

Representative Kenneth W. Sumsion proposes the following substitute bill:

PUBLIC LANDS LITIGATION

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kenneth W. Sumsion

Senate Sponsor: Wayne L. Niederhauser

LONG TITLE

General Description:

This bill amends and enacts provisions related to actions filed by the attorney general on property possessed by the federal government and the appropriation of funds for those actions.

Highlighted Provisions:

This bill:

- ▶ appropriates money from the Land Exchange Distribution Account to the Constitutional Defense Council Restricted Account for legal services and just compensation for property taken;
- ▶ directs the attorney general to file certain eminent domain or quiet title actions on property possessed by the federal government;
- ▶ authorizes the attorney general to file an action to enforce a section of the Utah Enabling Act; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

This bill appropriates \$1,000,000 from the Land Exchange Distribution Account for fiscal years 2010-11, 2011-12, and 2012-13 only to the Constitutional Defense Council Restricted Account.



26 **Other Special Clauses:**

27 None

28 **Utah Code Sections Affected:**

29 AMENDS:

30 **53C-3-203**, as last amended by Laws of Utah 2008, Chapter 216

31 **63C-4-102**, as last amended by Laws of Utah 2009, Chapter 121

32 **63C-4-103**, as last amended by Laws of Utah 2009, Chapter 121

33 ENACTS:

34 **67-5-29**, Utah Code Annotated 1953



36 *Be it enacted by the Legislature of the state of Utah:*

37 Section 1. Section **53C-3-203** is amended to read:

38 **53C-3-203. Land Exchange Distribution Account.**

39 (1) As used in this section, "account" means the Land Exchange Distribution Account
40 created in Subsection (2)(a).

41 (2) (a) There is created within the General Fund a restricted account known as the Land
42 Exchange Distribution Account.

43 (b) The account shall consist of all revenue deposited in the account as required by
44 Subsections 53C-3-202(2)(a)(ii) and (2)(b)(ii).

45 (3) (a) The state treasurer shall invest monies in the account according to Title 51,
46 Chapter 7, State Money Management Act.

47 (b) The Division of Finance shall deposit interest or other earnings derived from
48 investment of account monies into the General Fund.

49 (4) [~~For fiscal years beginning on or after fiscal year 2007-08, because the revenue is~~
50 ~~not derived from taxes, the~~] The Legislature shall annually appropriate from the account in the
51 following order:

52 (a) \$1,000,000 to the Constitutional Defense Council Restricted Account, created in
53 63C-4-103, to be used in accordance with Subsection 63C-4-103(6) for:

54 (i) fiscal year 2010-11;

55 (ii) fiscal year 2011-12; and

56 (iii) fiscal year 2012-13; and

57 (b) from the deposits to the account remaining after the appropriation in Subsection
 58 (4)(a), the following amounts:

59 ~~[(a)]~~ (i) 55% of ~~[aH]~~ the deposits ~~[made to the account]~~ to counties in amounts
 60 proportionate to the amounts of mineral revenue generated from the acquired land, exchanged
 61 land, acquired mineral interests, or exchanged mineral interests located in each county, to be
 62 used to mitigate the impacts caused by mineral development;

63 ~~[(b)]~~ (ii) 25% of ~~[aH]~~ the deposits ~~[made to the account]~~ to counties in amounts
 64 proportionate to the total surface and mineral acreage within each county that was conveyed to
 65 the United States under the agreement or an exchange, to be used to mitigate the loss of
 66 mineral development opportunities resulting from the agreement or exchange;

67 ~~[(c)]~~ (iii) 1.68% of ~~[aH]~~ the deposits ~~[made to the account]~~ to the State Board of
 68 Education, to be used for education research and experimentation in the use of staff and
 69 facilities designed to improve the quality of education in Utah;

70 ~~[(d)]~~ (iv) 1.66% of ~~[aH]~~ the deposits ~~[made to the account]~~ to the Geological Survey, to
 71 be used for natural resources development in the state;

72 ~~[(e)]~~ (v) 1.66% of ~~[aH]~~ the deposits ~~[made to the account]~~ to the Water Research
 73 Laboratory at Utah State University, to be used for water development in the state; and

74 ~~[(f)]~~ (vi) 7.5% of ~~[aH]~~ the deposits ~~[made to the account]~~ to the Constitutional Defense
 75 Restricted Account created in Section 63C-4-103.

76 (5) For fiscal years 2007-08 and 2008-09, the Legislature shall annually appropriate
 77 ~~[from the account]~~ 7.5% of ~~[aH]~~ the deposits ~~[made to the account]~~ remaining in the account
 78 after the appropriation is made in accordance with Subsection (4)(a) to the Geological Survey,
 79 to be used for test wells and other hydrologic studies in the West Desert.

80 (6) For fiscal years beginning on or after fiscal year 2009-10, the Legislature shall
 81 annually appropriate ~~[from the account]~~ 7.5% of ~~[aH]~~ the deposits ~~[made to the account]~~
 82 remaining in the account after the appropriation is made in Subsection (4)(a) to the Permanent
 83 Community Impact Fund created in Section 9-4-303, to be used for grants to political
 84 subdivisions of the state to mitigate the impacts resulting from the development or use of
 85 school and institutional trust lands.

86 Section 2. Section **63C-4-102** is amended to read:

87 **63C-4-102. Duties.**

- 88 (1) The Constitutional Defense Council is a council to assist the governor and the
89 Legislature on the following types of issues:
- 90 (a) the constitutionality of unfunded federal mandates;
 - 91 (b) when making recommendations to challenge the federal mandates and regulations
92 described in Subsections (1)(e)(i) through (v), the rationale for and effectiveness of those
93 federal mandates or regulations;
 - 94 (c) legal and policy issues surrounding state and local government rights under R.S.
95 2477;
 - 96 (d) legal issues relating to the rights of the School and Institutional Trust Lands
97 Administration and its beneficiaries; and
 - 98 (e) the advisability, feasibility, estimated cost, and likelihood of success of challenging:
99 (i) federal court rulings that hinder the management of the state's prison system and
100 place undue financial hardship on the state's taxpayers;
 - 101 (ii) federal laws or regulations that reduce or negate water rights or the rights of owners
102 of private property, or the rights and interest of state and local governments, including
103 sovereignty interests and the power to provide for the health, safety, and welfare, and promote
104 the prosperity of their inhabitants;
 - 105 (iii) conflicting federal regulations or policies in land management on federal land;
 - 106 (iv) federal intervention that would damage the state's mining, timber, and ranching
107 industries;
 - 108 (v) the authority of the Environmental Protection Agency and Congress to mandate
109 local air quality standards and penalties; and
 - 110 (vi) other issues that are relevant to this Subsection (1).
- 111 (2) The council shall:
- 112 (a) provide advice to the governor, state planning coordinator, and the public lands
113 policy coordinator concerning coordination of:
114 (i) state and local government rights under R.S. 2477; and
115 (ii) other public lands issues;
 - 116 (b) approve a plan for R.S. 2477 rights developed in accordance with Section
117 63C-4-104; and
 - 118 (c) review, at least quarterly:

119 (i) financial statements concerning implementation of the plan for R.S. 2477 rights;
120 and

121 (ii) financial and other reports from the Public Lands Policy Coordinating Office
122 concerning its activities.

123 (3) The council chair may require the attorney general or a designee to provide
124 testimony on potential legal actions that would enhance the state's sovereignty or authority on
125 issues affecting Utah and the well-being of its citizens.

126 (4) The council chair may direct the attorney general to initiate and prosecute any
127 action that the council determines will further its purposes, including an action described in
128 Section 67-5-29.

129 (5) (a) Subject to the provisions of this section, the council may select and employ
130 attorneys to implement the purposes and duties of the council.

131 (b) The council chair may, in consultation with the council, direct any council attorney
132 in any manner considered appropriate by the attorney general to best serve the purposes of the
133 council.

134 (c) The attorney general shall negotiate a contract for services with any attorney
135 selected and approved for employment under this section.

136 (6) The council chair shall, only with the concurrence of the council, review and
137 approve all claims for payments for:

138 (a) legal services that are submitted to the council[-]; and

139 (b) an action filed in accordance with Section 67-5-29.

140 (7) Within five business days' notice, the council chair may, with the concurrence of
141 the council, order the attorney general or an attorney employed by the council to cease work to
142 be charged to the fund.

143 (8) (a) At least 20 calendar days before the state submits comments on the draft
144 environmental impact statement or environmental assessment for a proposed land management
145 plan of any federal land management agency, the governor shall make those documents
146 available to:

147 (i) members of the council; and

148 (ii) any county executive, county council member, or county commissioner of a county
149 that is covered by the management plan and that has established formal cooperating agency

150 status with the relevant federal land management agency regarding the proposed plan .

151 (b) (i) Council members or local government officials receiving the documents may
152 make recommendations to the governor or the governor's designee concerning changes to the
153 documents before they are submitted to the federal land management agency.

154 (ii) Council members or local government officials shall submit recommendations to
155 the governor or the governor's designee no later than 10 calendar days after receiving the
156 documents under Subsection (8)(a).

157 (c) Documents transmitted or received under this Subsection (8) are drafts and are
158 protected records pursuant to Subsection 63G-2-305(22).

159 (9) The council shall submit a report on December 1 of each year to the speaker of the
160 House of Representatives and the president of the Senate that summarizes the council's
161 activities.

162 Section 3. Section **63C-4-103** is amended to read:

163 **63C-4-103. Creation of Constitutional Defense Restricted Account -- Sources of**
164 **funds -- Uses of funds -- Reports.**

165 (1) There is created a restricted account within the General Fund known as the
166 Constitutional Defense Restricted Account.

167 (2) The account consists of monies from the following revenue sources:

168 (a) monies deposited to the account as required by Section 53C-3-203;

169 (b) voluntary contributions;

170 (c) monies received by the Constitutional Defense Council from other state agencies;

171 and

172 (d) appropriations made by the Legislature.

173 (3) Funds in the account shall be nonlapsing.

174 (4) The account balance may not exceed [~~\$2,000,000~~] \$5,000,000.

175 (5) [~~The~~] Subject to Subsection (6), the Legislature may annually appropriate [~~monies~~]
176 money from the Constitutional Defense Restricted Account to one or more of the following:

177 (a) the Constitutional Defense Council to carry out its duties in Section 63C-4-102;

178 (b) the Public Lands Policy Coordinating Office to carry out its duties in Section
179 63J-4-603;

180 (c) the Office of the Governor, to be used only for the purpose of asserting, defending,

181 or litigating state and local government rights under R.S. 2477, in accordance with a plan
182 developed and approved as provided in Section 63C-4-104;

183 (d) a county or association of counties to assist counties, consistent with the purposes
184 of the council, in pursuing issues affecting the counties; or

185 (e) the Office of the Attorney General, to be used only for:

186 (i) public lands counsel and assistance and litigation to the state or local governments
187 including asserting, defending, or litigating state and local government rights under R.S. 2477
188 in accordance with a plan developed and approved as provided in Section 63C-4-104[-]; or

189 (ii) an action filed in accordance with Section 67-5-29.

190 (6) Money appropriated to the Constitutional Defense Restricted Account in
191 accordance with Subsection 53C-3-203(4)(a), if appropriated by the Legislature, may only be
192 expended by the agency to which it was appropriated to pay the costs of an action filed in
193 accordance with Section 67-5-29.

194 [~~6~~] (7) (a) The Constitutional Defense Council shall require that any entity that
195 receives monies from the Constitutional Defense Restricted Account provide financial reports
196 and litigation reports to the Council.

197 (b) Nothing in this Subsection [~~6~~] (7) prohibits the council from closing a meeting
198 under Title 52, Chapter 4, Open and Public Meetings Act, or prohibits the council from
199 complying with Title 63G, Chapter 2, Government Records Access and Management Act.
200 Section 4. Section **67-5-29** is enacted to read:

201 **67-5-29. Duty to legal actions.**

202 (1) The attorney general may file an action to enforce the Utah Enabling Act, Section
203 9.

204 (2) In accordance with Title 78B, Chapter 6, Particular Proceedings, the attorney
205 general shall file an eminent domain action or quiet title action on property possessed by the
206 federal government:

207 (a) (i) that facilitates the state's ability to manage the school and institutional trust lands
208 consistent with the state's fiduciary responsibilities towards the beneficiaries of the trust lands;
209 and

210 (i) (A) that provides access to school and institutional trust lands; or

211 (B) that increases the profitability of the school and institutional trust lands; or

- 212 (b) for a public use that increases the ability of the state to generate revenue.
213 (3) The attorney general shall file, by no later than July 1, 2011, an eminent domain
214 action or quiet title action described in Subsection (2) on property possessed by the federal
215 government for:
216 (a) a highway on Spring Creek Road located in the western half of section 3, township
217 38 south, range 12 west to provide access to section 2, township 38 south, range 12 west;
218 (b) a highway off of Old Canyon Road located in the northeast quarter of the southeast
219 quarter of section 5, township 10 north, range 5 east to provide access to the southeast quarter
220 of the southeast quarter of section 32, township 11 north, range 5 east; or
221 (c) the purposes described in Subsection (2).

Legislative Review Note
as of 2-26-10 9:21 AM

As required by legislative rule and practice, the Office of Legislative Research and General Counsel provides the following legislative review note to assist the Legislature in making its own determination as to the constitutionality of the bill. The note is based on an analysis of relevant state and federal constitutional law as applied to the bill. The note is not written for the purpose of influencing whether the bill should become law, but is written to provide information relevant to legislators' consideration of this bill. The note is not a substitute for the judgment of the judiciary, which has authority to determine the constitutionality of a law in the context of a specific case.

This bill authorizes the state to exercise eminent domain authority on property possessed by the federal government unless the property is owned by the federal government in accordance with the U.S. Constitution article I, section 8, clause 17, also known as the "Enclave Clause." The U.S. Supreme Court has held that eminent domain authority, or the right to take and dispose land for public use and necessity, belongs to the sovereign government of the land (i.e. federal or state government). See Pollard v. Hagan, 44 U.S. 212, 223 (1845). This bill contests the U.S. Supreme Court's opinion that the federal government is the sovereign of public land or property acquired by the federal government in accordance with federal constitutional authority other than the Enclave Clause.

In 1894 the U.S. Congress passed the Utah Enabling Act. Act Cong. July 16, 1894, ch. 138, 28 Stat. 107. The Act declared that as a condition of Utah's acceptance into the Union, the people of Utah "agree[d] that they forever disclaim[ed] all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; 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" *Id.* at § 3. At this time, Utah also adopted the U.S. Constitution as a condition to

joining the Union. *Id.*

Two clauses in the U.S. Constitution empower the federal government to own and retain land. The first, the Enclave Clause, authorizes the federal government to "purchas[e] by the Consent of the Legislature of the State" land for specific and enumerated purposes like military structures "and other needful Buildings." U.S. Const. art. I, sec. 8, cl. 17. This bill would not affect lands acquired by the federal government in accordance with the Enclave Clause.

The second, the "Property Clause," authorizes Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...." U.S. Const. art. IV, sec. 3, cl. 2. Unlike the Enclave Clause, the Property Clause does not require that the federal government receive a state legislature's consent to own land. The U.S. Supreme Court has held that "Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation...." United States v. Gratiot, 39 U.S. 526, 537 (1840). *See also* Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). Pursuant to its broad authority under the Property Clause, Congress may enact legislation to manage or sell federal land, and any legislation Congress enacts "necessarily overrides conflicting state laws under the Supremacy Clause." Kleppe, 426 U.S. at 543. *See* U.S. Const. art. VI, cl. 2.

Parties contesting federal control or ownership of public lands under the Property Clause have argued that the equal footing doctrine requires Congress' recognition of a state's sovereignty over public lands. "The equal footing doctrine is grounded in the idea that new states enter the Union with the same rights as the original states." Koch v. United States, DOI, Interior Bd. of Land Appeals, BLM, 47 F.3d 1015, 1018 (10th Cir. 1995) (citations omitted). The courts, however, have limited the equal footing doctrine to apply only to the title of land underlying navigable waters: "The equal footing doctrine simply does not cause land in non-navigable waters to pass from the federal government to the state." *Id.* at 1019. *See also* Texas v. Louisiana, 410 U.S. 702, 713 (1973). Furthermore, the equal footing doctrine requires political, not economic or geographic, equality between the states. United States v. Texas, 339 U.S. 707, 716 (1950). *See also* Texas v. Louisiana, 410 U.S. at 713.

Based on the courts' previous application of the Property Clause, there is a high probability that a court would hold that the federal government is the sovereign of public lands surrendered to or withheld by the federal government at the time of Utah's acceptance into the Union. *See generally* United States v. Nye County, 920 F. Supp. 1108, 1109 (D. Nev. 1996); Gibson v. Chouteau, 80 U.S. 92 (1872). In short, the state has no standing as sovereign to exercise eminent domain or assert any other state law that is contrary to federal law on land or property that the federal government holds under the Property Clause.

Office of Legislative Research and General Counsel

H.B. 324 1st Sub. (Buff) - Public Lands Litigation

Fiscal Note

2010 General Session

State of Utah

State Impact

Provisions of this bill requires an appropriation of \$1,000,000 from the General Fund Restricted - Land Exchange Distribution Account to the General Fund Restricted - Constitutional Defense Restricted Account in FY 2011, FY 2012, and FY 2013. Remaining balances in the Land Exchange Distribution Account will be allocated to programs as currently outlined in statute.

Individual, Business and/or Local Impact

County governments will receive fewer allocations from the Land Exchange Distribution Account. No direct, measurable costs and/or benefits for individuals or businesses.
