sup> The Land and Water Conservation Fund is the principal source of funds for acquisition of lands by BLM, FWS, NPS, and FS. However, some of the agencies have other sources of funds. For instance, the Migratory Bird Conservation Fund provides mandatory appropriations to FWS for land acquisition.

which could then be leased or sold to generate state funds for education. Still other proposals sought to limit federal land ownership or acquisition, for example by prohibiting or restricting acquisition in states with a certain percentage of federal land ownership or by linking acquisition to comparable disposal.

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