UTAH'S TRANSFER OF PUBLIC LANDS ACT: A LEGAL CASE FOR LOCALIZING LAND OWNERSHIP

KEY POINTS

Background

- Utah's Transfer of Public Lands Act (TPLA) calls on the federal government to fulfill its pledge under the state's Enabling Act to dispose of most federal lands in the state.
- The act has been challenged with arguments that the state gave up its public lands upon statehood, and that it is unconstitutional to demand the federal government dispose of these lands.

What's at stake?

- The federal government owns about two-thirds of Utah's land, including lands with significant economic potential from responsible development and tax revenues.
- Many of these lands that are eligible for development – excluding parks, wilderness areas, etc. – are being effectively cut off as economic resources by federal policies.
- Utah's public programs, including education, health and safety, and more, are unable to benefit from the economic and tax revenues these lands have the potential to provide.

What's next?

- Ultimately the courts will decide the fate of the TPLA, but the public will play a vital role through their elected representatives in whether the state is allowed access to its lands.
- Other Western states with significant federal lands holdings are considering similar legislation and closely watching the Utah battle to regain sovereignty over its lands.

Utah's Transfer of Public Lands Act is consistent with the intent of the state and the United States at the time of Utah's founding; does not conflict with the Property Clause of the U.S. Constitution; and would be equally valid if passed in other Western states.

EXECUTIVE SUMMARY

Only one-third of land in the state of Utah is locally owned. The other two-thirds is controlled from Washington, D.C. The Transfer of Public Lands Act (HB 148) puts some of those federal lands back in state hands. The act demands that the United States Congress transfer public lands within the state of Utah back to the state by Dec. 31, 2014 (with the exception of national parks and monuments, certain wilderness and Department of Defense areas, and tribal lands). The act also requires Utah to pay the United States 95 percent of the proceeds from the sale of any land, while the remaining 5 percent is reserved for school funding in Utah in accordance with its Enabling Act.[1] Opponents, including the Sierra Club and Southern Utah Wilderness Alliance, object to the Transfer of Public Lands Act as unconstitutional, but their legal arguments are misplaced. At the outset, the opponents face a heavy burden because state laws are presumed constitutional.[2] The opposition fails to satisfy its burden. The Transfer of Public Lands Act is a constitutional demand by the state.

The primary legal objection to the Transfer of Public Lands Act is based upon a provision in Utah's Enabling Act that required Utah to disclaim rights and title to all unappropriated public lands. The United States assumed federal ownership and control over that land.[3] But the Enabling Act, which is essentially a contract between the state and federal governments, must be read in the context of

the intent of the parties at the time it was entered. In that context, opponents cannot dispute that the United States was expected to dispose of public lands. Although there was no timeline in the Enabling Act for disposal, Utah's demand for the United States to complete it is now more than 100 years old, and well within the power and meaning of the founding documents.

Utah's demand does not conflict with the congressional power to regulate and dispose of public land in the Property Clause of the United States Constitution. Instead, the demand provides the necessary timeline and motivation for Congress to comply. This paper examines the rights and obligations of Utah and the United States regarding public lands at the time of the state's founding. It demonstrates that public land acts were predicated on a federal policy of disposal – a policy that is reflected in, and required by, Utah's founding documents. Finally, it demonstrates why the Property Clause and related legal opinions, upon which opponents of Utah's Transfer of Public Lands Act rely, fail to show that the act is invalid. The Transfer of Public Lands Act is not only constitutional, but is consistent with the intent of both the state and the United States at the time of Utah's founding.

LAND HISTORY

The first key to understanding Utah's land rights requires an examination of United States history. In the 1800s, the federal debt of the Revolutionary War was considered a common debt and the equal responsibility of the states. A natural and convenient way for states to pay their portion of the common debt was by selling unappropriated land within their bounds.[4] Revenue was generated from the sale of land for private purposes, and once the land was privately settled, further revenue could be derived from taxation. After a state's share of the war debt was discharged, revenue from the sale of land in the state would finance the new government. Selling unappropriated lands in the states also promoted social and economic development within the states, which was considered to be necessary and beneficial for individual and unified governing.[5] This purpose was to be achieved by encouraging private settlement (i.e., selling land to private settlers within the states). Education was another priority, with Congress promising 5 percent of the proceeds from the sale of public lands for a permanent interest fund to support common schools.[6]

THE TRANSFER OF PUBLIC LANDS ACT IS CONSTITUTIONAL AND IS CONSISTENT WITH THE INTENT OF BOTH THE STATE AND THE UNITED STATES AT THE TIME OF UTAH'S FOUNDING.

Early national policy – both before and after the creation of the federal government – demonstrated a consistent practice and design for selling public lands. Over half the delegates to the Continental Congress agreed on Oct. 10, 1780, "That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, ... shall be disposed of for the common benefit of the United States."[7] By 1828, a federal report of the Committee on Public Lands recommended expediting the sale of federal lands by gradually reducing the price. The report detailed the impermissibly slow rate at which the lands were being sold, which threatened "infinite injury" to the federal government because of the "unproductiveness of an immense of capital," and infinite injury to the states because of an "interminable suspension imposed upon cultivation and improvement, and upon the rights of eminent domain and taxation."[8] Citing the benefits of transferring federal lands to the states, the report concluded,

> [I]t would relieve Congress from the numerous and increasing causes for legislation in relation to [the lands]; it would leave them in the hands of a government intimately acquainted with their localities, consequently more capable of legislating upon the subject, and of turning them to the best account, in the promotion of education, improvements, and agriculture, the great purposes for which the God of nature designed them.[9]

The policy of federal disposal continued through 1832, when President Andrew Jackson encouraged Congress to reduce the price of public lands to "a price barely sufficient to reimburse to the United States the expense of the present system and the cost arising under our Indian compacts." Jackson explained, "It cannot be doubted that the speedy settlement of these lands constitutes the true interest of the republic."[10] A year later, Jackson reminded Congress of the importance of disposing of the federal lands. "It can not be supposed," wrote Jackson, "the compacts intended that the United States should retain forever a title to lands within the States which are of no value, and no doubt is entertained that the general interest would be best promoted by surrendering such lands to the States."[11]

Consistent with this context, the United States Supreme Court decided in 1845 "that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them."[12] In other words, the United States was to hold public lands temporarily, and in trust on condition that they would be released from federal ownership. It is this history upon which the state of Utah was founded.

UTAH'S ENABLING ACT

Utah was admitted to the Union on January 4, 1896. As with previous states, Utah's Enabling Act contained a provision for Utah to "forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, ... and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States."[13] According to the Enabling Act, Utah disclaimed title to its public lands in favor of the United States "until" the United States disposed of the lands, consistent with the federal policy of the previous century. Now, a century later, Utah demands that the United States comply.

Opponents of Utah's Transfer of Public Lands Act focus on the state's promise to "forever disclaim all right and title" in the state's Enabling Act.[14] But this ignores the remainder of the expectation expressed in the act that the United States hold title "until the title thereto shall have been extinguished by the United States."[15] The state's land grant was not an absolute transfer; it was a transfer "until" the United States "shall" dispose of the land. The state's agreement to disclaim title was predicated on a federal policy of disposal, and the word "shall" in the Enabling Act imposes a mandatory obligation by the United States to dispose of the land.[16] The Transfer of Public Lands Act is consistent with the original intent of Utah and the United States when the state was founded.

The legal question is whether to interpret Utah's Enabling Act in accordance with this intent, given that the

explanation is omitted in the text of the Act. Much legal debate is devoted to methods of constitutional interpretation, where textualists (who look only to the language of the constitution) challenge theorists of original intent (who look to the context surrounding the constitution at the time of enactment). Fortunately, there is no debate over which theory applies to the Enabling Act because the Enabling Act is not a constitution. It is an agreement between the United States and Utah. It is therefore effectively a "contract" between two parties.[17] In contractual interpretation, the long-standing cardinal rule is to interpret the text to give effect to the intent of the parties at the time they entered the contract.[18]

The intentions of the parties were clear in 1894. Utah forever disclaimed title to the land within its bounds for the United States to dispose of it. Revenue from the sale of the land would be used to pay the war debt, and settlement of the land would be encouraged to fund governmental operations and promote development of the land for the public interest. Five percent of the proceeds from the sale of federal lands would help fund Utah schools. Utah's Enabling Act must be interpreted to effectuate this intent.

BASED ON THE INTENT OF THE PARTIES, THE TEXT, AND THE CONTEXT OF THE ENABLING ACT, FEDERAL LANDS IN THE STATE MUST BE DISPOSED OF.

The intent of the parties at the time of the Enabling Act can be ascertained by reading Section 3, which disclaims public land for disposal by the United States, in conjunction with a related provision in the act. Intent is demonstrated by reading the entire Enabling Act as a whole, harmonizing and giving effect to each and every part.[19] In Section 9, the Enabling Act distributes the 5 percent of the proceeds from the sales of public lands to the state with the interest as a permanent fund for schools. Like Section 3, Section 9 presumes that the lands "*shall be sold*" by the United States.[20] Thus, again, the Enabling Act repeats that disposal of lands by the United States *must* follow. Both Section 3 and Section 9 of the Enabling Act identify the meaningful and mandatory duty of the United States to dispose of public lands in Utah. To read the presumption of disposal out of Section 3, as opponents of the Transfer of Public Lands Act attempt to do, requires nullifying a part of Section 9 as well, which cannot be done.[21]

An Enabling Act is not merely a symbolic record in history. It is an event of "uniquely sovereign character" that creates substantive rights – including land rights, which the U.S. Supreme Court has said cannot be diminished by later events.[22] Based on the intent of the parties, the text, and the context of the Enabling Act, federal lands in the state must be disposed of. Utah's Transfer of Public Lands Act rightfully demands fulfillment of this purpose.

UNITED STATES CONSTITUTION

Laws are always presumed to be constitutional.[23] Therefore, any attempt to declare the Transfer of Public Lands Act as a violation is met with a heavy burden.[24] The suggestion by opponents of the state Act, that the Property and Supremacy Clauses render it unconstitutional, fails to satisfy that burden.

The Property Clause authorizes the United States Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[25] According to the Supremacy Clause, federal law supersedes state law whenever the two conflict.[26] The U.S. Supreme Court twice struck down state actions in favor of the federal Property Clause because the two conflicted.[27] But the key in those cases is

that they both involved a conflict. In *Kleppe v. New Mexico*, the Supreme Court asked, could the United States require the preservation of wild horses on federal lands when the state had a policy of removing them? In *Gibson v. Chouteau*, the question was, did the plaintiff own certain land under federal law, or had the defendant usurped it pursuant to state law? Both positions could not be possible in each of those cases; only one could be correct. Under those circumstances, the federal law superseded the state. As the *Kleppe* Court explained, "where those state laws conflict with [a federal] Act, or with other [federal] legislation passed pursuant to the Property Clause, . . . [t]he state laws must recede."[28]

A STATE DEMAND FOR THE FEDERAL GOVERNMENT TO TRANSFER PUBLIC LANDS DOES NOT CONFLICT WITH A FEDERAL POWER TO DISPOSE OF PUBLIC LANDS.

Unlike the state laws in *Kleppe* and *Gibson*, there is no conflict between Utah's Transfer of Public Lands Act and the federal Property Clause. A state *demand* for the federal government to transfer public lands does not conflict with a federal *power* to dispose of public lands. In fact, the two complement each other. Courts will not look to create a conflict where there is none, and in fact, they do the opposite. If there is any possible way to interpret two laws harmoniously, a court must apply that interpretation.[29] For Utah's Transfer of Public Lands Act, a harmonious interpretation is not only possible, it is the most logical. Congress has the power under the Property Clause to dispose of public lands, and Utah demands under the Transfer of Public Lands Act that Congress exercise that power. The Property Clause does not swallow the state act, like it did in the *Kleppe* and *Gibson* cases, because the state law does not conflict with federal law.

Another reason the *Kleppe* and *Gibson* cases fail to invalidate the Transfer of Public Lands Act is because they do not address land disposal, which is the heart of Utah's act. In *Kleppe*, the United States Supreme Court held that Congress had "broad" power under the Property Clause to regulate wild horses on public lands.[30] The same broad power does not apply to the Transfer of Public Lands Act because the power to *regulate* is different from the power to *dispose*. In *Gibson*, the plaintiff owned a piece of land according to federal law, and the defendant owned it according to state law – a private dispute that does not relate to the federal disposal of public lands.

In a passage from *Gibson*, quoted extensively by the Office of Legislative Research and General Counsel in opposition to the Transfer of Public Lands Act, the Supreme Court explained that the Property Clause could not be embarrassed by state law:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.[31]

Unlike the state law in the *Gibson* case, Utah's demand for the United States to dispose of federal land does not embarrass the power of disposal. It assumes the federal

power exists. It does not attempt to remove or limit the federal exercise of disposal; instead, it *encourages* it. It is improper to extend the legal conclusions in *Gibson*, a case of a land dispute between two private individuals, to the disposal of public lands.

For example, it is clearly inaccurate to conclude, as opponents quote from *Gibson*, that "Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring property" when it comes to land disposal, when Congress is expressly bound by Section 9 of Utah's Enabling Act to pay 5 percent from all land sales to the state in support of education. Likewise, Congress may not hold the state's share of land proceeds for 100 or more years after a sale under the ruse of some "absolute power" verbiage from a private land dispute opinion. Nor can Congress hold public lands in Utah for more than 100 years without disposing of them. Instead, Congress is bound by the Enabling Act, a "solemn agreement" of "uniquely sovereign character" that is effectively a "contract" between two governments.[32] The United States may not unilaterally nullify that contract by any "subsequent events," or in this case, by subsequent federal inaction.[33] The Transfer of Public Lands Act "may be viewed as the remedy" for the failure of Congress to dispose of public lands in Utah.[34] As such, it is consistent with the U.S. Constitution and Supreme Court case law.

THE UNITED STATES MAY NOT UNILATERALLY NULLIFY THAT CONTRACT BY ANY "SUBSEQUENT EVENTS," OR IN THIS CASE, BY SUBSEQUENT FEDERAL INACTION.

A third Property Clause case cited by opponents of Utah's Transfer of Public Lands Act, *United States v. Gratiot*, does not save their theory.[35] In that case, the defendants objected to a federal lease, and the Supreme Court decided that the power to dispose of federal lands under the Property Clause included ("without limitation") the power to lease the lands.[36] This decision does nothing to show that the Transfer of Public Lands Act is unconstitutional, because upholding a congressional power to lease public lands does not forbid a state from demanding that Congress transfer them. Neither the *Gratiot* case nor any other is sufficient to satisfy the heavy burden of proving that a state law is unconstitutional.

CONCLUSION

The United States was required at Utah's founding to dispose of public lands, albeit on an open-ended timeline. The state's agreement to disclaim lands in favor of the United States was predicated on disposal, and the context of the Enabling Act memorialized these expectations in a binding contract. There is no case or other authority that forbids Congress from exercising its power to dispose of public lands by transferring them to the states, and nothing prohibits Utah from demanding that such action be completed by December 2014. The Transfer of Public Lands Act is a legally valid state law to compel local ownership of public lands in Utah.

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ENDNOTES

1. Sec. 9.
2. *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931).
3. The requirement was faithfully enacted in the Utah Constitution (art. III, sec. 2), and Utah was admitted as a state in 1896.
4. Kristina Alexander & Ross W. Gorte, *Report for Congress, Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention* 4 (Congressional Research Service, Dec. 3, 2007); *see also Pollard v. Hagan*, 44 U.S. 212, 224 (1845).
5. *Id.*
6. *E.g.*, Utah Enabling Act, Sec. 9 (1894).
7. 18 Journals of the Continental Congress 915 (Oct. 10, 1780).
8. Report to the House of Representatives, No. 639: Reduction and Graduation of the Price of the Public Lands, 20th Congress, 1st Session, Public Lands: Volume 5, p. 448 (Feb. 5, 1828).
9. *Id.*, p. 449.
10. Fourth Annual Message to Congress (Dec. 4, 1832).
11. Veto Message (Dec. 4, 1833).
12. *Pollard*, 44 U.S. at 222.
13. Utah Enabling Act, Sec. 3.
14. *Id.*
15. *Id.*
16. *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (using the term *shall* "creates an obligation impervious to judicial discretion").
17. *Andrus v. Utah*, 446 U.S. 500, 507 (1980).
18. *Miller v. Robertson*, 266 U.S. 243, 251 (1924); *Creason v. Peterson*, 470 P.2d 403, 405 (Utah 1970) (it is a "well settled rule of law that conveyances of property are to be construed in accordance with the intentions of the parties").
19. *Miller*, *supra*; *Flood v. ClearOne Comm'ns, Inc.*, 618 F.3d 1110, 1125 (10th Cir. 2010).
20. Section 9 of the Utah Enabling Act provides,
    That five per centum of the proceeds of the sales of 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, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State.
    (italics added).
21. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) ("a document should be read to give effect to all its provisions and to render them consistent with each other").
22. *Haw. v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009) (quoting *Idaho v. U.S.*, 533 U.S. 262, 284 (2001) (Rehnquist, C.J., dissenting)).
23. *See* n. 1, *supra*.
24. *See Fleming v. Nestor*, 363 U.S. 603, 617 (1960) ("the presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it. It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void.") (internal quotation omitted).
25. U.S. Constitution art. IV, sec. 3, cl. 2.
26. U.S. Constitution art. VI, cl. 2.
27. *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Gibson v. Chouteau*, 80 U.S. 92 (1871).

28. 426 U.S. at 543.
29. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).
30. 426 U.S. at 539.
31. *Gibson*, 80 U.S. at 99.
32. *Andrus*, 446 U.S. at 507; *Haw.*, 556 U.S. at 176 (quoting *Idaho*, 533 U.S. at 284 (Rehnquist, C.J., dissenting)).
33. *See id.*
34. *See Andrus*, 446 U.S. at 507. The "remedy" in the Transfer of Public Lands Act (transferring certain public lands in Utah back to the state) would not occur until December 31, 2014, should such lands remain federally owned at that time.
35. 39 U.S. 526 (1840).
36. 39 U.S. at 537.

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