

**Testimony of Professor Hillary M. Hoffmann, Vermont Law School**  
**Before the U.S. House of Representatives, Committee on Natural Resources,**  
**Subcommittee on Energy and Mineral Resources**  
**November 15, 2016**  
**Hearing on H.R. 866 and H.R. 1484**

Chairman Lamborn, Ranking Member Lowenthal, and members of the Subcommittee. Thank you for the opportunity to submit a written statement on the record for this hearing on House Bills 866 and 1484. It is an honor to appear before you today. I am a Professor of Law at Vermont Law School, where I teach Natural Resources Law, Administrative Law, and Federal Indian Law. I have practiced, taught, and engaged in scholarship involving these three areas, with a particular focus on mineral development and livestock grazing on federal and tribal lands, for the past 15 years. Most recently, my work has focused on land transfer proposals, hydraulic fracturing on public lands, and the impacts of mineral development in Indian Country, all of which are implicated by H.R. 866 and H.R. 1484.

I want to address three points for the Committee regarding H.R. 866 and H.R. 1484, which would have serious and permanent consequences for our nation's publicly owned natural resources and for tribal lands and resources. First, H.R. 866 would remove virtually all environmental protections from the hazards of oil and gas extraction on public lands and create inevitable conflicts between surface users that will likely stymie federal and state planning and administration efforts. Second, H.R. 1484 is based on a legally flawed interpretation of the Nevada Enabling Act and overlooks serious potential administrative costs to the state. The land management scheme this bill contemplates would also result in serious environmental losses for the State of Nevada. Third, both bills would impact Native Americans and Indian Country in specific and potentially devastating ways.

**I. HR 866 Removes Virtually All Environmental Protections From Oil and Gas Drilling on Federal Lands and Creates Inevitable Conflicts Between Natural Resources Users and Uses.**

One of the express purposes of H.R. 866 is to increase energy independence by granting permitting authority over oil and gas to the states, presumably because the states would issue permits faster than the federal agencies, increasing the potential for production.<sup>1</sup> This increase would result in inevitable environmental costs to the States that opted into the program, however. It would also result in serious conflicts between

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<sup>1</sup> It is worth noting at the outset that not all states might readily accept this authority, and if they did, there may be little interest in increasing drilling rates. California, for one, has attempted to pass legislation banning fracking entirely, and other states have either attempted to pass similar legislation (Massachusetts) or have state-wide fracking bans in place (Vermont, New York, Maryland).

natural resources users and uses that might completely stall federal and state administration efforts, for several reasons.

First, federal oil and gas leasing decisions are subject to a multitude of federal laws. These laws are the result of decades of acquired knowledge about the hazards of unfettered oil and gas leasing (such as fraud during the Teapot Dome Scandal) and consequences to the surface and subsurface natural and cultural resources of the nation's public lands, waters, and wildlife. Under the mineral leasing statutes, BLM is authorized to issue leases on BLM land and in national forests (which are the lands that H.R. 866 encompasses) for the development of valuable minerals.<sup>2</sup> On BLM land, the BLM determines which lands will be made available for oil and gas extraction and incorporates that designation into its resource management plan (RMP) under FLPMA. In national forests, the determination occurs within the process of developing a land and resource management plan (LRMP) under NFMA. Additionally, although the BLM has primary authority over mineral leasing on BLM land and in national forests, the Forest Service has the authority to approve surface activities related to mineral leasing in national forests.<sup>3</sup> In each planning process, the agencies must take into consideration *all* of the multiple uses contemplated in FLPMA and the Multiple Use Sustained Yield Act (MUSYA), such as mineral development, livestock grazing, recreation, wildlife, watershed protection, and others.<sup>4</sup>

The determination of which lands will be made available for oil and gas exploration also includes the analysis of criteria the agencies will impose on any future leases to mitigate environmental harms. In general, the planning processes under FLPMA and NFMA are subject to the requirements of the National Environmental Policy Act (NEPA), which obligates the agencies to consider various alternatives to the proposed oil and gas leasing. H.R. 866 would eliminate NEPA review, which would be disastrous not only for the agencies in terms of planning natural resource uses and development, but also because there would be no requirement that federal agencies stop and consider the environmental and other consequences of developing the selected mineral resources before drilling commenced.<sup>5</sup> For oil and gas, this includes decisions about access, siting, water quality protection, subsurface well casing integrity, and disposal of waste byproducts.

Under NEPA, the agencies must produce an Environmental Impact Statement (EIS) prior to approval of any drilling.<sup>6</sup> The EIS reflects the agencies' site-specific assessment of the location for any proposed drilling and any "concerns and other issues identified earlier in the process, or during site examinations, may result in conditions of approval (COA) on the operator's drilling permit."<sup>7</sup> These conditions may "require,

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<sup>2</sup> 30 U.S.C. §§ 223-236b; 241-242.

<sup>3</sup> *Id.* at 840.

<sup>4</sup> *See* 16 U.S.C. § 528.

<sup>5</sup> The agencies' obligations under the Mineral Leasing Act will be discussed below.

<sup>6</sup> *Id.*

<sup>7</sup> BLM Final Fracking Rule, at 16129.

forbid, or control specified activities or disturbances.”<sup>8</sup> NEPA’s requirements here are primarily aimed at environmental values, although not entirely. This stage of review of the drilling plans and maps ensures that any cultural resources located within the footprint of any surface disturbing activities are accounted for and protected as required by federal law. It also allows the agencies to prohibit drilling, in places where the harm it would cause would be irreversible, such as in Wilderness Study Areas. Allowing drilling in WSAs would permanently foreclose their eligibility for wilderness designation.

NEPA and other federal lands statutes also assist the agencies in making decisions about which resources should take priority during a given ten-year period and allows those decisions to change over time, as social, cultural, economic, and environmental circumstances change. It also allows the agencies to forecast future reclamation needs associated with the mineral development. Moreover, NEPA allows the American public the opportunity to participate in the decisions that affect federal public lands and natural resources. Over the course of decades since it was enacted, NEPA has changed the way that land managers act and think about decisions affecting the environment, incorporating concepts such as tiering to aid the agency in planning for major actions that will occur over time, in phases.<sup>9</sup> H.R. 866 eliminates NEPA review and federal oversight of the permitting process, which would likely result in minimal planning, greater environmental losses, and less flexibility as the needs of the American public shift from fossil fuels to renewable sources of energy.

In addition, the development of oil and gas on federal lands is subject to a multitude of laws and regulations the federal agencies must comply with before, during, and after issuing permits to drill, related to long-term resource planning. Some of these other laws are Federal Land Policy and Management Act (FLPMA), the National Forest Management Act (NFMA), the Multiple-Use Sustained Yield Act (MUSYA), the Healthy Forest Restoration Act, the Federal Lands Recreation and Enhancement Act, the Wild and Scenic Rivers Act, the Timber Protection Act, and others.<sup>10</sup> There are also multiple federal regulations governing all of these activities and resources, including the recently promulgated BLM Final Fracking Rule.

To give an example of the complications that will ensue if H.R. 866 is enacted, imagine a shale gas play located in southern Utah, which the state wants to open for drilling under the newly implemented H.R. 866. Having submitted its declaration under H.R. 866, the state could enter into leases to explore or drill. Yet, the BLM land above the shale play, is governed by a Resource Management Plan (RMP) developed by the BLM after years of dedicated study, planning, public input, and NEPA review. The

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<sup>8</sup> *Id.*

<sup>9</sup> *See* 40 C.F.R. § 1502.20.

<sup>10</sup> *See* [Hillary M. Hoffmann, Fracking the Sacred: Resolving the Tension between Unconventional Oil and Gas Development and Tribal Cultural Resource Protection, Denver Law Review \(forthcoming 2016\), \[https://papers.ssrn.com/sol3/papers.cfm?abstract\\\_id=2776722\]\(https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2776722\).](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776722)

surface uses covered by the RMP most likely include travel management plans, other mineral rights, livestock grazing allotments<sup>11</sup>, recreational uses, cultural resource designations, riparian corridors, archaeological and other cultural resources, and wildlife management and conservation. For the sake of discussion, imagine that the RMP does not authorize mineral development in the areas the State leased for drilling, or authorizes it only in limited regions.

If the surface area above the shale play is dedicated primarily to livestock grazing, the BLM cannot cancel the RMP, change the surface use, or cancel the grazing permits because the state wants to issue oil and gas leases, without subjecting itself to administrative appeals and potentially, litigation. The most likely potential challenges to any change to the grazing permits would be from the permittees, who have licenses to graze the surface allotments, and the right to renewal of their grazing permits under the Taylor Grazing Act, as long as the land remains valuable for grazing.<sup>12</sup> Historically, Congressional attempts to alter or amend grazing privileges on federal lands have faced strong resistance from the regulated industry. Administrative attempts to modify the grazing regulations to accommodate other uses have *all* been either struck down by federal courts or terminated by regulatory action. Moreover, the state has no power to alter or amend federal grazing permits on federal land. The most likely results in a dispute over the shale gas development between livestock grazing permittees and the state would be stalemates or litigation.

Complicating matters further, imagine that the grazing permit holder has entered into one or more conservation agreements to protect a species and its habitat and to ensure that U.S. Fish & Wildlife will not have to list the species as endangered or threatened. Even though H.R. 866 would exempt leasing decisions from the ESA, this does not account for pre-existing contractual arrangements based on the ESA that private landowners have relied on prior to H.R. 866's passage, if it is enacted.

Another very likely possibility in southern Utah is that BLM has established a series of OHV transportation routes used by recreational vehicle enthusiasts during certain seasons, which those individuals have come to rely upon in planning their visits to BLM lands and nearby communities. These OHV routes would have been negotiated with the other interested public's views and privileges in mind, including grazing, recreation, and conservation, and after years of dedicated planning efforts by the BLM. There might likely be private landowners who hold easements or special use permits allowing access to or across the surface that could interfere with the drilling plans. There could be patented hardrock mining claims or R.S. 2477 routes that vested pursuant to the General Mining Law. The State has no power to invalidate or alter those rights and uses,

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<sup>11</sup> Of the 245 million acres of BLM land, 155 million acres under currently under active grazing permits, so conflicts between grazing permit holders and oil and gas operators are almost inevitable under H.R. 866. On Forest Service lands, 95 million acres, or roughly half of all lands managed by that agency are under active grazing permits, making conflicts likely on Forest Service lands as well.

<sup>12</sup> 43 U.S.C. § 315b.

and the federal government cannot eliminate vested mining claims or R.S. 2477 vested rights of way without compensating the landowner pursuant to the Fifth Amendment. And these are only a few examples of the public reliance that have arisen from the detailed series of public land laws and regulations governing the BLM and Forest Service lands that H.R. 866 implicates. People in communities located near these lands, and indeed those from around the country, in some cases (hunters, off-road vehicle enthusiasts, and river runners, to name a few) rely upon the planning, rules and regulations the BLM has carefully put in place over decades to guide their use of the public lands. Recreational businesses do as well. Allowing the State to interfere with this deliberately established scheme in the unpredictable manner H.R. 866 contemplates would upset these expectations and likely create extensive litigation involving the various interest groups of public lands users.<sup>13</sup>

Finally, there are many federal initiatives related to natural resources that involve contractual arrangements with private parties, and it is completely unclear how H.R. 866 would alter, accommodate, or invalidate those. Examples are wildlife conservation agreements, existing grazing permits, timber leases, contracts for land exchanges, forest conservation programs and agreements, river restoration agreements, water quality monitoring agreements, tribal, state, and federal natural resources co-management agreements, and many others. In these arrangements, both the parties to the agreement, as well as surrounding landowners and other users of the public lands, have come to rely upon the guarantees in the agreements. H.R. 866 would completely upset this carefully established structure, with no warning, no planning, and unclear consequences.

## **II. H.R. 1484 is Not a Logical or Legal Outgrowth of the Nevada Enabling Act and May Impose Significant Environmental and Economic Burdens on the State of Nevada.**

H.R. 1484's express intent is to honor the Nevada Enabling Act by granting 45 million acres of federal public lands to the state. Yet, the Nevada Enabling Act is very specific, and very limited, and does not support the transfer that H.R. 1484 authorizes. It also does not represent a legally binding federal promise to give these lands to the State.

To start, the bill states that "The Federal Government promised all new States, in their statehood enabling Act contracts, that it would dispose of federally controlled public lands within the borders of those States." This premise is simply unsupported by the text of the western enabling acts. Like the other western enabling acts, the Nevada Enabling Act conveyed very limited and very specific parcels of lands directly to the State upon admission. These lands were sections sixteen and thirty-six, in each township, to be managed for the benefit of the public schools. Section 7 also provided that, if those

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<sup>13</sup> If the oil and gas is located below National Forest land, the Forest Service has mandates under NFMA and MUSYA, and other statutes, similar to the BLM's. The most likely conflicts in the national forests would be plans for timber sales or existing leases, fire management plans, pest control initiatives, and conservation measures.

sections were no longer open land (because they had been homesteaded or were part of the railroad land grants, for instance), the State was entitled to select “other lands equivalent thereto.”<sup>14</sup> This so-called “in lieu” provision ensured that the State would receive the equivalent of two sections in every thirty-six section township if the two enumerated sections were unavailable on the date of admission.

Other than the school land grants in Section 7, there are very limited references to outright grants of land to the State in Nevada’s Enabling Act. They appear in Sections 8 and 9, in which Congress allowed the state to select twenty sections of land for “erecting public buildings” and twenty other sections of land “for erecting state prisons.”<sup>15</sup> These grants were for specific purposes (schools, public buildings, and the state prison) and Congress delineated those purposes in the Act. Pursuant to the Enabling Act, the State received over 2.5 million acres from the federal government for these specific purposes.

In section 10 of the Nevada Enabling Act, Congress stated

That five percentum of the proceeds of the sales of all public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state for the purpose of making and improving public roads, constructing ditches or canals, to effect a general system of irrigation of the agricultural land in the state, as the legislature shall direct.

This provision, which mirrors the provisions of other western Enabling Acts, is the one that advocates of land transfer statutes argue creates a binding promise on the part of the federal government to “dispose of” all public lands to the states. Yet, it is clear from the scholarly analysis of the language used in this provision, the historical context in which it was enacted, and the current federal lands retention policy, that this provision did not create any such promise.<sup>16</sup> There is simply no support, in the Nevada Enabling Act, or elsewhere in the historical record, for the proposition stated above in H.R. 1484 – that the federal government promised all newly admitted western states that it would grant all of the federal lands within the states’ borders to the respective states after admission. Many

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<sup>14</sup> Nevada Enabling Act, § 7.

<sup>15</sup> *Id.* §§ 8, 9.

<sup>16</sup> See John D. Leshy, “FLPMA at 40: The Historical Context of The Federal Land Policy and Management Act” (Oct. 2016); John D. Leshy, “Is Permanent U.S. Ownership of Public Lands In States Unconstitutional? A Critique of the “Legal Analysis” Prepared by the “Legal Consulting Services Team” for the Utah Commission for the Stewardship of Public Lands (Sept. 2016); Hillary M. Hoffmann, Report to Utah House Committee on Natural Resources Regarding the Constitutionality of the Transfer of Public Lands Act, Apr. 2015); Hillary M. Hoffmann, *The Flawed Law & Economics of Federal Land Seizure Statutes*, Natural Resources & Environment (Feb. 5, 2015); Robert B. Keiter & John C. Ruple, *A Legal Analysis of the Transfer of Public Lands Movement*, Stegner Center White Paper No. 2014-2 (Oct. 7, 2014).

legal scholars, including myself, have analyzed the language of these five percentum clauses, the historical context in which they were passed, and the Supreme Court jurisprudence surrounding them, and concluded that there is no evidence supporting a construction that they contain general promises to give federal lands to states after admission.<sup>17</sup>

Section 10 of the Nevada Enabling Act in particular cannot be construed as a binding federal promise to give Nevada the public lands within its borders after admission. This is clear for two reasons. First, Congress did not use the term “grant” in Section 10, like it did in Sections 7, 8, and 9. If Congress had intended Section 10 to convey land directly to the state, it would have couched that conveyance in the same language it used for the grants in the other sections. Second, Congress included a disclaimer clause in Section 4, in which the residents of Nevada agreed that they would “forever disclaim 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>18</sup> There can be no meaning to Section 4’s disclaimer clause if Section 10 was a promise to convey all of the federal lands to the State. The only possible reading of Section 10 that does not render it or Section 4 meaningless, is that *if* the federal government later decided to sell public lands within Nevada’s borders, the State would be entitled to five percent of the proceeds. Yet, the State was foreclosed from “claiming,” or forcing any subsequent sale of federal lands within the state under Section 4.

H.R. 1484 also misuses the term “dispose” as it was understood in 1894. As the land grant provisions demonstrate, when Congress intended to give land directly to the States, it used the term “grant.” When it intended something else, it used different terminology. For instance, in Section 7 of the Enabling Act, Congress used the term “disposed of,” noting that where sections sixteen and thirty-six had been “disposed of” prior to statehood, Nevada would be entitled to make other selections in lieu of the granted sections.

The term “disposal” is generally used today to refer the period of time (and related acts of the federal government) between 1776 and 1891, during which the government sold or deeded some of its lands to private parties. The purpose of the statutes that authorized these actions, such as the Homestead Act, the Preemption Act, and others, was to induce settlement of large expanses west of the original colonies, which eventually helped incorporate these areas into the union.<sup>19</sup> Proponents of land transfers have concluded that “disposal,” as used in the nineteenth century, must equal divestiture because today, that period of time is generally referred to as the “disposal era”

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<sup>17</sup> *Id.*

<sup>18</sup> Nevada Enabling Act, § 4.

<sup>19</sup> James Rasband, *et al.*, NATURAL RESOURCES LAW & POLICY (3<sup>rd</sup> ed., Foundation Press), p. 138.

and because the federal government did alienate some of its lands in the process of westward expansion and settlement.<sup>20</sup>

However, simply because this period is referred to as the “disposal era,” does not mean that Congress’s use of the term “dispose” or “disposed of” carried the same meaning at the time the Nevada Enabling Act was drafted as it does today. In fact, legal scholars who have researched the early nineteenth century definitions of the word “dispose” have found that there were in fact “several broad meanings of ‘dispose’ besides ‘to transfer,’ and ‘to give away’”(i.e., to divest of ownership).<sup>21</sup> These other meanings included “to regulate,” “to place in any condition,” and “to apply to any purpose.”<sup>22</sup> Later nineteenth century dictionary definitions of “to dispose of” include even more potential meanings.<sup>23</sup> Three of these equate to divestiture and the others include “to direct the course of a thing,” “to place in any condition,” “to direct what to do or what course to pursue,” “to use or employ,” or “to put away.”<sup>24</sup> Similarly, the isolated term “dispose” has even more meanings, including “To set; to place or distribute; to arrange;” “To regulate; to adjust; to set in right order;” “To apply to a particular purpose; to give; to place, to bestow;” “To set, place or turn to a particular end or consequence;” and “To adapt; to form for any purpose.”<sup>25</sup> Thus, applying the plain meaning of the terms “dispose” or “to dispose of”, as Congress would have understood them in 1894 (which is what the Supreme Court would do to determine the meaning of the statute today) could result in a conclusion that Congress was referring to retaining the lands, managing them for other uses, using them in some way, or distributing them. There is no clear interpretation from the plain meaning of the text that the term “disposal” means “to give away.”

In short, there is no “credible evidence” that the federal government intended to bind itself to an obligation to give away any land to the states in the various enabling acts. Moreover, it is quite clear from the historical context that the territories were in no position to extract such an enormous promise from the federal government. At the time the territories were petitioning for statehood, the federal government, and not the states,

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<sup>20</sup> See American Legislative Exchange Council, “Resolution Demanding that Congress Convey Title of Federal Public Lands to the States,” at <https://www.alec.org/model-policy/resolution-demanding-that-congress-convey-title-of-federal-public-lands-to-the-states/> (describing a “federal duty to dispose of the public lands” arising from enabling acts of the various western states); James Rasband, *et al.*, p. 130 (discussing the federal periods of “disposition” and “retention”)

<sup>21</sup> Leshy, *supra*, note 22 (quoting Samuel Johnson’s *Dictionary of the English Language* (3d ed. 1768)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (quoting Webster’s 1828 Dictionary).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*



held absolute power over the terms of admission.<sup>26</sup> To construe an enabling act beyond the plain text in a manner similar to H.R. 1484 not only controverts the meaning of the words as Congress would have understood them at the time, but upends the historical context in which the enabling acts were passed.

In further support of the transfer, H.R. 1484 states that “The United States Supreme Court has declared that statehood enabling Act contracts are ‘solemn compacts’ with enforceable rights and obligations.” This statement appears to be extrapolated from the United States Supreme Court opinion in *Andrus v. Utah*, 446 U.S. 500 (1980) or *Pollard v. Hagan*, 44 U.S. 212 (1845), or both, although neither opinion uses the exact term “solemn compacts” to describe Enabling Acts. In *Andrus*, the Court had to interpret the Utah Enabling Act’s provision regarding school trust lands and in lieu selections in particular, similar to Section 7 of the Nevada Enabling Act. The State of Utah was precluded from receiving certain school trust parcels that had already been disposed of by the time it exercised the option, so the State submitted a list of “in lieu” parcels, which it wished to receive instead. The in lieu sections were part of grazing districts created pursuant to the Taylor Grazing Act, however, so the Secretary of Interior declined to approve Utah’s request to transfer them to the state. The State filed suit, arguing that the Secretary’s action essentially breached the federal government’s promise in the Enabling Act to award in lieu parcels of the State’s choosing.<sup>27</sup> The Supreme Court disagreed with the State’s position, for several reasons relevant to H.R. 1484. First, the Court held that the land grant language could not be enforced against the federal government if the grant had not vested. Vesting would not occur until the lands were surveyed. If the lands were not surveyed, and the federal government had disposed of, preserved, or taken other action with respect to those lands, such as placing them within grazing districts pursuant to the Taylor Grazing Act, that subsequent action abrogated any alleged promise contained within the land grant provision of the Enabling Act.

Also, although the *Andrus* Court did acknowledge that “in some ways,” a school land grant was a “solemn agreement”, analogous to a contract, there were limits to that analogy. For one, the land grant provision was an agreement by which “The United States agreed to cede some of its land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry.”<sup>28</sup> But the agreement was only enforceable by the State to a certain extent. Lands that were subsequently preserved or placed under federal programs by Congress (such as in grazing districts under the Taylor Grazing Act) were unavailable to the State. Also, mineral bearing lands were unavailable to the State, unless the State could prove that the

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<sup>26</sup> Several western states were unable to gain admission to the union on the first attempt and spent years, and in some cases, decades, trying to accede to the federal government’s requirements before Congress would finally admit them.

<sup>27</sup> H.R. 1484 sets up a similar conflict as in *Andrus*, which the Supreme Court resolved against the state. *Andrus v. Utah*, 446 U.S. 500, 507 (1980).

<sup>28</sup> *Id.*

specifically granted sections were also mineral in character.<sup>29</sup> Thus, the State could not force the federal government to adhere to its construction of the enabling act.

In *Pollard v. Hagan*, the Supreme Court had to determine whether the Alabama Enabling Act conveyed ownership of land submerged under navigable waterways to the state upon admission. The Enabling Act provision at issue stated “that all navigable waters within the said state shall for ever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by said state.”<sup>30</sup> The Court interpreted this as a grant of title to lands immediately riparian to navigable waterways, as well as lands underlying them, to the state – a form of “compact” similar to that recognized in *Andrus*. In dicta, the majority opinion made reference to a “temporary” ownership of public lands by the federal government, which several advocates of legislation like H.R. 1484 have attempted to convert into an argument that the Supreme Court sanctions the principle that enabling acts created binding promises to the states that the federal government would transfer all of the public lands within their borders after admission.

Yet, *Pollard* does not support that expansive interpretation of the “compact” reference either. Reading beyond the isolated reference to “temporary” federal governance, and looking at the context in which the opinion was written, it is clear that that *Pollard*’s apparent constraint of the federal government’s rights of governance and ownership of federal property was an attempt to assuage states’ fears about slavery during a time in which states’ antipathy toward each other was fomenting war and the union was particularly weak.<sup>31</sup> This interpretation is supported by the very brief nature of these statements of dicta, which disappear completely after the Supreme Court’s opinion in *Dred Scott v. Sanford*, in 1856.<sup>32</sup> After *Dred Scott*, the Supreme Court has in fact never relied upon the *Pollard-Dred Scott* interpretation of the Property Clause in a subsequent opinion.<sup>33</sup> Were another case to reach the Court today invoking the meaning of the Property Clause and the scope of the federal government’s power under it, there is no reason to believe that the Court would choose to realign its interpretation with the dicta in *Pollard* or the holding *Dred Scott*.

Aside from the legal arguments, there are valid economic and policy arguments weighing against transfers like the one proposed in H.R. 1484. One of the publicly stated purposes of the land transfer movement is that state governance of public lands would increase energy independence, improve local economies, and “better care for the

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<sup>29</sup> *Id.* at 509.

<sup>30</sup> *Pollard v. Hagan*, 44 U.S. 212 (1845).

<sup>31</sup> See John D. Leshy, “Is Permanent U.S. Ownership of Public Lands In States Unconstitutional? A Critique of the “Legal Analysis” Prepared by the “Legal Consulting Services Team” for the Utah Commission for the Stewardship of Public Lands (Sept. 2016).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

environment.”<sup>34</sup> As far as the economic argument is concerned, the Nevada legislature commissioned a 2014 study (Nevada Study) on the effects of transferring all federal public lands to the state, which total roughly 45 million acres.<sup>35</sup> To examine whether it would be economically feasible for the State to assume the massive administrative responsibilities associated with assuming 45 million acres of additional public lands, the Nevada Study made certain assumptions relying on data from other states’ reports of school trust lands revenue, concluding that Nevada could realize a similar revenue stream if it assumed ownership of the federal public lands included in H.R. 1484. In a nutshell though, the State would go from a position of accepting federal funds to offset the lost property tax revenue and receiving 49% of the mineral revenue with little to no administrative costs to receiving no federal funds to offset lost property tax revenue (assuming the state does not immediately sell all of the transferred land) and 100% of the mineral revenue, but assuming 100% of the management costs of that program and every other program and cost associated with the acquired public lands. To determine whether this dramatic shift would be economically feasible for the state, or self-sustaining, as the Nevada Study notes, it is critical to have precise values for revenue streams and costs, which the Study admittedly lacks in certain areas.

The Nevada Study estimates the administrative cost of assuming ownership of the first phase of lands to be transferred (7.2 million acres) at \$26 million. The report is vague as to the definition of administrative costs, and it is unclear how much the State estimates it would cost to administer the additional 37.8 million acres transferred in subsequent Phases, noting only that 30,000 acres of the Phase 1 lands could be sold to cover the initial \$26 million cost of administering those lands. Yet, the explanation for this figure - \$26 million – is lacking, and based on similar studies done by other western states, could be vastly underestimating the true costs the state aims to assume.

One of the largest limitations of the Nevada Study is the lack of information about federal fire management and suppression costs. The Study authors note that they had been “unable to assemble and analyze” federal fire suppression data from the BLM prior to publication.<sup>36</sup> Yet, comparisons can be drawn from a more comprehensive study in Utah, which is a similarly fire-prone state.<sup>37</sup> The Utah Study presented a more holistic

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<sup>34</sup> American Lands Council, Key Points, [http://www.americanlandscouncil.org/key\\_points](http://www.americanlandscouncil.org/key_points).

<sup>35</sup> A Report of the Nevada Land Management Task Force to the Nevada Interim Legislative Committee on Public Lands: Congressional Transfer of Public Lands to the State of Nevada (July 18, 2014).

<sup>36</sup> Nevada Study, p. 17.

<sup>37</sup> University of Utah, Bureau of Economic and Business Research (Jan Elise Stambro, John C. Downen, Michael T. Hogue, Levi Pace), Utah State University, Department of Applied Economics (Paul M. Jakus), Weber State University, Department of Economics (Therese C. Grijalva), *An Analysis of the Transfer of Federal Lands to the State of Utah* (Nov. 2014) (Utah Study).

picture of the costs to the State of assuming management authority of the federal public lands, especially surrounding maintenance of roads, administration of programs such as grazing, timber, and mineral leasing, and wildfire management and associated infrastructure. The Utah study concluded that the State would incur \$280 million (total) in *annual* additional costs once it assumed title to the 20-30 million acres of federal public lands that Utah seeks in a similar transfer, taking into account the various costs of administering all of the above programs, particularly fire management. Making a very rough acre-for-acre extrapolation based on the Utah Study, the true costs to Nevada of assuming 45 million acres of land could be upwards of \$630 million *annually*, depending on the annual expenses associated with fire management and suppression and road maintenance. According to the Utah Study, fire management is roughly 35% of the total funds expended by the federal government on public lands management in any given year.<sup>38</sup>

Given that Nevada would go from managing 200,000 acres to over 45 million acres of state land, the initial investments by the State would be significant, particularly when one factors in the loss of the payment in lieu of taxes (PILT) funds and other federal funds currently received by the state and its subdivisions to reimburse them for the loss of property tax revenue.<sup>39</sup> The Nevada Study indicates that the state intends to replace the lost PILT funds for the counties using revenue derived from the newly acquired lands, but as will be discussed below, those estimates do not indicate that revenue will definitely cover these payments to the counties.

On the revenue side, the Nevada Study relies on school trust data from other states, which is somewhat useful, but in some ways, not as useful. One limitation is that school trust lands are administered based on mandates that require the state agencies to maximize revenue for the benefit of the state public schools. Usually, this means developing the lands' mineral potential, which can produce revenue, but which comes at an environmental cost. The Nevada Study does not include any reference to the costs associated with environmental remediation of mineral development, and it makes reference to some land conservation, which would preclude mineral development in some areas. Moreover, the study concedes that not all 45 million acres to be transferred are mineral bearing, so a straight acre-for-acre comparison is of limited value until the mineral bearing capacity of the transferred lands is surveyed and determined. Based on the school trust lands data, though, the study concludes that "the State of Nevada might be capable of generating net revenues ranging between \$56,016,000 and \$205,848,000 annually" for the 7.2 million acres of Phase I lands.<sup>40</sup> The difference between the lower figure and the higher figure is obviously vast. At the higher end, Nevada would see a net gain in revenue from the entire 45 million acre transfer, but only as long as the mineral reserves continue to yield and if the acre-for-acre comparison with other states holds

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<sup>38</sup> Utah Study, at xxvi. This percentage is similar in Wyoming, where the U.S. Forest Service expends roughly 20 percent of its total budget on fire management.

<sup>39</sup> PILT funds are used by counties to support public services such as fire suppression, law enforcement, road construction, public schools, and search-and-rescue operations.

<sup>40</sup> Utah Study, at 18.

(meaning, if there are similar revenue streams other than mineral development in Nevada as there are in the states cited in the study). At the lower end, the State would assume title at a guaranteed annual loss.

One of the objectives of the transfer, according to the Nevada Study, is that the newly acquired lands be self-funding: “Lands transferred in subsequent phases will be managed primarily for long-term sustainable net revenue maximization with the exception of those lands identified as suitable for disposal and to the extent possible for long-term health, function, productivity and sustainability.”<sup>41</sup> The limitations of the modeling based on school trust lands in other states have been discussed above. Assuming not all of the lands transferred are mineral-bearing, revenue streams will have to be derived for those lands to make up for the lack of mineral resources. Various land uses are set forth in the revenue generation table on page 44 of the Nevada report, some of which might generate revenue, but others include recreation activities that the public might expect to engage in for free (such as cross-country skiing, “rockhounding,” archaeology, backpacking, trailriding, photography, and wildlife viewing)..

The livestock grazing potential might be high, given that all 45 million acres proposed to be transferred under H.F. 1484 are currently under federal grazing permits issued by the BLM.<sup>42</sup> There are currently 745 individual grazing allotments, 550 permit holders, and 635 individual grazing permits occupying these lands. H.R. 1484 and the study are silent as to whether these grazing permits would transfer automatically to the state, and if so, under what conditions. Both are also silent as to whether state law would secure similar grazing privileges as federal law. The Nevada Study also appears to presume that continued livestock grazing would be a source of revenue to the state, yet this would not occur unless the State raised the grazing fees by at least a factor of 5, as livestock grazing is currently one of the most heavily subsidized natural resource uses of the federal public lands.<sup>43</sup> This fee increase would likely be met with resistance by the Nevada public lands grazing community, some members of which have extensively and litigiously objected to the imposition of fees and restrictions on their grazing activity on public lands. Moreover, grazing cannot occur simultaneously with many of the other revenue streams identified in the study.

In addition, the Nevada study does not mention the current reality of livestock grazing in the arid west, which is that, although grazing is authorized on many federal lands under current federal regulations, grazing is not actually possible because of drought conditions and low forage levels. Therefore, federal agencies have suspended grazing on some allotments, resulting in the authorized grazing use of these lands being higher than the actual grazing use. In other places, permit holders have reduced their actual use for similar reasons. So, although the conclusion in the Nevada study is based

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<sup>41</sup> Nevada Study, at 43.

<sup>42</sup> U.S. Dep’t of Interior, Bureau of Land Management, Nevada Grazing, <https://www.blm.gov/nv/st/en/prog/grazing.html>.

<sup>43</sup> The Utah Study concludes that Utah would have to raise state grazing feeds for similar reasons.

on the assumption that increased grazing will occur under state ownership, it is not clear that the public lands could actually sustain it, especially on a consistent basis over the long term.

Finally, from a general perspective, the Utah and Nevada studies overlook the dramatic shift western economies will experience if the federal government is forced to turn over public lands to the states. Although the scope and nature of any shift will depend on what the states plan to do with any land they obtain in these transfers, states like Utah and Nevada will have to authorize more extractive uses, such as mining and grazing, to offset the tremendous increase in administrative costs to the state. This in turn would impact many of the recreation uses of the public lands, and has caused industry groups to oppose land transfer bills across the west due to the likely restrictions in access and deterioration in recreation-quality lands that will result.

In Utah alone, outdoor recreation contributed \$12 billion to the state's economy in 2013, including consumer spending, tourist industry wages and salaries, and state and local tax revenue. Revenue streams like this would most likely be lost if states were to assume ownership because the extensive mineral development and other extractive uses of the acquired lands are incompatible with hunting, fishing, skiing, and other forms of outdoor recreation. This increased development activity will also cause environmental damage from all of the surface disturbance activities associated with oil and gas, coal, timber sales, and grazing.

Moreover, recent studies have illustrated that the mere presence of protected federal lands improves local western economies. For instance, a December 2012 study by Headwaters Economics, a nonprofit economic research organization based in Bozeman, Montana, established that higher-wage industries establish themselves in towns and cities where their workers can enjoy recreation opportunities on nearby public lands. According to this study, one is more likely to see high-tech and health care jobs in communities located near federally protected lands. Rural towns are particularly affected. According to the Headwaters study, rural western counties "with more than 30 percent of the county's land base in federal protected status" experienced an overall job growth rate of 345 percent since 1972.<sup>44</sup> Rural western counties "with no protected federal public lands" saw an increase of only 83 percent.<sup>45</sup> These types of studies indicate that having federal lands near western communities, particularly rural ones, serves as an economic stimulator, which is contrary to what H.R. 1484 states.

In sum, the legal authority and policy statements offered in support of H.R. 1484 do not in fact support the transfer of 45 million acres of federal lands to the State of Nevada.

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<sup>44</sup> Headwaters Economics, *West is Best: Protected Lands Promote Jobs and Higher Incomes*, Dec. 2012.

<sup>45</sup> *Id.*

### III. H.R. 866 and H.R. 1484 Would Negatively Impact Indian Country in Several Ways.

H.R. 866 and H.R. 1484 would impact Native Americans and Indian Country in very particular and predictable ways. Both bills exclude tribal land, but only land that is “held in trust” for “federally recognized tribes.” This definition is not “Indian Country,” which is the definition typically used in federal legislation impacting Native American lands. “Indian Country” encompasses several types of lands – reservations, trust allotments, and dependent Indian communities, along with other parcels of land that are considered “tribal land,” but which do not satisfy the definition of either H.R. 866 or H.R. 1484. The consequence of using a smaller scope in these two bills would create a new jurisdictional category in federal Indian law, contradicting and confusing the application of other federal statutes and contradicting Supreme Court precedent.

H.R. 866 in particular would also confuse the application of mineral leasing statutes to Indian Country. Specifically, the Indian mineral leasing statutes allow tribes to develop their own mineral resource plans in “Indian Country.” Yet, the scope of H.R. 866’s definition is smaller. This would have the effect of excluding only some tribal lands from the reach of state permitting authority. Allowing the states to encroach upon tribal lands would upset over a century of settled law limiting state authority over tribal lands, which dates back to 1831 and the Supreme Court opinion in *Cherokee Nation v. Georgia*. It would add, rather than remove, confusion over the application of state authority to tribal lands not exempted by H.R. 866, especially since the Indian mineral leasing statutes (using the jurisdictional trigger “Indian Country”) would remain in effect.

In addition, the goal of both H.R. 866 and H.R. 1484 is increased mineral leasing. My scholarship and that of other scholars of federal Indian law in recent years has identified various ways in which mineral leasing has caused devastating impacts to tribal communities. First, fracking on public lands near tribal communities has resulted in serious environmental pollution, specifically from methane gas emission, and produced water disposal.<sup>46</sup> Both forms of pollution associated with fracking can cause serious harm to human health, and both would dramatically increase under H.R. 866 and H.R. 1484 because fracking is considered to be one of the most advanced forms of extracting oil and gas and no doubt will continue to be used under these statutory schemes. The environmental harms associated with oil and gas development impact Indian Country differently than state land because of a lack of governmental authority over pollutant discharges on tribal lands.<sup>47</sup>

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<sup>46</sup> Heather W. Williams & Hillary M. Hoffmann, *Fracking in Indian Country: The Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Water*, 32 Yale J. Reg. 451 (Summer 2015).

<sup>47</sup> *Id.*

In addition, oil and gas development on federal lands has devastated tribal cultural resources.<sup>48</sup> One need look no further than the ongoing dispute over the Dakota Access Pipeline to see an example of this. In that dispute, increasing development of the Bakken Shale Play has resulted in demand for another pipeline to transport crude to refineries located over a thousand miles from the oil fields. As everyone on this Subcommittee is no doubt aware, construction of that pipeline now threatens sacred sites and sacred waters of the Standing Rock Sioux Tribe, whose reservation lies within a half mile of the pipeline's trajectory. The pipeline is located on private land, and requires minimal federal permitting. Most of the pipeline has been constructed and the only permits standing in the way of completion have been issued by the Army Corps of Engineers. If Dakota Access Pipeline construction proceeds, the loss of sacred cultural resources like the cairns and stone prayer rings will be devastating for the Standing Rock Sioux community. It is hard for non-native Americans to really grasp the effect of these losses, but to the tribe, these places are like a combination of the Vatican and Bethlehem. They are irreplaceable, core elements of tribal religious practice and integral aspects of tribal identity. They cannot be moved. Resources such as burial grounds and sacred sites are material to the practice of tribal religions and some other natural resources, such as water for many western tribes, or fish for northwestern tribes, are elements of tribal identity. Their loss is irreplaceable, and fracking on public lands threatens them on public lands throughout the west.

Another serious and very troubling consequence of the oil and gas boom for tribes is the increase in violence against native women due to the influx of male populations of oil field workers and the siting of "man camps" to house these workers near tribal reservations.<sup>49</sup> The Bakken boom in particular has produced a dramatic increase in sexual assaults and domestic violence on the Spirit Lake and Ft. Berthold Reservations.<sup>50</sup> Particularly when the man camps are "undocumented," and do not appear on maps or formal town registries, law enforcement authorities have had trouble finding native women victims when they call for help.<sup>51</sup> Some tribes lack authority to prosecute domestic violence against their female members by non-native perpetrators because they have not obtained authority under the Violence Against Women Act re-authorization amendments. Moreover, tribes have virtually no say in the siting and development of mineral resources located off of their reservations, or the siting of man camps, yet they experience the consequences of these decisions in the form of environmental and cultural

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<sup>48</sup> See Hillary M. Hoffmann, *Fracking the Sacred: Resolving the Tension Between Unconventional Oil and Gas Development and Tribal Cultural Resources*, Denver Law Review (forthcoming 2016).

<sup>49</sup> Mary Annette Pember, "Brave Heart Women Fight to Ban Man Camps, Which Bring Rape and Abuse" (Aug. 28, 2013), <http://indiancountrytodaymedianetwork.com/2013/08/28/brave-heart-women-fight-ban-man-camps-which-bring-rape-and-abuse-151070>.

<sup>50</sup> *Id.* (noting that "According to a story in the Bismarck Tribune, North Dakota's Uniform Crime Report shows that violent crime is up 7.2 percent in the state and a record 243 rapes were committed in 2012, up from an already appalling 207 in 2011").

<sup>51</sup> *Id.*



destruction and sexual violence and abuse. Increasing the rate of mineral development near Indian Country will inevitably lead to more of these consequences for tribes.<sup>52</sup>

Finally, there are natural resource co-management agreements in place between the federal agencies and various tribes throughout the western states, giving tribes the authority to manage natural resources located on federal lands and including guarantees from the federal agencies that tribal natural resources will be safeguarded. Examples of these agreements in Nevada are the Pyramid Lake Paiute Tribe Fish Springs Ranch Settlement Agreement and the Washoe Tribe-Forest Service Agreement governing the Lake Tahoe Basin. There are many more agreements related to water, timber, and public lands management between the federal government and various tribes in the western states. It is unclear how either H.R. 866 or H.R. 1484 would account for and accommodate those co-management agreements with the tribes. If the agreements are based on other federal statutes or on treaties, it is unclear how authority or ownership could transfer to the states without interfering with these rights (in the case of treaties) or responsibilities (in the case of statutory authority). Under H.R. 1484, these co-management agreements would most likely be incompatible with the intensive revenue-generating goals for the newly acquired lands in Nevada. Under H.R. 866, there is potential for the state leasing authority to breach or otherwise disrupt the co-management agreements in Nevada and the other public lands states.

### **Conclusion**

I encourage the Subcommittee to consider all of the above consequences of H.R. 866 and H.R. 1484, for all of the above reasons. Thank you very much for the opportunity to submit this testimony.

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<sup>52</sup> *Id.* (describing similar threats to the Yankton Sioux Reservation, the Rosebud Sioux Reservation, and the Cheyenne River Sioux Reservation from the proposed Keystone XL pipeline).