

Federal Land Retention and the Constitution's Property Clause: The Original Understanding, 76 U. Colo. L. Rev. 327 (2005). In a nutshell, my findings were:

* Under the Property Clause (Art. IV, Sec. 3, Cl. 2), land titled to the federal government and held outside state boundaries is “Territory.” Federal land held within state boundaries is “other Property.”

* If the host state agrees, the federal government can acquire an “enclave” within the state under the Enclave Clause (I-8-17). This grants *governmental jurisdiction* to the federal government, but the federal government has to acquire *title* separately. Washington, D.C. (the most important enclave), for example, is under federal jurisdiction, but much of the land is held by other parties, including individuals.

* The Property Clause gives Congress unconditional power to dispose of property and authority to regulate what is already held. It does not mention a power to acquire.

* Under the Treaty Clause (II-2-2; see also Article VI), the federal government may acquire land outside state boundaries. As long as the area is governed as a territory, the federal government may retain any land it deems best.

* As for acreage (“other Property”) within state boundaries: Under the Necessary and Proper Clause, the federal government may acquire and retain land necessary for carrying out its enumerated powers. This includes parcels for military bases, post offices, buildings to house federal employees undertaking enumerated functions, and the like. It is not necessary to form federal enclaves for these purposes.

* But within state boundaries the Constitution grants no authority to retain acreage for unenumerated purposes, such as land for grazing, mineral development, agriculture, forests, or parks.

* Once a state is created and is thereby no longer a territory, the federal government has a *duty to dispose* of tracts not used for enumerated purposes.

* In the process of disposal, the federal government must follow the rules of public trust. It would be a breach of fiduciary duty for the feds to simply grant all of its surplus property to state governments. Each tract must be disposed of in accordance with the best interest of the American people. For example, natural wonders and environmentally sensitive areas (such as those now encompassed by the national parks) might be conveyed under strict conditions to state park authorities or (as in Britain) to perpetual environmental trusts. Land useful only for grazing, mining, or agriculture should be sold or homesteaded, with or without restrictions. The restrictions might include environmental protections, public easements, and protection for hunters and anglers.

Most states were admitted to the union pursuant to treaties, agreements of cession, and/or laws passed by Congress. These are called *organic laws*. They include, but are not limited to, enabling acts and acts of admission. These laws cannot change the Constitution, but they have some interesting ramifications for federal land ownership. That is a topic for another posting.