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ATTORNEY-CLIENT PRIVILEGE

To: Speaker Rebecca Lockhart
Rep. Mel Brown
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From: The Office of Legislative Research and General Counsel

Re: The role of the Utah Legislature in state land transfers to the federal government

Introduction

You have asked our office to research and formulate arguments that the Utah Legislature could make in relation to two issues: first, the Legislature's role in approving land exchanges between the School and Institutional Trust Lands Administration (SITLA) and the federal government under Senator Orrin Hatch's proposal to expand the Utah Test and Training Range; and second, the general need for the involvement of the Utah Legislature in matters involving the transfer or sale to the federal government of any lands owned by the state. This document discusses (1) the necessary involvement of the Utah Legislature under state law for all land exchanges involving SITLA lands, including those involved in Senator Hatch's proposal for expansion of the Utah Test and Training Range; (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; (3) arguments that could be made to support the Legislature's involvement in land sales and exchanges with the federal government, based upon general principles of federalism; and (4) options for legislation to ensure the Legislature's role in future transfers or sales of state lands.[1]

[1] This paper identifies general arguments that could be made by the Utah Legislature to assert that it should play a significant role in the decision by Utah government entities to sell to, or exchange state land with, the federal government. It presents possible arguments; it does not analyze the validity of those arguments, nor does it articulate or analyze the details and nuances of those arguments. Presently, many states, including Utah, are asserting federalism principles more aggressively. It is conceivable that future decisions by the United States Supreme Court could dramatically change the current landscape and jurisprudence regarding federalism and federal lands.

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1. **Senator Hatch's proposed land exchange requires legislative approval under existing state law and under the terms of the proposal.**

Senator Hatch has 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. 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.

As provided in Section 63L-2-201, if the proposed sale or transfer involves 10,000 or more acres of state school and institutional trust lands, SITLA must submit the proposal to the Legislature for its approval or rejection, or, in the interim, to the Legislative Management Committee for its review. The Legislative Management Committee may then recommend that the agency execute or reject the agreement or that the governor call a special session of the Legislature to review and approve or reject the agreement. In this case, Senator Hatch's proposal involves the transfer of over 68,000 acres of relevant state land. Therefore, it is clear that SITLA will need either a recommendation from the Legislative Management Committee or the approval of the full Legislature before executing the proposed transfer.

The pending federal legislation executing the land swap reinforces the need for involvement by the Utah Legislature. Section 2873 of Senator Hatch's proposed bill states, "If the State[2] offers to convey to the United States title to the non-Federal land," the Secretary of the Interior shall accept the land. Therefore, under the terms of the proposed land swap and because SITLA cannot act without the approval of the

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[2] Defined in the amendment as the "State of Utah, acting through the School and Institutional Trust Lands Administration," without reference to either the Legislature or Governor. However, as previously discussed, SITLA is not empowered to act in this case without legislative approval.

Legislature or the recommendation of the Legislative Management Committee, the Legislature is a necessary participant in this particular proposed exchange.

2. **The Enclave Clause of the United States Constitution requires the federal government to obtain the consent of the state in order to exercise exclusive jurisdiction over newly acquired land within the state.**

Article I of the United States Constitution addresses the legislative power that Congress may obtain over property it acquires within a state. The Enclave Clause of the Constitution provides that Congress shall "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."[3]

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."[4] 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."[5]

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[3] United States Constitution, Art. I, § 8, cl. 17 (emphasis added).

[4] *Paul v. United States,* 371 U.S. at 263 (1963).

[5] *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. *See also Chicago, R.I. & P. Ry. Co. v. McGlinn,* 114 U.S. 542, 545-46 (1885), stating,

> But, in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the state. This is the only mode prescribed by the federal constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended. We also held that it is competent for the legislature of a state to cede exclusive jurisdiction over places needed by the general government in the execution of its powers, the use of the places being, in fact, as much for the people of

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 purchases 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.[6] 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.[7]

> the state as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes.

[6] *See, e.g., 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.

[7] The issue of jurisdiction over land within a state held by the federal government is complicated because ownership of title to the land and legislative jurisdiction on the land are separate issues. The United States Supreme Court has held that the Property Clause of the United States Constitution (Art. IV, Sec. 3) grants Congress power to legislate concerning any land it owns. *Kleppe v. New Mexico*, 426 U.S. 529, 542–43 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. *Mason Co. v. Tax Comm'n of Washington*, 302 U.S. 186, 197 (1937); *Utah Power & Light Co. v. United States*, 243 U.S. 309, 403–05 (1917); *Ohio v. Thomas*, 173 U.S. 276, 283 (1899).") Therefore, where the federal government has not retained or obtained exclusive jurisdiction under the Enclave Clause but retains ownership of the land, the federal and state governments have concurrent jurisdiction; although Congress may still enact legislation concerning the specific land it owns, state law would govern. However, the United States Supreme Court's decision in *Kleppe* may have improperly ignored the Court's Property Clause precedent, incorrectly creating a new Article IV exception to state jurisdiction over federally owned land. David E. Engdahl, *Symposium: Federalism and Energy: State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 347 (1976). The degree to which each sovereign may exercise jurisdiction over a piece of federal land subject to the sovereign's concurrent jurisdiction is unclear. The state would certainly present Engdahl's argument challenging *Kleppe*'s premises and conclusions. The state could also argue that, because the

3. **Arguments related to federalism support the Legislature's involvement.**

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."[8] 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."[9]

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, the Court reiterated that "States retain sovereignty under the Constitution,"[10] 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."[11]

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

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federal government failed to seek exclusive jurisdiction under the Enclave Clause, the federal government ought to defer to state jurisdiction when conflicts arise between the two sovereigns. The state would argue that the federal government should defer both because the federal government had another remedy (a state legislature's grant of exclusive jurisdiction under the Enclave Clause) and under general federalism principles.

[8] THE FEDERALIST NO. 51, ¶ 9 (James Madison).

[9] THE FEDERALIST NO. 39, ¶ 14 (James Madison).

[10] *Shelby County v. Holder*, 133 S.Ct. 2612, 2623 (U.S. 2013). *See also Coyle v. Smith*, 221 U.S. 559, 567 (1911) ("'This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.")

[11] *Bond v. U.S.*, 131 S.Ct. 2355, 2364 (2011) (citations omitted).

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 section: that the state and federal governments are distinct sovereigns, that our system of government divides sovereignty between them, and that each sovereign serves as a check on the other. In addition to arguing this basic principle, the Legislature may make several other arguments, based on federalism, that the Legislature must be involved in transfers of state lands.

The Utah Legislature could argue that, 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*,[12] the case in which the Court upheld the individual mandate of the Patient Protection and Affordable Care Act, Supreme Court Chief Justice John Roberts expressed his opinion 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."[13] He reiterated that the federal government "can exercise only the powers granted to it,"[14] 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."[15] Chief Justice Roberts's federalism principles are reflected in a recent ruling by a Utah federal judge in United States District Court. 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.[16]

The Utah Legislature could also argue that the State of Utah is a separate and distinct sovereign. The reality of that distinct sovereignty requires that the federal

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[12] 132 S.Ct. 2566 (2012).

[13] *Id.* at 2577 (Roberts, C.J., writing separately).

[14] *Id.* (quoting *Mcculloch v. Maryland*, 4 Wheat. 316, 405 (U.S. 1819).

[15] *Id.*

[16] *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).

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."[17]

The Utah Legislature could argue that 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.'"[18]

In addition to Roberts's checks and separate sovereignty arguments, the Utah Legislature could also argue that the federal government is estopped from treating the states as anything other than distinct and separate sovereigns that have exclusive authority to act within their sovereign sphere. The federal Public Land Law Review Commission published a report to Congress and the President that outlined the ways in which the federal government's interaction with states at the time of their admission to the union reflects their nature as independent sovereigns.[19] The United States Supreme Court has echoed that idea: "As Utah correctly emphasizes, the school land grant was a 'solemn agreement' which in some ways may be analogized to a contract between private parties. The United States agreed to cede some of its

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[17] *Id.* at 2603 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)).

[18] *Id.* (citing *Bond*, 131 S.Ct. at 2364).

[19] Public Land Law Review Commission, *One Third of the Nation's Land: a Report to the President and to the Congress*, 244 (1970) ("At the time of admission to the Union, each state in effect entered into a compact with the United States setting for the terms of its admission, and we do not believe that they should be disturbed." *Id.* at 240. "[P]ublic land grants to states have not been strictly unilateral bounties, but rather important elements of bilateral compacts. These varied widely according to the circumstances of the times, and Federal land grants were part of the package. In our view, equity does not demand adjustments in these sovereign contracts." *Id.* Referring to Nevada's admission to the Union and the negotiations and choices it made, the Commission said "[t]he history of this transaction underlines the facts that the grants represent the consummation of contract negotiated between the Federal Government and the states." *Id.* at 245). *See also* 3-60 American Law of Mining, 2nd Ed. § 60.03 ("The various enabling acts were created as a result of negotiation between the federal government and the prospective state and are viewed as bilateral compacts").

land to the State in exchange for a commitment by the State to use the revenues derived from the land to educate the citizenry."[20]

The Utah Legislature could argue that while Utah's Enabling Act ceded "right and title" to Utah's "unappropriated public lands" to the federal government, it only ceded jurisdiction to the federal government over Indian lands, never ceding jurisdiction over "unappropriated public lands." Therefore, the argument could contend that the state retained jurisdiction under the state's Enabling Act, leaving the federal government with only proprietary jurisdiction under the Enclave Clause, and thus requiring it to comply with state laws that are not preempted. [21]

The Utah Legislature could make some, or all, of these arguments to the federal government, other branches of state government, and to Utah's local governments in support of its position that the Utah Legislature should approve or reject each proposed sale or exchange of state land to or with the federal government.

4. **Recommendations for ensuring the Utah Legislature's involvement in future transfers of state land to the federal government.**

The Utah Legislature could reinforce its responsibility to approve or reject state land transfer, sale, or exchange agreements with the federal government by enacting legislation establishing a mandatory process to be followed that includes legislative involvement. Section 63L-2-201 (requiring legislative approval for transfers of more than 10,000 acres of SITLA land) provides an existing model for required legislative approval. There are several options to implement a requirement that the Legislature must approve any future land transfers.

The Legislature could amend Title 63L to include a procedure that involves the Legislature whenever lands exceeding a certain number of acres that are owned by the state or its political subdivisions are transferred, exchanged, or sold to the federal government. The 10,000 acre threshold for SITLA land transfers described above does not take into account the identity of the party acquiring the land. Creating a procedure specific to land transfers to the federal government would ensure that the

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[20] *Andrus v. Utah*, 446 U.S. 500, 507 (1980) ("These agreements were solemn bilateral compacts between each State and the Federal Government." *Id.* at 523 (citing *United States v. Morrison*, 240 U.S. 192, 201–02 (1916); *Cooper v. Roberts*, 59 U.S. 173, 177–79 (1855))).

[21] *See Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 531 (1885); *Paul v. United States*, 371 U.S. 246, 264 (1963) (explaining that if the state does not cede jurisdiction to the federal government, the federal government's interest is that of an "ordinary proprietor").

federal government could not usurp the Legislature in dealing solely with another state or local entity.

Similarly, the Legislature could require that the Legislature pass a joint or concurrent resolution before any transfer, exchange, or sale of land to the federal government could be executed by a state or local entity.

The Legislature could clarify Section 63L-2-201 to mandate legislative approval in either a general or special session, even if the Legislative Management Committee recommends that SITLA execute a sale or exchange agreement. If SITLA moves forward when the Legislative Management Committee recommends that SITLA execute an agreement or proposal, the Legislative Management Committee's "recommendation" is essentially an "approval" without the actual consideration of the full Legislature. Requiring that the entire Legislature approve or reject proposed state land sales to, or exchanges with, the federal government would ensure that the entire Legislature has an opportunity to study, debate, and vote on the issue.

The Legislature could amend Section 63L-1-202 to remove or otherwise limit the governor's authority to execute conveyances to the federal government. In Section 63L-1-201, the state ceded jurisdiction to the United States "in, to and over any and all lands or territory within this state which have heretofore been acquired by the United States by purchase, condemnation or otherwise" for purposes of the Enclave Clause, "whenever authorized by Act of Congress, and in, to and over any and all lands or territory within this state now held by the United States under lease, use permit, or reserved from the public domain for any of the purposes aforesaid." Section 63L-1-202 grants authority to the governor to execute conveyances pursuant to this cession of jurisdiction: "The governor is hereby authorized and empowered to execute all proper conveyances in the cession herein granted, upon request of the United States or the proper officers thereof, whenever any land shall have been acquired, leased, used, or reserved from the public domain for such purposes." These statutes do not preclude the Legislature's review of SITLA land transfer proposal, but they appear to delegate broad powers over state land sales and exchanges to the governor.

In order to encourage the federal government to negotiate with the Legislature when seeking to purchase or exchange land with the state, the Legislature could require a waiting period before state land transfers could take effect. For example, the Legislature could require that a proposed land transfer may only be approved by it 30 days following the day on which the full Legislature had an opportunity to hear the proposal. A waiting period would force the federal government to involve the Legislature earlier in the process.

The Legislature could, by formal resolution or through informal channels, request that Congress enact federal legislation formally recognizing and institutionalizing a federal requirement that any land transfers within a state be not only proposed to the relevant state legislature, but require its direct involvement in negotiation and its approval or rejection of the proposal.

Conclusion

It is clear that the Legislature is a necessary party to the SITLA land transfer proposed by Senator Hatch, both under the provisions of his proposed bill and under Utah law. Under the Enclave Clause, the only way for the federal government to ensure that it has exclusive jurisdiction over land within a state is to purchase that land with the consent of the Legislature, which would cede the state's jurisdiction to the federal government. For future land transfers, there are several arguments, based on the principles of federalism, that the Legislature should always be involved in those decisions. Finally, the Legislature could enact or amend state law to create a process securing its involvement in land transfers between Utah and the federal government.