



Utah State Legislature

Senate • Utah State Capitol Complex • 320 State Capitol
PO BOX 145115 • Salt Lake City, Utah 84114-5115
(801) 538-1035 • fax (801) 538-1414

House of Representatives • Utah State Capitol Complex • 350 State Capitol
PO BOX 145030 • Salt Lake City, Utah 84114-5030
(801) 538-1029 • fax (801) 538-1908

November 17, 2014

Dear _____,

We are writing in regard to present and future proposals to transfer, sell, or exchange state land in Utah with the federal government. The Utah Legislature fully supports efforts to strengthen our Nation's defensive capabilities. The Utah Test and Training Range is a crucial part of these efforts. Additionally, Hill Air Force Base continues to be a critical and necessary part of the strategic research and preparedness plans for our Armed Forces, as well as an integral part of Utah's economic well-being. We stand ready and willing to assist. We believe that a land exchange proposal can be achieved that benefits the United States, the State of Utah, and Utah's School and Institutional Trust Lands Administration (SITLA), as envisioned at statehood in 1896.

This letter discusses (1) the necessary involvement of the Utah Legislature under state law for all land exchanges involving SITLA lands; (2) the requirement imposed by the Enclave Clause of the United States Constitution that the federal government obtain state consent to exercise exclusive jurisdiction over newly acquired land; and (3) arguments in support of the Legislature's involvement in land sales and exchanges with the federal government, based upon general principles of federalism.

Senator Hatch has recently proposed an exchange of land currently owned by the federal Bureau of Land Management (BLM) and Utah's School and Institutional Trust Lands Administration. In order to allow for the testing of more advanced weapons, Senator Hatch's proposed bill would enlarge the Utah Test and Training Range and create buffer areas around the testing range. To accomplish that enlargement, BLM would exchange SITLA-owned lands within the proposed buffer area with lands owned by the BLM ~~that are contiguous to SITLA-owned lands~~ outside the proposed buffer area. **Under the initial proposal ...** The exchange would not be an acre-for-acre swap; instead, there would be a net increase of federal land holdings in Utah and a net decrease in SITLA-owned land.

Section 63L-2-201 of the Utah Code deals with the transfer of certain state lands to the United States government. Under that section, SITLA may not legally bind the state by executing an agreement to sell or transfer any state lands or school and institutional trust lands unless certain conditions are met, including review or approval by the Utah Legislature in certain circumstances. In this case, Senator Hatch's proposal involves the transfer of over 68,000 acres of relevant state land. Therefore, SITLA will need either a recommendation from the Legislative Management Committee or the approval of the full Legislature before executing the transfer.

Senator Hatch's current proposal invites a broader discussion of the role the Utah Legislature must play in any transfer, sale, or exchange of public land with the federal government. We would argue that the Legislature is a necessary participant in any proposed transfer, sale, or exchange, and urge the Congressional Delegation to involve the Utah Legislature early in various negotiations.

Article I of the United States Constitution limits the legislative power that Congress may obtain over property it acquires within a state. The Enclave Clause of the Constitution provides that Congress shall have power to "exercise exclusive jurisdiction" over the District of Columbia and "exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

However, the United States Supreme Court has held that when the federal government purchases land within a state but does so without the state Legislature's consent, "the United States does not obtain the benefits of [the Enclave Clause,] its [the federal government's] possession being simply that of an ordinary proprietor." *Paul v. United States*, 371 U.S. at 263 (1963). In that case, "the State could have exercised the same authority and jurisdiction which she [the state] could have exercised over similar property held by private parties." *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. at 527 (1885). The Court goes on to say, "Where lands are acquired without such consent [of the state legislature], the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals." *Ft. Leavenworth*, 114 at 531.

The Enclave Clause requires the federal government to obtain the consent of the Utah Legislature in order for federal law to govern exclusively over any property the federal government acquires within the state. Without that consent, state law would govern to the extent that it would not be in conflict with or be otherwise preempted by federal law. Furthermore, states may give their consent and the federal land still may be subject to some local regulation. See, for example, *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624, 626-27, (1953), stating that,

A state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States. Kentucky's consent to this acquisition gave the United States power to exercise exclusive jurisdiction within the area. A change of municipal boundaries did not interfere in the least with the jurisdiction of the United States within the area or with its use or disposition of the property. The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not

antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Although the federal government may have exclusive ownership of a tract of land, exclusive jurisdiction over newly purchased land can only be given to the federal government by the state Legislature.

The role of the state Legislature in relation to state-federal land transfers is based upon the fundamental principles of federalism. James Madison illustrated this principle by describing the government formed by the United States Constitution as a "compound republic of America" in which "the power surrendered by the people is first divided between two distinct governments. . . . Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." THE FEDERALIST NO. 51, ¶ 9 (James Madison). Additionally, Madison explained that "the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere." THE FEDERALIST NO. 39, ¶ 14 (James Madison).

The fundamental principle of federalism is echoed throughout many United States Supreme Court opinions. Just last year, in striking down a federal regulation of state election law in *Shelby County v. Holder*, the Court reiterated that "States retain sovereignty under the Constitution," 133 S.Ct. 2612, 2623 (U.S. 2013), and in 2011 the Court held that federalism concerns could satisfy a standing issue, stating that "[t]he allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right. But that is not its exclusive sphere of operation. . . . Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. U.S.*, 131 S.Ct. 2355, 2364 (2011) (citations omitted). See also *Bond v. U.S.*, 131 S.Ct. 2355, 2364 (2011) (citations omitted).

The principle of federalism is apparent in the construction of the Constitution and the writings of the founders, and that principle is articulated and reinforced in the decisions of the United States Supreme Court and the opinions of its justices. Federalism is the fundamental argument underlying all of the arguments suggested in this letter: that the state and federal governments are distinct sovereigns, dividing sovereignty between them, and serving as checks on one another,

Unless the federal government can show a constitutional grant of authority that preempts the state's involvement, the state retains the authority to decide whether to authorize land sales and transfers to the federal government. The Legislature, as the branch closest to the people, should be the state entity that decides whether the state should sell or transfer the land. In *National Federation of Independent Business v. Sebelius*, the case in which the Court upheld the individual mandate of the Patient Protection and Affordable Care Act, Supreme Court Chief Justice John Roberts opined about the important role of states as independent sovereigns. He explained the basic principles of federalism, namely that "the National Government possesses only limited powers; the States and the people retain the remainder." He reiterated that the federal government "can exercise only the powers granted to it," and that because of the limited scope of federal power, the federal government "must show that a constitutional grant of power authorizes each of its actions." See generally 132 S.Ct. 2566 (2012).

Chief Justice Roberts's federalism principles are reflected in a recent ruling by a Utah federal judge. The judge held that federal protections of prairie dogs in Utah were unconstitutional because the federal government could not show that the prairie dogs had a sufficiently substantial effect on interstate commerce to be within the scope of Congress's power to regulate under the Commerce Clause of the United States Constitution. *People for the Ethical Treatment of Prop. Owners v. United States Fish and Wildlife Serv.*, No. 2:13-cv-00278-DB (D. Utah filed Nov. 4, 2014).

The State of Utah is a separate and distinct sovereign. The reality of that distinct sovereignty requires that the federal government recognize and involve the Legislature in state land transfers. In *Sebelius*, Roberts spoke of states choosing whether to accept conditional grants of federal funds, stating that "[the court] look[s] to the States to defend their prerogatives by adopting 'the simple expedient of not yielding' to federal blandishments when they do not want to embrace the federal policies as their own. States are separate and independent sovereigns. Sometimes they have to act like it."

The Legislature's involvement in state land transfers serves a necessary function as a check on the federal government. Chief Justice Roberts's opinion in *Sebelius* emphasized the importance of states as sovereigns: "The independent power of the States also serves as a check on the power of the Federal Government: 'By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.'"

With the understanding of the above fundamental principles, it is clear that any proposal of sale, transfer, or exchange of state land to or with the federal government must begin with the involvement of the Utah Legislature. Additionally, approval by the Utah Legislature is necessary to finalize any agreement that involves SITLA lands. We appreciate the work done so far by members of Utah's Congressional Delegation, and we anticipate cordial and fruitful communication as we move toward an agreement of mutual benefit, not only at present, but also as future sales, transfers, or exchanges are contemplated.

Sincerely,