LEGISLATIVE GENERAL COUNSEL
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H.J.R. 3

JOINT RESOLUTION ON FEDERAL TRANSFER OF PUBLIC LANDS

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Roger E. Barrus

Senate Sponsor: Margaret Dayton

LONG TITLE

General Description:

This joint resolution of the Legislature demands that the federal government extinguish title to Utah's public lands and transfer title to those lands to the state of Utah.

Highlighted Provisions:

This resolution:

- demands that the federal government transfer title of the public lands within Utah's borders directly to the state of Utah;
- urges the United States Congress to engage in good faith communication, cooperation, coordination, and consultation with the state of Utah regarding the transfer of title of public lands directly to the state of Utah;
- declares that the Legislature, upon transfer of title of the public lands directly to the state of Utah, intends to affirmatively cede the national park lands to the federal government, under Article I, Section 8, Clause 17 of the United States Constitution, on condition that the lands permanently remain national park lands and that they not be sold, transferred, or conveyed to any party other than the state of Utah;
- declares that, upon transfer of the public lands directly to the state of Utah, the Legislature intends to affirmatively cede to the federal government all lands currently designated as part of the National Wilderness Preservation System pursuant to the Wilderness Act of 1964;

H.J.R. 3

- calls for the creation of a Utah Public Lands Commission to review and manage multiple use of the public lands, including access, open space, and sustainable yield of the abundant resources, and to determine, through a public process, the extent to which public land may be sold, if any; and
- urges, to the extent that the Public Lands Commission determines through a public process that any such land should be sold to private owners, that 5% of the net proceeds should be paid to the Permanent Fund for public education and 95% of the net proceeds should be paid to the federal government to pay down the national debt.

Special Clauses:

None

Be it resolved by the Legislature of the state of Utah:

WHEREAS, in 1780, the United States Congress resolved that "the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be granted and disposed of for the common benefit of all the United States that shall be members of the federal union, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states: . . . and that upon such cession being made by any State and approved and accepted by Congress, the United States shall guaranty the remaining territory of the said States respectively. (Resolution of Congress, October 10, 1780)";

WHEREAS, the territorial and public lands of the United States are dealt with in Article IV, section 3, clause 2 of the United States Constitution, referred to as the Property Clause, which states, "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.";

WHEREAS, with this clause, the Constitutional Convention agreed that the Constitution would maintain the "statu quo" that had been established with respect to the federal territorial lands being disposed of only to create new states with the same rights of sovereignty, freedom, and independence as the original states;

WHEREAS, under these express terms of trust, the land claiming states, over time,

ceded their western land to their confederated Union and retained their claims that the confederated government dispose of such lands only to create new states "and for no other use or purpose whatsoever" and apply the net proceeds of any sales of such lands only for the purpose of paying down the public debt;

WHEREAS, with respect to the disposition of the federal territorial lands, the Northwest Ordinance of July 13, 1787, provides, "The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers";

WHEREAS, by resolution in 1790, the United States Congress declared "That the proceeds of sales which shall be made of lands in the Western territory, now belonging or that may hereafter belong to the United States, shall be, and are hereby appropriated towards sinking or discharging the debts for the payment whereof the United States now are, or by virtue of this act may be holden, and shall be applied solely to that use, until the said debt shall be fully satisfied";

WHEREAS, the intent of the founding fathers to eventually extinguish title to all public lands was reaffirmed by President Andrew Jackson in a message to the United States Senate on December 4, 1833, where he explained the reasons he vetoed a bill entitled "An act to appropriate for a limited time the proceeds of the sales of the public lands of the United States and for granting lands to certain States": "I do not doubt that it is the real interest of each and all the States in the Union, and particularly of the new States, that the price of these lands shall be reduced and graduated, and that after they have been offered for a certain number of years the refuse remaining unsold shall be abandoned to the States and the machinery of our land system entirely withdrawn. It can not be supposed 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";

WHEREAS, in 1828, United States Supreme Court Chief Justice John Marshall, in American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511 (1828), confirmed that no provision in the Constitution authorized the federal government to indefinitely exercise control over western public lands beyond the duty to manage these lands pending the disposal of the lands to create

new states when he said, "At the time the Constitution was formed, the limits of the territory over which it was to operate were generally defined and recognised (sic). These limits consisted in part, of organized states, and in part of territories, the absolute property and dependencies of the United States. These states, this territory, and future states to be admitted into the Union, are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those Limits.";

WHEREAS, in 1833, referring to these land cession compacts which arose from the original 1780 congressional resolution, President Andrew Jackson stated, "These solemn compacts, invited by Congress in a resolution declaring the purposes to which the proceeds of these lands should be applied, originating before the constitution, and forming the basis on which it was made, bound the United States to a particular course of policy in relation to them by ties as strong as can be invented to secure the faith of nations" (Land bill veto, December 5, 1833);

WHEREAS, the United States Supreme Court, in State of Texas v. White, 74 U.S. 700 (1868), clarified that a state, by definition, includes a defined sovereign territory, stating that "State", in the constitutional context, is "a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed", and added, "This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established";

WHEREAS, in Shively v. Bowlby, 152 U.S. 1 (1894), the United States Supreme Court confirmed that all federal territories, regardless of how acquired, are held in trust to create new states on an equal footing with the original states when it stated, "Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territory.";

WHEREAS, the United States Supreme Court has affirmed that the federal government must honor its trust obligation to extinguish title to the public lands for the sovereignty of the new state to be complete, stating once "the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective

borders, and they, and the original states, will be upon an equal footing, in all respects. . ." (Polland v. Hagan, 44 U.S. 212 (1845));

WHEREAS, the enabling acts of the new states west of the original colonies established the terms upon which all such states were admitted into the union, and contained the same promise to all new states that the federal government would extinguish title to all public lands lying within their respective borders;

WHEREAS, the United States Supreme Court looks upon the enabling acts which create new states as "solemn compacts" and "bilateral (two-way) agreements" to be performed "in a timely fashion";

WHEREAS, under Section 3 of Utah's Enabling Act, Utah agreed to the same solemn compacts as states preceding in statehood, that until the title to unappropriated public lands lying within the state's boundaries "shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use";

WHEREAS, the trust obligation of the federal government to timely extinguish title of all public lands lying within the boundaries of the state of Utah is made even more clear in Section 9 of Utah's Enabling Act as follows: "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";

WHEREAS, the federal government confirmed its trust obligation to timely extinguish title to all public lands lying within the boundaries of the state of Utah by and through the 1934 Taylor Grazing Act which declared that the act was established "In order to promote the highest use of the public lands pending its final disposal";

WHEREAS, in 1976, after nearly 200 years of trust history regarding the obligation of Congress to extinguish title of western lands to create new states and use the proceeds to discharge its public debts, the United States Congress purported to unilaterally change this solemn promise by and through the Federal Land Policy Management Act (FLPMA), which

provides, in part, "The Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the federal interest";

WHEREAS, at the time of Utah's Enabling Act the course and practice of the United States Congress with all prior states admitted to the Union had been to fully extinguish title, within a reasonable time, to all lands within the boundaries of such states, except for those Indian lands, or lands otherwise expressly reserved to the exclusive jurisdiction of the United States;

WHEREAS, the state of Utah did not, and could not have, contemplated or bargained for the United States failing or refusing to abide by its solemn promise to extinguish title to all lands within its defined boundaries within a reasonable time such that the state of Utah and its Permanent Fund for its Common Schools could never realize the bargained-for benefit of the deployment, taxation, or economic benefit of all the lands within its defined boundaries;

WHEREAS, from 1780 forward the federal government only held bare legal title to the western public lands in the nature of a trustee in trust with the solemn obligation to timely extinguish title to such lands to create new states and to use the proceeds to pay the public debt;

WHEREAS, the federal government complied with its promise and solemn obligation to imminently transfer title of public lands lying within the boundaries of all states to the eastern edge of the state of Colorado and also with the state of Hawaii;

WHEREAS, by the terms of Utah's Enabling Act, Utah suspended its sovereign right to eventually tax the public lands within its borders, pending final disposition of the public lands;

WHEREAS, the federal government has repeatedly and persistently failed to honor its promises and has refused to abide by the terms of its preexisting solemn obligations to imminently extinguish title to all public lands;

WHEREAS, had Congress honored its promise to Utah to timely extinguish title to all public lands within Utah's boundaries, Utah would have had sovereign control over lands within its borders;

WHEREAS, Congress, by and through FLPMA, unilaterally altered its duty in 1976 to extinguish title to all public lands within Utah's borders by committing to a policy of retention and a process of comprehensive land management and planning coordinated between the federal government, the states, and local governing bodies for access, multiple use, and

sustained yield of the public lands;

WHEREAS, despite the fact that the federal government had not divested all public lands within Utah's borders by 1976, this did not alleviate the federal government from its duty to extinguish title and divest itself of federal ownership of remaining public land in Utah by ceding such land directly to the state as it did with other states;

WHEREAS, since the passage of FLPMA, the federal government has engaged in a persistent pattern and course of conduct in direct violation of the letter and spirit of FLPMA through an abject disregard of local resource management plans, failure and refusal to coordinate and cooperate with the state and local governments, unilateral and oppressive land control edicts to the severe and extreme detriment of the state and its ability to adequately fund education, provide essential government services, secure economic opportunities for wage earners and Utah business, and ensure a stable prosperous future;

WHEREAS, under the United State Constitution, the American states reorganized to form a more perfect union, yielding up certain portions of their sovereign powers to the elected officers of the government of their union, yet retaining the residuum of sovereignty for the purpose of independent internal self-governance;

WHEREAS, by compact between the original states, territorial lands were divided into "suitable extents of territory" and upon attaining a certain population, were to be admitted into the union upon "an equal footing" as members possessing "the same rights of sovereignty, freedom and independence" as the original states;

WHEREAS, the federal trust respecting public lands obligates the United States, through their agent, Congress, to extinguish both their government jurisdiction and their title on the public lands that are held in trust by the United States for the states in which they are located;

WHEREAS, the state and federal partnership of public lands management has been eroded by an oppressive and over-reaching federal management agenda that has adversely impacted the sovereignty and the economies of the state of Utah and local governments;

WHEREAS, federal land-management actions, even when applied exclusively to federal lands, directly impact the ability of the state of Utah to manage its school trust lands in accordance with the mandate of the Utah Enabling Act and to meet its obligation to the beneficiaries of the trust;

WHEREAS, Utah has been substantially damaged in its ability to provide funding for education and the common good of the state and to serve a sustainable, vibrant economy into the future because the federal government has unduly retained control of nearly two-thirds of the lands lying within Utah's borders;

WHEREAS, Utah consistently ranks highest among all the states in class size and lowest in the nation in per pupil spending for education;

WHEREAS, had the federal government disposed of the land in or about 1896, Utah would have, from that point forward, generated substantial tax revenues and revenues from the sustainable managed use of its natural resources to the benefit of its public schools and to the common good of the state and nation;

WHEREAS, the federal government gives Utah less than half of the net proceeds of mineral lease revenues and severance taxes generated from the lands within Utah's borders;

WHEREAS, Utah has been substantially damaged in mineral lease revenues and severance taxes in that, had the federal government extinguished title to all public lands, Utah would realize 100% of the mineral lease revenues and severance taxes from the lands;

WHEREAS, the Bureau of Land Management's (BLM) failure to act affirmatively on definitive allocation decisions of multiple use activities in resource management plans has created uncertainty in the future of public land use in Utah and has caused capital to flee the state;

WHEREAS, during the process of finalizing the most recent six Resource Management Plans, the BLM refused to consider state and local government acknowledgments of R.S. 2477 rights-of-way or other evidence of the existence of R.S. 2477 rights-of-way in the Grand Staircase Escalante National Monument;

WHEREAS, the BLM has demonstrated a chronic inability to handle the proliferation of wild horses and burros on the public lands, to the detriment of the rangeland resource;

WHEREAS, the United States Army Corps of Engineers is proposing to extend its jurisdiction to regulate the waters of the United States to areas traditionally dry, except during severe weather events, in violation of the common definition of jurisdictional waters;

WHEREAS, in 1996 the president of the United States abused the intent of the Antiquities Act by the creation of the Grand Staircase Escalante National Monument without any consultation with the state and local authorities or citizens;

WHEREAS, the United States Fish and Wildlife Service is making decisions concerning various species on BLM lands under the provisions of the Endangered Species Act without serious consideration of state wildlife management activities and protection designed to prevent the need for a listing, or recognizing the ability to delist a species, thereby affecting the economic vitality of the state and local region;

WHEREAS, the BLM has not authorized all necessary rangeland improvement projects involving the removal of pinyon-juniper and other climax vegetation, thereby reducing the biological diversity of the range, reducing riparian viability and water quality, and reducing the availability of forage for both livestock and wildlife;

WHEREAS, Utah initially supported placing into reserve the six National Forests in Utah -- Ashley, Fishlake, Manti La-Sal, Dixie, Uinta, and Wasatch-Cache, because Utah was promised this action would preserve the forest lands as watersheds and for agricultural use -- namely timber and other wood products, and grazing;

WHEREAS, this vision and promise of agricultural production on the forest lands is the reason that the United States Forest Service was made part of the United States Department of Agriculture as opposed to the Department of the Interior;

WHEREAS, the promise of preservation for agricultural use has been broken by the current and recent administrations;

WHEREAS, logging, timber, and wood products operations on Utah's National Forests have come to a virtual standstill, resulting in forests that are choked with old growth monocultures, loss of aspen diversity, loss of habitat, and a threat to community watersheds due to insect infestation and catastrophic fire;

WHEREAS, these conditions are the result of a failure to properly manage the forest lands for their intended use, which is responsible and sustained timber production, watersheds and grazing;

WHEREAS, the only remedy for federal government breaches of Utah's Enabling Act Compact and breaches to the spirit and letter of the promises of FLPMA is for the state of Utah to take back title and management responsibility of federally-managed public lands, which would restore the promises in the solemn compact made at statehood;

WHEREAS, under Article I, Section 8, Clause 17 of the United States Constitution, the federal government is only constitutionally authorized to exercise jurisdiction over and above

bare right and title over lands that are "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";

WHEREAS, the United States Supreme Court affirmed that the federal government only holds lands as a mere "ordinary proprietor" and cannot exert jurisdictional dominion and control over public lands without the consent of the state Legislature, stating "Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor (emphasis added). 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 R. Co. v. Lowe, 114 U.S. 525 (1885));

WHEREAS, in a unanimous 2009 decision, the United States Supreme Court, in Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009), affirmed that Congress has no right to change the promises it made to a state's Enabling Act, stating, ". . . [a subsequent act of Congress] would raise grave constitutional concerns if it purported to ‘cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union . . . '*[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event . . . to suggest that subsequent events somehow can diminish what has already been bestowed'. And that proposition applies a fortiori [with even greater force] where virtually all of the State's public lands . . . are at stake*" (emphasis added, citation omitted);

WHEREAS, citizens of the state of Utah have a love of the land and have demonstrated responsible stewardship of lands within state jurisdiction;

WHEREAS, the state of Utah is willing to sponsor, evaluate, and advance the locally driven efforts in a more efficient manner than the federal government, to the benefit of all users, including recreation, conservation, and the responsible and sustainable management of Utah's natural resources;

WHEREAS, the state of Utah has a proven regulatory structure to manage public lands for multiple use and sustainable yield;

WHEREAS, the United States Congress disposed of lands within the boundaries of the states of Tennessee and Hawaii directly to those states;

WHEREAS, because of the entanglements and rights arising over the 116 years that the federal government has failed to honor its promise to timely extinguish title to public lands and because of the federal government's breach of Utah's Enabling Act and breach of FLPMA, among other promises made, and the damages resulting from such breaches, the United States Congress should imminently transfer title to all public lands lying within the State of Utah directly to the State of Utah, as it did with Hawaii and Tennessee;

WHEREAS, the Legislature of the state of Utah, upon transfer of title by the federal government of the public lands directly to the state, intends to cede the national park land to the federal government on condition that the lands permanently remain national park lands, that they not be sold, transferred, left in disrepair, or conveyed to any party other than the state of Utah;

WHEREAS, the Legislature of the state of Utah, upon transfer of title by the federal government of the public lands directly to the state, intends to cede to the federal government all lands currently designated as part of the National Wilderness Preservation System pursuant to the Wilderness Act of 1964;

WHEREAS, in order to effectively address the accumulated entanglements and expectations over Utah's public lands, including open space, access, multiple use, and the management of sustainable yields of Utah's natural resources, a Utah Public Lands Commission should be formed to review and manage multiple use of the public lands and to determine, through a public process, the extent to which public land may be sold, if any; and

WHEREAS, to the extent that the Public Lands Commission determines through a public process that any such land should be sold to private owners, that 5% of the net proceeds should be paid to the Permanent Fund for Utah's public schools, and 95% of the net proceeds should be paid to the federal government to pay down the federal debt:

NOW, THEREFORE, BE IT RESOLVED that Ĥ→ **in order to provide a fair, justified, and equitable remedy for the federal government's past and continuing breaches of its solemn promises to the State of Utah as set forth in this resolution and to provide for the sufficient and necessary funding of Utah's public education system,** ←Ĥ the Legislature of the state of Utah demands that the federal government imminently transfer title to all of the public lands within Utah's borders directly to the state of Utah.

BE IT FURTHER RESOLVED that the Legislature of the state of Utah urges the United States Congress in the most strenuous terms to engage in good faith communication, cooperation, coordination, and consultation with the state of Utah regarding the transfer of public lands directly to the state of Utah.

BE IT FURTHER RESOLVED that, upon transfer of the public lands directly to the state of Utah, the Legislature intends to affirmatively cede the national park lands to the federal government, under Article I, Section 8, Clause 17 of the United States Constitution, on condition that the lands permanently remain national park lands, that they not be sold, transferred, left in substantial disrepair, or conveyed to any party other than the state of Utah.

BE IT FURTHER RESOLVED that, upon transfer of the public lands directly to the state of Utah, the Legislature intends to affirmatively cede to the federal government all lands currently designated as part of the National Wilderness Preservation System pursuant to the Wilderness Act of 1964.

BE IT FURTHER RESOLVED that the Legislature calls for the creation of a Utah Public Lands Commission to review and manage access, open space, sustainable yields, and the multiple use of the public lands and to determine, through a public process, the extent to which public land may be sold.

BE IT FURTHER RESOLVED that, to the extent that the Public Lands Commission determines through a public process that any such land should be sold to private owners, that 5% of the net proceeds should be paid to the Permanent Fund for the public schools, and 95% should be paid to the Bureau of the Public Debt to pay down the federal debt.

BE IT FURTHER RESOLVED that copies of this resolution be sent to the United States Department of the Interior, the Majority Leader of the United States Senate, the Speaker of the United States House of Representatives, the members of Utah's congressional delegation, and the Governors, Senate Presidents, and Speakers of the House of the 49 other states.

Legislative Review Note
as of 2-10-12 8:59 AM

Office of Legislative Research and General Counsel