

SAGEBRUSH REBELLION PART II

ANALYSIS OF THE PUBLIC LANDS DEBATE IN UTAH

HIGHLIGHTS

- Nearly 67% of the land in Utah is owned by the federal government, the fourth highest among all 50 states.
- The Legislature passed the Transfer of Public Lands Act (TPLA) in 2012, which demands the federal government transfer nearly 20 million acres of land by 2015.
- Supporters of the TPLA argue that when Utah became a state, the federal government promised to “extinguish title” to all federal lands within a timely manner. Because it hasn’t, it has put the state at an economic disadvantage, has hurt education funding, and manages the land inefficiently.
- Opponents of the TPLA argue that Utah agreed to “forever disclaim” all public lands when it became a state. They posit that the state was brought into the union under equal footing, there are economic benefits to federal control of the land, and the problems with education funding have more to do with taxation and revenue dedication rather than public lands.
- If a court battle does occur, experts on both sides believe Utah’s Enabling Act could give legal justification for their cause. Supporters of the TPLA say the federal government made a compact to dispose of all lands, while opponents argue the state agreed to give up the rights to the land.

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Daniel T. Harbeke, Chairman
 Jeffrey K. Larsen, Vice Chairman
 Bryson Garbett, Treasurer
 Stephen J. Hershey Kroes, President
 Morgan Lyon Cotti, Ph.D., Research Director
 10 West Broadway, Suite 307
 Salt Lake City, UT 84101
 (801) 355-1400 • www.utahfoundation.org

The federal government owns around 635 million acres, or 28% of the land comprising the United States.¹ Within Utah, nearly 67% of the state’s total acreage, or 35 million acres, is owned by the federal government. Throughout the nation’s history, groups have debated who should control this land and how it should be managed. In 2012, the Utah State Legislature passed H.B. 148, which demands the United States transfer their title to public lands to the State of Utah before December 31, 2014.

This research report will explain the history of public lands in the U.S. and Utah, past efforts to transfer the land to state control, the arguments for and against keeping the lands under federal ownership, and assess the merits and faults of each argument. It will also analyze the legalities of the issue and address the arguments that would be made if a court battle occurs.

H.B. 148 – THE TRANSFER OF PUBLIC LANDS ACT AND RELATED STUDY

The passage of H.B. 148, the Transfer of Public Lands Act and Related Study (TPLA), has focused a great deal of attention on the issue of federal lands in Utah. The bill demands the federal government transfer an estimated 20 million acres of public lands within Utah to the state.² National parks, national monuments (except Grand Staircase-Escalante), national recreation areas, 33 wilderness areas, Department of Defense areas and tribal lands are excluded from the transfer. The TPLA also assigns the Constitutional Defense Council and the staff of the Public Lands Policy Coordination Office the task of writing a study that would evaluate implementation strategies and develop legislation to plan for state management of the newly acquired lands. Interest groups both for and against the TPLA are debating several aspects of the law, including whether it is enforceable, constitutional, and the “wisdom” of the law as well.³

UTAH – THE SIZE AND MAKEUP OF OUR STATE

Utah is made up of 52.7 million acres, making it the 12th largest state in the union. Within Utah, over 35 million acres are owned and controlled by the federal government, amounting to 66.5% of the state. In number of acres controlled by the federal government, Utah ranks fourth among states behind Alaska, Nevada and California; as a percentage of the state, Utah is behind only Nevada. This leaves 17.6 million acres of nonfederal land in

Figure 1: Acreage and Ownership of Land by State

Total Acres			Total Federal Land Acreage			Percentage of Land Owned by Federal Govt			Total Non-Federal Land Acreage		
	Total Acres	Rank		Total Federal Land Acreage	Rank		Percentage of Land Owned by Federal Govt	Rank		Total Non-Federal Land Acreage	Rank
Alaska	365,481,600	1	Alaska	225,848,164	1	Nevada	81.1%	1	Texas	165,239,650	1
Texas	168,217,600	2	Nevada	56,961,778	2	Utah	66.5%	2	Alaska	139,633,436	2
California	100,206,720	3	California	47,797,533	3	Alaska	61.8%	3	Montana	66,349,179	3
Montana	93,271,040	4	Utah	35,033,603	4	Idaho	61.7%	4	California	52,409,187	4
New Mexico	77,766,400	5	Oregon	32,665,430	5	Oregon	53.0%	5	Kansas	52,209,563	5
Arizona	72,688,000	6	Idaho	32,635,835	6	Wyoming	48.2%	6	New Mexico	50,764,817	6
Nevada	70,264,320	7	Arizona	30,741,287	7	California	47.7%	7	Nebraska	48,482,334	7
Colorado	66,485,760	8	Wyoming	30,043,513	8	Arizona	42.3%	8	Minnesota	47,736,549	8
Wyoming	62,343,040	9	New Mexico	27,001,583	9	Colorado	36.2%	9	South Dakota	46,235,679	9
Oregon	61,598,720	10	Montana	26,921,861	10	New Mexico	34.7%	10	Oklahoma	43,384,344	10
Idaho	52,933,120	11	Colorado	24,086,075	11	Montana	28.9%	11	North Dakota	42,716,725	11
Utah	52,696,960	12	Washington	12,173,813	12	Washington	28.5%	12	Missouri	42,572,920	12
Kansas	52,510,720	13	Florida	4,536,811	13	D.C.	21.6%	13	Colorado	42,399,685	13
Minnesota	51,205,760	14	Michigan	3,637,965	14	Hawaii	20.3%	14	Arizona	41,946,713	14
Nebraska	49,031,680	15	Minnesota	3,469,211	15	New Hampshire	13.5%	15	Iowa	35,737,878	15
South Dakota	48,881,920	16	Arkansas	3,161,978	16	Florida	13.1%	16	Illinois	35,388,466	16
North Dakota	44,452,480	17	Texas	2,977,950	17	Michigan	10.0%	17	Georgia	35,338,640	17
Missouri	44,248,320	18	South Dakota	2,646,241	18	Arkansas	9.4%	18	Wisconsin	33,145,826	18
Oklahoma	44,087,680	19	North Carolina	2,426,699	19	Virginia	9.2%	19	Michigan	32,854,195	19
Washington	42,693,760	20	Virginia	2,358,071	20	North Carolina	7.7%	20	Wyoming	32,299,527	20
Georgia	37,295,360	21	Georgia	1,956,720	21	Vermont	7.6%	21	Alabama	31,807,168	21
Michigan	36,492,160	22	Wisconsin	1,865,374	22	West Virginia	7.3%	22	Washington	30,519,947	22
Iowa	35,860,480	23	North Dakota	1,735,555	23	Minnesota	6.8%	23	New York	30,469,538	23
Illinois	35,795,200	24	Missouri	1,675,400	24	South Dakota	5.4%	24	Arkansas	30,437,382	24
Wisconsin	35,011,200	25	Mississippi	1,523,574	25	Wisconsin	5.3%	25	Florida	30,184,469	25
Florida	34,721,280	26	Louisiana	1,330,429	26	Georgia	5.2%	26	North Carolina	28,976,181	26
Arkansas	33,599,360	27	Tennessee	1,273,974	27	Mississippi	5.0%	27	Oregon	28,933,290	27
Alabama	32,678,400	28	West Virginia	1,130,951	28	Tennessee	4.8%	28	Mississippi	28,699,146	28
North Carolina	31,402,880	29	Kentucky	1,083,104	29	South Carolina	4.6%	29	Pennsylvania	28,187,585	29
New York	30,680,960	30	South Carolina	898,637	30	Louisiana	4.6%	30	Louisiana	27,537,411	30
Mississippi	30,222,720	31	Alabama	871,232	31	Kentucky	4.2%	31	Ohio	25,923,580	31
Louisiana	28,867,840	32	Hawaii	833,786	32	North Dakota	3.9%	32	Tennessee	25,453,706	32
Pennsylvania	28,804,480	33	New Hampshire	777,807	33	Missouri	3.8%	33	Kentucky	24,429,216	33
Tennessee	26,727,680	34	Oklahoma	703,336	34	New Jersey	3.7%	34	Virginia	23,138,249	34
Ohio	26,222,080	35	Pennsylvania	616,895	35	Maryland	3.1%	35	Indiana	22,817,704	35
Kentucky	25,512,320	36	Nebraska	549,346	36	Alabama	2.7%	36	Idaho	20,297,285	36
Virginia	25,496,320	37	Vermont	453,871	37	Delaware	2.3%	37	Maine	19,637,945	37
Indiana	23,158,400	38	Illinois	406,734	38	Pennsylvania	2.1%	38	South Carolina	18,475,443	38
Maine	19,847,680	39	Indiana	340,696	39	Texas	1.8%	39	Utah	17,663,357	39
South Carolina	19,374,080	40	Kansas	301,157	40	Massachusetts	1.6%	40	West Virginia	14,279,609	40
West Virginia	15,410,560	41	Ohio	298,500	41	Oklahoma	1.6%	41	Nevada	13,302,542	41
Maryland	6,319,360	42	New York	211,422	42	Indiana	1.5%	42	Maryland	6,123,374	42
Vermont	5,936,640	43	Maine	209,735	43	Ohio	1.1%	43	Vermont	5,482,769	43
New Hampshire	5,768,960	44	Maryland	195,986	44	Illinois	1.1%	44	New Hampshire	4,991,153	44
Massachusetts	5,034,880	45	New Jersey	176,691	45	Nebraska	1.1%	45	Massachusetts	4,953,188	45
New Jersey	4,813,440	46	Iowa	122,602	46	Maine	1.1%	46	New Jersey	4,636,749	46
Hawaii	4,105,600	47	Massachusetts	81,692	47	Rhode Island	0.8%	47	Hawaii	3,271,814	47
Connecticut	3,135,360	48	Delaware	28,574	48	New York	0.7%	48	Connecticut	3,126,803	48
Delaware	1,265,920	49	Connecticut	8,557	49	Kansas	0.6%	49	Delaware	1,237,346	49
Rhode Island	677,120	50	D.C.	8,450	50	Iowa	0.3%	50	Rhode Island	671,872	50
D.C.	39,040	51	Rhode Island	5,248	51	Connecticut	0.3%	51	D.C.	30,590	51
United States	2,271,343,360		United States	628,801,636		United States	27.7%		United States	1,642,541,724	

Source: Congressional Research Service.

Utah, ranking it 39th in the nation, just below South Carolina and above West Virginia.

The federal land in Utah is managed by five different agencies. The largest block of land is managed by the Bureau of Land Management (22.8 million acres), followed by the U.S. Forest Services (8.2 million), National Parks Service (2.1 million), the Department of Defense (1.8 million) and Fish and Wildlife Services (107,885).

The 22 million acres that the Bureau of Land Management (BLM) manages is the third most of any state, behind only Alaska (73 million) and Nevada (48 million). This acreage consists of one national monument, four wilderness areas, 98 wilderness study areas, 59 areas of critical environmental concern, several historic and recreation trails, and national natural landmarks.

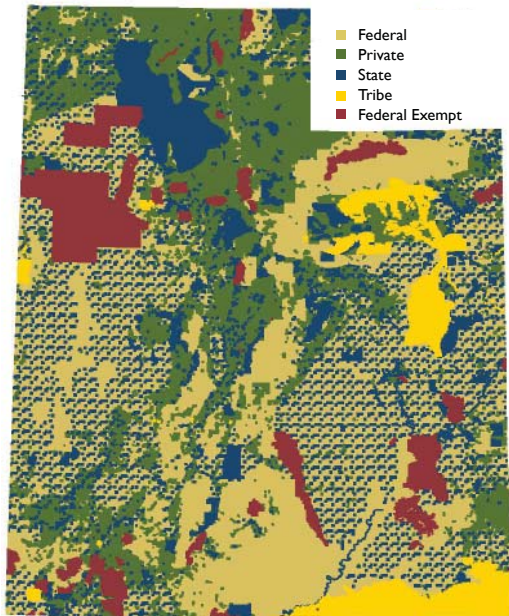
Federal collections on BLM lands are almost entirely derived from mineral royalties, rents and bonuses. In FY 2007, the BLM collected \$276.2 million (nearly \$270 million of this was from mineral royalties), followed by recreation and use fees (\$2.6 million), grazing fees (\$1.1 million) and receipts from other things like mining claims, rights-of-way, and sales of land. The federal government does not keep all of these funds. It is required to transfer half of

mineral royalties and rents back to the state. This amounted to \$135.4 million from mineral transfers in FY 2007, in addition to smaller amounts from grazing fees (\$134,295), sales (\$26,664) and timber receipts (\$3,470). The BLM also invests additional funds for such purposes as construction access, wildfire operations, wildfire preparedness and other investments, which totaled \$72.5 million in FY 2007.

The U.S. Forest Service manages four national forests within Utah: Ashley National Forest, Uinta-Wasatch-Cache National Forest, Manti-La Sal National Forest, Fishlake National Forest and Dixie National Forest. These forests contain fisheries, wilderness areas, recreation areas, and scenic byways, and act as backdrops and gateways for some of the state's national parks and monuments. Beyond recreation and tourism, the forests also provide economic benefits. The Manti-La Sal National Forest provides more coal than any other national forest in the country; this and other forests also provide natural gas, drinking water, timber and grazing.⁴

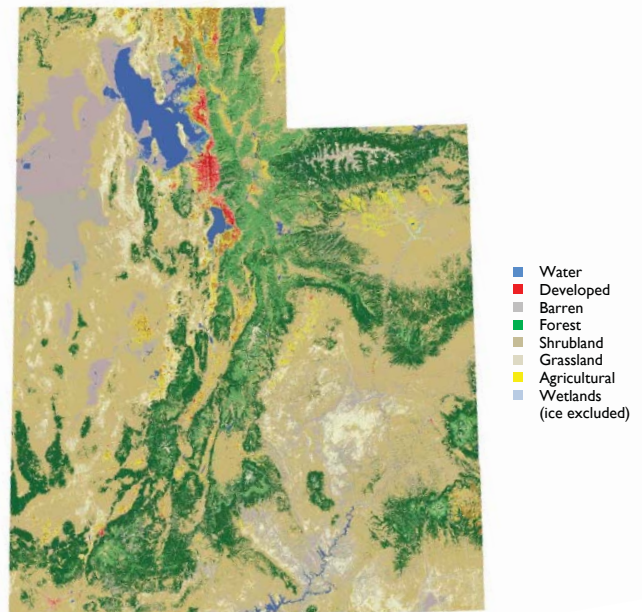
A portion of the revenue that comes from the national forests is shared with the states. Originally, 25% of forest revenues were shared, but with a decline of grazing, timber and mining since the 1980s, these revenues have dropped significantly and become a volatile source of

Figure 2: Map of Land Ownership



Source: Utah AGRC, GIS calculations by Utah Foundation.

Figure 3: Map of Land Coverage



Source: National Land Cover Database, GIS calculations by Utah Foundation.

funding. One of the solutions to prop up this funding was the 2000 Secure Rural Schools Act, which has provided between \$10 and \$16 million per year since 2009 for National Forest restoration and rural schools and roads.⁵

The third largest manager of federal lands in Utah is the National Parks Service, which oversees 13 national parks, nearly 1,700 National Register of Historic Place listings, two National Heritage Areas, four National Natural Landmarks and 14 Natural Historic Landmarks. In 2012, there were over 9.5 million visitors to national parks, with an estimated economic benefit of \$693 million to tourism in Utah.⁶

HISTORY

Developing the Nation Westward

The U.S. Constitution dictates that Congress has the task of developing a public land policy. Since the ratification of the Constitution, federal land policy has been dictated by two visions: reserving some federal lands for preservation and selling or disposing of other lands for development, transportation or settlement. These lands and resources have been important throughout American history, and have provided opportunities for land settlement, economic development and a source of revenue for national, state and local needs.

From the founding of the nation, the federal government began accumulating, and then finding ways to dispense, large tracts of land.⁷ After the Revolutionary War, the federal government and states struggled over who would control the “western” lands between the Appalachian Mountains and Mississippi River.⁸ At the time, seven of the original colonies had claimed these lands as their own. Eventually, the original states ceded their lands to the federal government, playing a crucial role in helping to create a strong, centralized federal government under the new constitution. The land

not included within the boundaries of the original thirteen states was then considered to be “public domain,” owned and administered by the national government. The size of the public domain was later increased through the Louisiana Purchase, the Oregon Compromise, the cessions from Mexico, the Alaska Purchase, and other smaller transactions.

In the mid- to late-1800s, Congress passed a number of laws to encourage the settlement of the West. The Homestead Act of 1862 allowed settlers to acquire 160-acre, self-sufficient farms with their time, labor, and a relatively small fee. For states east of the 100th

Figure 4: Bureau of Land Management Collections, Transfers and Investments

Federal Collections from BLM-Managed Lands and Minerals in Utah	
Grazing Fees	\$1,074,362
Recreation and Use Fees	2,602,644
FLPMA Rights-of-Way Rent	930,052
Miscellaneous Receipts	845,886
Sale of Land and Materials	663,139
Timber Receipts	3,470
Mining Claim Holding Fees and Service Charges	433,453
Helium Operations	n/a
Mineral Royalties, Rents, and Bonuses	269,661,471
TOTAL	\$276,214,477
Direct BLM Financial transfers to the State of Utah	
Grazing Fees	\$134,295
Proceeds of Sales	26,664
Timber Receipts	3,470
National Grasslands	n/a
Mineral Royalties, Rents, and Bonuses	135,429,658
TOTAL	\$135,594,087
BLM Investments in the State of Utah	
Management of Land and Resources	\$58,548
Land Acquisition	672,545
Range Improvements	529,293
Construction and Access	4,382,384
Central Hazardous Materials Fund	136,665
Management of O&C Lands	n/a
Helium Operations	n/a
Wildland Fire Preparedness	18,586,353
Wildland Fire Operations	48,111,262
TOTAL	\$72,477,050

Source: Bureau of Land Management.

meridian -the line which roughly divides the eastern and western halves of the U.S.- the policies that sought to encourage land settlement and economic development were successful, as public land passed reasonably quickly into private ownership.⁹ However, as settlers moved further west, this process slowed as the climate and landscape became less suitable for agricultural development. Settlers discovered that the climate of the far West was semi-arid to arid, and much of the land was made up of mountains or desert, making it ill-suited for cultivation. As a consequence, relatively little of the western land was transferred to private ownership.

By the end of the 19th century, Congress began to recognize the need to protect the nation's natural, historical, and cultural resources while providing opportunities for recreation. It stopped offering large tracts of land for auction, and special acts withdrew millions of acres of public lands from settlement for national parks, forests, monuments, wildlife refuges, trails and scenic rivers, including Yellowstone in 1872, the country's first national park.^{10,11} Other early conservation efforts focused on public timberlands in an effort to protect the nation's forests.

Subsequently, the federal government's focus shifted from disposal to retention and management of the remaining federal lands. President Theodore Roosevelt pushed several conservation measures through Congress, including the Antiquities Act of 1906, which provided for the protection of historic and prehistoric objects on public lands. Since its enactment, this law has been used to create national monuments throughout the country. It is interesting to note that even from the early days of our nation's history, public land policy debates took on East vs. West themes, with easterners more likely to view the western lands as national public property, and westerners more likely to view their land as necessary for local use and development.¹²

By the time the United States entered World War I in 1917, the rush for homesteads had come to an end. There was very little good agricultural land left in the public domain, and with entry to the war, many homesteaders were drafted into the military, while others left to take well-paying industrial jobs in the cities. After the war the homestead bust continued as drought devastated many parts of the country.¹³ All of this signaled a dramatic decrease in the transfer of the public domain to private owners.

The Taylor Grazing Act of 1934 to a great extent marked the end of federal disposal of land. Members of Congress from western states began to acknowledge that the prospects for the federal government relinquishing land to the states were poor, despite the fact that the language in the bill left it as a possibility. That same year, President Franklin D. Roosevelt withdrew most public lands in the western U.S. for classification.¹⁴ The impact of the Antiquities Act and Taylor Grazing Act is clear when one considers that of the approximately 816 million acres of public domain that have been transferred to private ownership since 1781, the vast majority occurred before 1940.¹⁵

It is important to note that leaders from western states were not shut out of this policy process. Senator Reed Smoot of Utah served from 1905 to 1933, and was a leader of a group of business-minded conservationists who championed public control of the forests, the creation of national parks, and resource policies designed to encourage systemic development. He played a significant role in the enactment of conservation legislation at this time.¹⁶

The Sagebrush Rebellion

The enactment of the Federal Land Policy and Management Act of 1976 expressly declared that the remaining public domain lands generally would remain in federal ownership. This declaration was a contributing factor to what became known as the Sagebrush Rebellion.

The Sagebrush Rebellion was a movement that started in the 1970s to provide state or local control over federal land and management decisions in western states. The base of the Rebellion was multi-faceted and went beyond just the simple question of land ownership.¹⁷ Another contributing factor to the Rebellion was the view of many westerners that "environmental extremists" had gained greater influence in Washington, D.C.¹⁸ It can variously be characterized as an East-West conflict, an intraregional dispute, a states' rights issue, and a struggle between environmentalists and developers. Indeed, many western political leaders embraced the Sagebrush Rebellion more as a symbol of western unhappiness with federal management practices than as an actual policy proposal.¹⁹

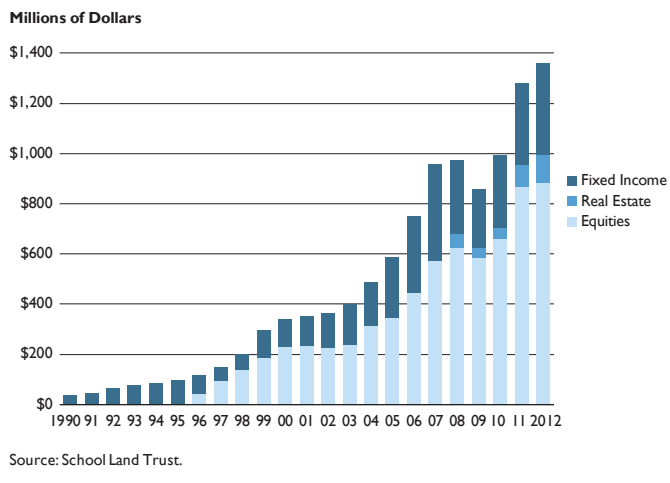
Several bills were proposed and even passed at the state and federal levels regarding this movement. The Nevada State Legislature passed a bill to claim ownership of more than 50 million acres of public land. In Utah, the Land Reclamation Act of 1980 asserted Utah's ownership of federal lands within its borders. Governor Scott Matheson agreed to sign the legislation if it was amended to incorporate land-use safeguards such as the *National Environmental Policy Act* and the Endangered Species Act, and limited the bill's application to Bureau of Land Management lands. However, when the Supreme Court did not sustain Nevada's law, Utah's law became a dead letter, meaning it was no longer valid or enforceable.²⁰ At the federal level, Senator Orrin Hatch introduced S. 1680, the Western Lands Distribution and Regional Equalization Act of 1979, which would have transferred most federally owned land, excluding national parks and monuments, wilderness areas, military reservations and other specified areas, to the states west of the 100th meridian. Senator Hatch's bill never made it up for a vote on the Senate Floor.²¹

State leaders in Utah also created Project BOLD, which was initiated by Governor Matheson as a proposal for land exchanges between the federal and state governments.²² It was formalized in 1983-84 as a strategy to "exchange school lands for Federal lands to consolidate State lands to resolve in a rational and equitable manner some of the problems caused by the checkerboard pattern of land ownership."²³ Project BOLD was designed as a separate state proposal, but required congressional approval. Despite strong support from many quarters, a resolution from the Utah State Legislature and bills introduced in the U.S. Senate and House of Representatives, the movement eventually died. This is most likely due to a lack of continued political backing tied to declining support by county commissioners, and lack of interest from newly elected Governor Norm Bangerter in 1984.²⁴

While supporters of the Sagebrush Rebellion felt they were moving their cause forward with these actions, it eventually stalled for several reasons.

First, supporters found little constitutional backing for their cause. At the time, there were five important U.S. Supreme Court cases

Figure 5: SITLA Funds Investment Balances



that supported the federal government managing the land. As early as 1840, the Court ruled that the power over the public lands was “vested in Congress without limitation,” and was considered the foundation on which the territorial governments rest.²⁵ In 1897, the Court ruled that the federal government also has power over lands adjacent to public lands.²⁶ Early in the 20th century, the Court decided that the federal government can withhold or reserve land as it sees fit, stating that “Public lands of the nation are held in trust for the people of the whole country.”²⁷ Other Supreme Court cases have also upheld the “complete power” Congress has over public lands.²⁸

Second, efforts were also stymied by the “split estate,” the concept that ownership of land is not a singular or simple thing. With public lands, there are a variety of claimants to both resources and lands. For instance, private companies or individuals have contracts with the government regarding energy extraction or grazing. Supporters of the Sagebrush Rebellion came to realize that there was no “practical way to transfer the millions of split estate ownerships belonging to miners, grazers, loggers, cabin owners and all the rest into state ownership.”²⁹

A final reason the Sagebrush Rebellion died off was because of declining support. Over time, some of the leaders either left public office or began to focus on other issues. In addition, some people took heart when conservative leaders were elected in 1980 thinking they would support the cause of transferring federal lands to the states, but these newly elected officials chose to focus on other issues.

Utah Trust Land Exchanges

When Utah was granted statehood, the federal government gave the state parcels of land to be managed in trust to provide financial support for public education and other public institutions. Congress granted four one-mile square sections in each 36-square mile “township” to become school trust land, making up more than 10% of the land in the state. In return, the state agreed not to tax or lay claim to the federal land in the state.³⁰ However, whether the state should be able to lay claim to federal lands is currently being disputed, this issue will be described more fully below.

In 1994, the School and Institutional Trust Lands Administration (SITLA) was created by the Utah State Legislature to manage these lands. Before this, the land had been managed by the Division of State Land and Forestry within the Department of Natural

Resources, but concerns over whether this was the best way to manage the lands in the 1980s led to a change.³¹ As an independent agency of state government, SITLA’s directive is to manage the real estate and financial portfolios of the lands, working with beneficiaries, state lawmakers, state agencies, local communities and the public in the process.³² In addition, SITLA must find a balance between the inherent conflict of the management mandate for the trust lands and federal conservation management.

As stated before, the money for the trust lands comes from several sources, the largest of which is mineral revenues. SITLA leases mineral properties for gas, oil, coal, sand, gravel and gold extraction. SITLA also leases land for a variety of users, including telecommunication sites, governmental uses, commercial sites, industrial sites, recreation, farming, timber harvesting and grazing. The land is also used for rights of entry and easements for things like oil and gas pipelines and wind farms.³³ The income SITLA earns from these different sources has grown dramatically throughout the past two decades, as shown in Figure 5.

An additional way SITLA can raise money is through selling land, either through public auction or through a development project. This can be done at varying scales, from auctioning off small portions of land to very large land swaps that involve multiple state and federal agencies and legislation from Congress. For instance, in 1998, Utah received \$50 million and approximately 139,000 acres of resource-rich, federally owned land. In return, the federal government acquired 379,739 acres of checkerboard state parcels, many of which were landlocked within the newly created Grand Staircase-Escalante National Monument. This deal was negotiated by Interior Secretary Bruce Babbitt and Utah Governor Mike Leavitt to resolve the controversy surrounding President Clinton’s executive order establishing the Monument.³⁴

More recently, a deal which was authorized by the 2009 Utah Recreational Land Exchange Act is expected to be finalized by the end of this year. This would give the BLM nearly 46,000 acres with conservation and recreational values. In exchange, SITLA is expected to receive 35,516 acres of federal lands with oil and gas potential.³⁵ Very large swaps like this, especially those that are pursued by actors or agencies at the state level, are often authorized by federal legislation. This occurs because a member of the state’s congressional delegation is asked to sponsor legislation, and the congressional directive gives great structure and incentive to the land exchange.

ARGUMENTS FOR STATE CONTROL OF LAND

Those who support the movement to transfer federal lands to state control make several arguments. They argue that upon being admitted as a state, the federal government promised all new states that it would “extinguish title” to all federal public lands. Similarly, the Equal Footing Doctrine, which is covered more extensively later in this document, argues that since the original thirteen colonies were admitted into the Union with little or no federal public lands within their borders, all other states should be treated the same. Arguments for state control of land also posit that if states control the federal public lands, it would open up development and economic opportunities and help the state close its education funding gap and make the state more self-reliant. Lastly, supporters argue that the state can do a better job of managing the land, as opposed to bureaucrats in Washington D.C.

“Extinguish Title”

Section 3 of Utah’s Enabling Act states “That the people . . . agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof . . . 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.”³⁶ Supporters of state control of federal land argue that with these words, the federal government made a promise to extinguish its title to federal lands in a timely manner. In legal terms, they have a contractual duty to dispose of the lands.³⁷ Supporters further stipulate that a similar promise was made in the enabling acts of other states like North Dakota, South Dakota, Oklahoma and Iowa, and that the lands were eventually transferred.³⁸ In addition, they argue that the states only agreed to “disclaim all right and title” to the public lands so that when they were eventually transferred there could be no superior claim to the lands from a third party.³⁹ It may seem counterintuitive, but it was actually in the states’ interest to agree to this, since it increased the state’s gains in the long run.

Apart from the legal arguments, supporters also posit that Utah became a state at a time when there was a predominant ethic of disposal. They argue that “Beginning in 1776 and continuing for most of the 19th and into the 20th century, the primary goal of the United States was to dispose of as much public land as possible,” and that the state had an expectation that this norm would continue.⁴⁰ Utah’s Enabling Act was entered into during the disposal era of public lands, and supporters of the transfer of federal lands argue it is a critical component in their case.

Unequal Footing

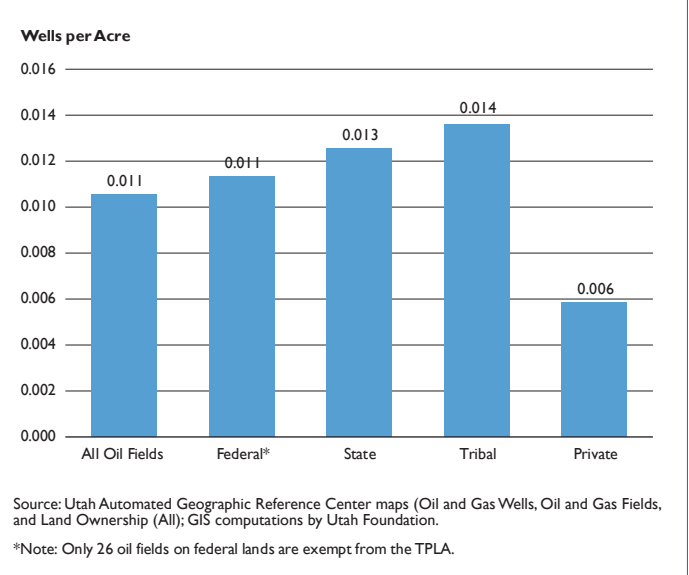
Equal footing is a constitutional law doctrine upon which states are admitted into the United States with the same legal rights as already existing states. This doctrine is based on Article IV, Section 3, Clause 1 of the U.S. Constitution, which states: “New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” In addition, since Tennessee became a state in 1796, Congress has included in each state’s act of admission a clause providing that the state enters the Union “on an equal footing with the original States in all respects whatever.”⁴¹

Supporters of the transfer of public lands argue that the states west of the 100th meridian were not admitted into the union on equal footing with other states. As noted earlier, though their enabling acts are similar, the land in eastern states was transferred to private ownership or to the states, but this is not the case in the West. They further argue that since the original thirteen states were admitted into the Union with little or no federal public lands within their borders, all other states should have the same.⁴²

Economic Opportunities of State Control

Supporters of the Transfer of Public Lands Act (TPLA) often compare Utah to North Dakota and say that since North Dakota has access to its lands and resources, its economy is stronger and per-pupil spending on education is higher. They argue that since only 3.9% of

Figure 6: Number of Oil Wells in Oil Fields in Utah Per Acre



land in North Dakota is owned by the federal government, the state has greater opportunities for economic development, and because of this, the state weathered the recession better and can afford to spend more on education. They also point out that 10 of the 12 public lands states are below the national average in per pupil spending, with only Alaska and Wyoming being above it.⁴³

Of great importance to the story of the settlement of Utah is that the state is rich in resources. While Utah has been referred to as the “Wasatch Oasis” because it possesses an abundance of water and rich soil, it’s land is not flat and conducive to farming throughout the state.⁴⁴ Because of this, a large portion of it was not homesteaded. However, just because the land was not transferred to private ownership does not mean it has no value or that the state couldn’t benefit from it being developed. As noted earlier, the federal government derives revenues from mining, drilling, logging, grazing and other activities, a portion of which are then transferred to the state. It is argued that if the state had ownership of the land, it would receive more of the current revenues the land produces, and further economic development would lead to increased revenues.

One example supporters point to when citing the economic hardships the state deals with is the process of receiving a permit for oil and gas wells from state and federal agencies. Oil and gas companies must file an Application for Permit to Drill for each well, and state and federal agencies then perform evaluations, onsite visits, environmental analyses and drilling plan evaluations before they can be approved. A common complaint is that it takes about 45 days to receive a drilling approval from Utah’s Division of Natural Resources, but much longer to receive federal approval from the BLM.⁴⁵ While there are nearly as many wells per acre on federal lands as there are on state lands (see Figure 6), a vast majority of the existing wells on federal land are older, vertical wells which produce far less gas flow than horizontally-drilled, hydraulically fractured – or “fracked” – wells. Accordingly, the time delay from receiving federal approval could prove significant to increasing oil and gas production and the corresponding state revenues.

It has been argued that “Utah’s ability to access and responsibly develop those resources is often thwarted by federal rules, regulations,

processes and management policies. These federal policies also have stymied revenue opportunities that could have been realized from development of resources on many of the State lands held by SITLA for the benefit of Utah's schools.⁴⁶

State Management is Better Management

In their case statement in favor of the TPLA, Utah's Constitutional Defense Council wrote, "Examples of federal inefficiency and mismanagement abound. These difficulties are not attributable to the efforts of capable federal employees, but are, instead, symptomatic of the non-functioning federal land management policies and processes." Such examples include the size and frequency of forest fires, bark beetle infestation, deterioration of ranges, and rampant wild horse and burro populations. They also include the failure to produce the jobs, realize the revenue, and meet the nation's energy needs through increased oil and gas production. A common refrain from supporters of HB 148 is that the state can manage its own land and affairs better than bureaucrats in Washington, D.C. They point to the fact that SITLA was created because the federal government was not managing the state trust lands efficiently. They also point to practical examples, like individuals arrested on federal land must go to a magistrate rather than a jury of their peers.

Struggle for Independence

Supporters of the TPLA catalogue a long history of struggling for more independence. In 1915, the Utah State Legislature passed a resolution titled Senate Joint Memorial 4 that urged the federal government to make the public domain accessible for development. It noted that older states benefited from generous land policies, and urged the federal government to return to those types of policies.⁴⁷ During the 1920s and 1930s, Utah Governor George Dern actively participated in a large federal commission that studied state and federal land issues. This commission eventually failed when President Hoover offered to return all federal lands but retain the mineral rights, a deal most westerners could not agree upon.⁴⁸ Utahns actively participated in the Sagebrush Rebellion, and are now once again taking action to have federal lands transferred to state control.

ARGUMENTS FOR FEDERAL CONTROL OF LAND

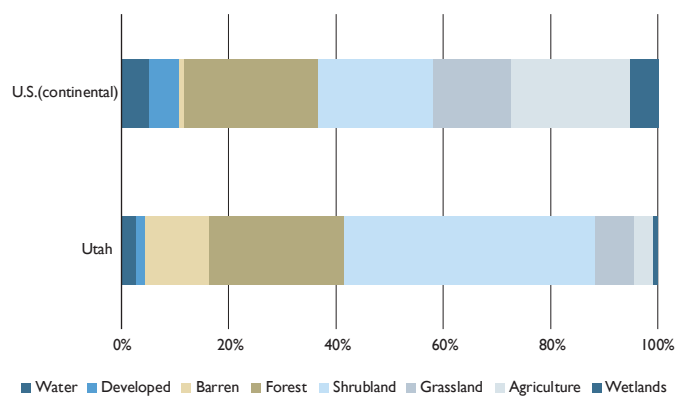
Those who are against the transfer of lands, and argue that the federal government should maintain control of the public lands, make several counterpoints to those outlined above. First, they argue that the federal government did not promise to "extinguish title" to all lands and that the legal property rights belong to the federal government. Second, they contend that the Equal Footing Doctrine does not pertain to this case, because the original colonies ceded a large portion of their lands to the federal government before becoming states. Third, they point out that the states already benefit economically from the federal government managing the public lands and that taking them over would be a costly and burdensome task. As part of this, those against state control argue that the state's education funding woes would not be solved by state control of the public lands. They also stipulate that the federal government does not manage the lands from afar, but the many field offices throughout the country insure local interests help manage the land. Finally, they point to a history within the state of conservation and say that keeping the land protected is in keeping with the state's interests.

Forever Disclaim

Just as advocates of transferring federal lands to state control point to Section 3 of Utah's Enabling Act, so do the critics. They point to the first sentence, "That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof," and argue that the case for upholding the TPLA is a dead letter.⁴⁹ They argue that the state made a promise not to try to claim the land in the future.

It is also argued that although Utah's Enabling Act does say that the federal government will extinguish title to lands, nowhere does it indicate this means all lands nor does it specify that this would be done in a certain time frame. It is true that the federal government had "land disposal" laws like the Homestead Act, but the topographical reality made it so the implementation was not widespread. Supporters of federal lands would argue that there is a close correlation to the percentage of federal lands and the amount of arid or semi-arid land in each state, meaning that the large amount of federal land in Utah is largely due to a lack of homesteading on non-arable land, especially compared to other states. A cursory review

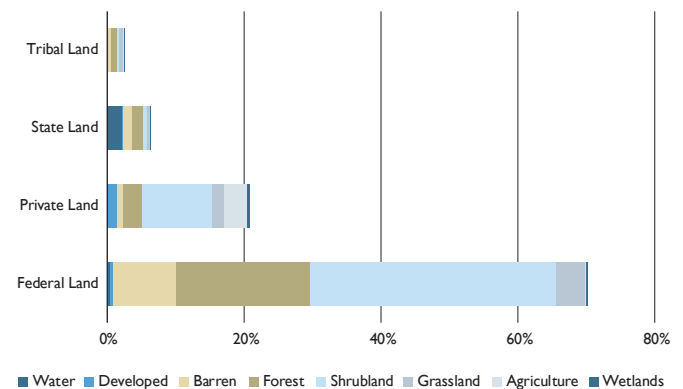
Figure 7: U.S. and Utah Land Coverage by Type



Source: U.S. Geological Survey, Earth Resources Observation and Science Center, MRLC Project; GIS calculations by Utah Foundation.

Note: A very small portion of Utah & the U.S. is categorized as "Ice and Snow" and is not included in this figure.

Figure 8: Land Ownership in Utah by Coverage Type



Source: U.S. Geological Survey, Earth Resources Observation and Science Center, MRLC Project; GIS calculations by Utah Foundation.

Note: A very small portion of Utah is categorized as "Ice and Snow" and is not included in this figure.

of the data regarding rainfall or soil type shows that compared to other states, Utah receives very little precipitation, and has soil that does not lend itself to the type of agricultural activities other areas enjoy. This is highlighted in Figure 7, which shows that within the continental U.S., most land is forest, agricultural, shrubland, or grassland. Utah on the other hand is mostly covered by shrubland, forest, or is barren. Figure 8 shows that the federal land within Utah is composed almost entirely of shrubland, forest and barren land.

Equal Footing

Just as there is an argument that Utah was not let into the union on equal footing with other states, there is a counterargument. Opponents of the TPLA point to several historical events. First, as noted previously, after the Revolutionary War, seven of the original colonies had claimed the “Western Lands” as their own. Eventually, these new states ceded their lands to the federal government, and this land became known as the “public domain,” owned and administered by the national government. Over half of the United States is composed of land that at one time was a part of the public domain.⁵⁰ In effect, saying the original states were admitted into the union with no federal land does not tell the broader story of compromise over these land issues.

Second, states outside of the West were also admitted into the Union with sizeable amounts of federal land. The topography and climate of these states made them more suitable for development and homesteading, so the land was transferred to states or private individuals or companies at a much faster rate than in the West.

Economic Benefits of Federal Control

Proponents of federal control of public lands argue that Utahns have benefited from this arrangement since settlers first arrived. Settlers paid only a small fee for the titles according to homesteading laws, and in a pattern that Mormons would follow in community after community, surveyors apportioned lots of farms to the first settlers.⁵¹ Utah stock raisers used public lands for grazing. The number of sheep and lambs grazing in Utah increased by more than 6,300% from 1870 to 1900 – from 60,000 to more than 308 million.⁵² Cattle and calves increased by 860% over this period from under 36,000 to nearly 344,000; increasing an additional 47% by 1920 to nearly 506,000.⁵³

It is also argued that Utah continues to benefit from this relationship. As noted previously, the federal government does not keep all revenues derived from federal lands. In addition to the \$135.6 million the BLM transfers to the state, it invests an additional \$72.5 million for management, land acquisition, construction, wildfire preparedness and operations, and other services.⁵⁴ Once these transfers and investments are accounted for, the federal government retains \$68.1 million. In addition, they argue that the state is not well positioned to manage the federal lands. The Utah Department of Natural Resources saw its budget cut from \$12.2 million in FY 2010 to \$6.7 million in 2011 and \$3.9 million in 2012.⁵⁵ These cuts have put some state parks on the verge of closure. Opponents of TPLA argue that the state can barely afford to maintain its own public lands. How could it afford to manage additional lands? They question why some would want to put that burden on Utah’s taxpayers and point out that bills that were similar to HB 148 failed to pass in Colorado and Arizona because lawmakers were concerned about the fiscal implications.⁵⁶

Opponents of the TPLA worry that the state would over-develop the land. They highlight the fact that the state already has over 1,500 grazing permits and leases, over one million acres producing oil and gas, 75 producing leases for coal production, and other notable developments.⁵⁷ They argue energy development is already intensive in many parts of the state, with oil trucks on U.S. 40 in the Uinta Basin already putting strains on the area’s infrastructure and air quality. There are also concerns over endangered species due to this development, with efforts being made to protect the Sage Grouse population.⁵⁸

Opponents also try to poke holes in the argument that increased economic activity on public lands would solve the state’s education funding problems. They point out that in order to make up the \$2.6 billion funding gap that would be required to get Utah’s per pupil funding rate to the national average, the amount of economic activity on federal lands would have to increase nine fold, and that assumes all revenue would be dedicated to education with none invested in the infrastructure projects or public services that would most certainly be needed. Just capturing the full amount of current BLM revenue would not even be enough to lift Utah’s per pupil funding above Idaho, the next highest ranked state.⁵⁹ Additionally, if the state gained control of federal lands, it would lose the PILT (payment in lieu of taxes) payments it receives to support rural schools. PILT payments are meant to offset losses in property taxes due to nontaxable federal lands. In 2012, this amount was over \$35 million.⁶⁰

An important part of education funding is property taxes, and western states have lower property taxes on average than other states. In fact, the major cities in 11 of the 12 federal lands states have property taxes below the national average.⁶¹ In addition to looking at per-pupil funding, it is important to look at funding effort. Utah Foundation describes funding effort as revenues per \$1,000 of personal income appropriated for education. Research has shown that Utah’s funding effort has slowly been declining, in part because of changes made to property tax laws and changes to how funds are dedicated.⁶² In fact, of the 12 states that have smaller non-federal land than Utah (including the District of Columbia), five have higher education funding efforts, as shown in Figure 9.

A History of Conservation

There is also an argument that Utah has a history of conservation. Early city engineers protected City Creek Nature Preserve from becoming a gravel pit, and Pioneer Park from expanding manufacturing and commercial business.⁶³ At the direction of church president Joseph F. Smith, LDS men voted to support the withdrawal from the market of all public lands above Utah cities in order to protect them from damage from logging and grazing. This was done in a special general priesthood meeting on April 7, 1902.⁶⁴ Salt Lake City was the site of the first National Irrigation Congress in 1891, and three years later the territorial legislature made it illegal to pollute the streams of the territory. After Utah became a state in 1896, Governor Heber M. Wells followed the lead of the federal government and protected all state lands containing forest reserves. In 1905, the Legislature authorized Governor John C. Cutler to create a conservation commission, which Cutler’s successor, William Spry, later broadened.⁶⁵

Figure 9: Education Funding, 2010-2011

Per Pupil Current Spending			Education Revenues per \$1,000 Personal Income		
	Rank			Rank	
U.S. Average		\$10,560	U.S. Average		\$48.68
New York	1	19,076	Alaska	1	75.47
District of Columbia	2	18,475	Wyoming	2	64.32
Alaska	3	16,674	Vermont	3	60.56
New Jersey	4	15,968	New York	4	60.39
Vermont	5	15,925	West Virginia	5	58.74
Wyoming	6	15,849	New Jersey	6	57.03
Connecticut	7	15,600	Ohio	7	54.97
Massachusetts	8	13,941	Arkansas	8	54.52
Maryland	9	13,871	Michigan	9	54.30
Rhode Island	10	13,815	Georgia	10	53.76
Pennsylvania	11	13,467	Indiana	11	53.66
New Hampshire	12	13,224	Illinois	12	53.17
Delaware	13	12,685	New Mexico	13	52.77
Hawaii	14	12,004	Wisconsin	14	52.72
West Virginia	15	11,846	Texas	15	52.69
Wisconsin	16	11,774	Nebraska	16	52.67
Maine	17	11,438	Pennsylvania	17	52.58
North Dakota	18	11,420	South Carolina	18	51.99
Ohio	19	11,223	Iowa	19	50.86
Nebraska	20	10,825	Kentucky	20	50.27
Michigan	21	10,823	Kansas	21	50.25
Illinois	22	10,774	Rhode Island	22	49.73
Louisiana	23	10,723	Mississippi	23	49.21
Minnesota	24	10,712	New Hampshire	24	49.14
Montana	25	10,639	Maine	25	48.82
Virginia	26	10,364	Connecticut	26	48.31
Iowa	27	9,807	Delaware	27	48.25
Oregon	28	9,682	Maryland	28	47.77
Kansas	29	9,498	Minnesota	29	47.63
Washington	30	9,483	Louisiana	30	47.52
Missouri	31	9,410	Montana	31	47.46
Indiana	32	9,370	Utah	32	46.40
Arkansas	33	9,353	Alabama	33	45.72
Kentucky	34	9,309	Massachusetts	34	45.50
Georgia	35	9,253	Missouri	35	45.09
California	36	9,139	Hawaii	36	44.77
New Mexico	37	9,070	North Dakota	37	44.08
South Carolina	38	8,986	Oregon	38	43.98
Florida	39	8,887	California	39	43.81
Alabama	40	8,813	Oklahoma	40	43.66
South Dakota	41	8,805	North Carolina	41	43.56
Colorado	42	8,724	Nevada	42	42.84
Texas	43	8,671	Idaho	43	42.14
Nevada	44	8,527	Washington	44	41.70
North Carolina	45	8,312	Colorado	45	40.93
Tennessee	46	8,242	Virginia	46	40.71
Mississippi	47	7,928	South Dakota	47	40.09
Arizona	48	7,666	Tennessee	48	38.74
Oklahoma	49	7,587	Arizona	49	38.49
Idaho	50	6,824	Florida	50	36.61
Utah	51	6,212	District of Columbia	51	29.78

Source: U.S. Census Bureau.

LEGALITIES

The TPLA establishes December 31, 2014 as the deadline by which the specified federal lands must be transferred to the state, or a court battle will ensue. Both supporters and opponents of the TPLA argue that if this issue goes to federal court, they have very strong cases.

The Legal Case for TPLA

As discussed earlier, arguments that will be made in support of the TPLA include:

- Utah’s Enabling Act, in which the federal government promised to dispose of all public lands. Longstanding precedents support the theory that an enabling act is a binding compact and should be treated as a contractual agreement.⁶⁶ In *Andrus v. Utah*, a 1980 U.S. Supreme Court Case over federal grazing issues, the Court explained that promises in enabling acts are “solemn agreements” which can be compared to a contract between private parties.⁶⁷ Furthermore, the Court recognized that if a party is in breach of an enabling act compact, a solution must be found, legislative or judicial.⁶⁸

- The laws and norms that existed in 1896 when Utah’s Enabling Act went into effect must be taken into account. The federal government made a compact to dispose of lands, at a time when it was a norm for large chunks of land to be homesteaded or sold. Thus, Utah had an expectation that all of these lands would eventually be transferred.

- In 2009, the Supreme Court ruled on *Hawaii vs. Office of Hawaiian Affairs*, a case about the former crown lands of the Hawaiian monarchy and whether the state had the right to sell them. The Office of Hawaiian Affairs (OHA) filed suit against the state of Hawaii to prevent the transfer of “ceded” lands for the purpose of private development. OHA successfully argued that “any transfer of ceded lands by the State to third parties would amount to a breach of trust” and would be without consideration of the claims of native Hawaiians to those lands. A unanimous Supreme Court held that the Apology Resolution of 1993 did not restrict Hawaii’s sovereign authority to transfer publicly held land for private development.⁶⁹ TPLA supporters point to this as an example of the Court returning to states lands that are rightfully theirs.

The Legal Case Against TPLA

Arguments against the TPLA include:

- The Office of Legislative Research and General Counsel (LRGC) gave HB 148 a high probability of being declared unconstitutional.⁷⁰ In its Legislative Review Note, LRGc explained that the Property Clause of the Constitution authorizes Congress “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁷¹ Furthermore, the Supreme Court has ruled that Congress’ power over property and territory is “without limitation.”⁷² The fact that the Supreme Court has interpreted the Constitution in such a broad and unrestrictive manner has given Congress discretion to deal with federal property as it sees fits. It would also make it very difficult for the TPLA to hold up in court.
- In Utah’s Enabling Act, the state agreed to “forever disclaim” the federal lands, and thus the case for upholding the TPLA is a dead letter.⁷³
- “The Power to dispose” in the Utah Enabling Act is not a duty or obligation to transfer or sell the land to private ownership. Rather, opponents argue that the Supreme Court has consistently held that the clause does not mandate a duty but that it delegates a power. In short, it is the power to dispose of or not dispose of.⁷⁴
- Hawaii vs. Office of Hawaiian Affairs* is not applicable to Utah’s situation. In Utah, the federal government created a state and then slowly began to dispose of the land. In Hawaii, the U.S. took over an existing kingdom where land rights already existed.

LOOKING FORWARD

Education Funding

Supporters of the TPLA argue that increased economic activity on public lands would solve the state’s education funding problems. However, this argument does not consider the history of education funding in Utah. In 1995, Utah had the seventh highest funding

effort for K-12 education in the country. Since that time, it has steadily declined, and Utah now ranks 32nd. Education funding in Utah is low because of changes to property taxes in Utah and the way education funds are dedicated. Additionally, of the 12 states that have smaller non-federal land than Utah (including the District of Columbia), five have higher education funding efforts. The challenges that Utah faces with education funding are not due to restricted access to federal lands, rather they are due to our above average school-aged population and below-average funding effort. If Utah currently exerted the same level of funding effort in proportion to Utah incomes as in 1995, K-12 education would have about \$850 million more funding, or about \$1,300 more per pupil. This would change Utah's rank in per-pupil funding slightly, rising only above Idaho.

Access to federal land may not be the reason for Utah's low education funding, but greater economic activity on those lands could provide new sources of funding that would benefit education. One way this could occur is through greater production of oil and natural gas if the current ownership of land is impeding such production. One current example of this is North Dakota, which has been experiencing an oil and gas boom since 2008. The economic activity generated by this boom has increased tax revenues for schools, and North Dakota increased K-12 education funding by more than \$1,700 per pupil in a three-year span, rising from 26th in the nation in 2008 to 18th in 2011 in per-pupil funding.⁷⁵

Cooperation

Within the past two decades, the State of Utah has negotiated several large land exchanges with the federal government. In 1998 a deal was struck exchanging nearly 380,000 acres of checkerboard state parcels in the newly created Grand Staircase-Escalante National Monument for 139,000 acres of resource-rich, federally owned land. The 2009 Utah Recreational Land Exchange Act is expected to give the BLM nearly 46,000 acres with conservation and recreational values, and in exchange SITLA is expected to receive 35,516 acres of federal lands with oil and gas potential.⁷⁶

Currently, lawmakers in Utah and Washington, D.C. have been trying to negotiate a "grand bargain" that would appease both environmentalists and energy development. This type of cooperation is preferred because it is most efficient and less costly than the federal government declaring certain lands to be off limits, the state demanding other lands be transferred, or either party getting involved in a lengthy court battle.

Public Perception

Surveys have shown that the public lands issue is not as important to voters as it is to party delegates and elected officials. In a Utah Voter Poll conducted in 2012, respondents were asked to rank six issues in order of personal importance, including: homosexual rights, jobs, taxes, education, public lands and immigration. Public lands was listed as the fifth most important issue, above only homosexual rights.⁷⁷ When Utah Foundation asked a similar question in the 2012 Utah Priorities survey, access to public lands was ranked 16th among 19 issues.⁷⁸

However, 70% of Republican state delegates felt it was important for elected officials to allow mining and grazing on federal lands in Utah, compared to 39% of voters.⁷⁹ In addition, Republican

delegates ranked it as a top priority, while Democratic delegates and voters of both parties did not. Republican gubernatorial candidates also thought it was important, with five of the six candidates saying they were very concerned about access to public lands, making it a much higher priority than voters or even Republican voters.⁸⁰ It is important to note that while some elected officials and advocates of TPLA argue that public lands is a very important issue, survey work shows that the general public does not hold this same concern.

Further Study

During the 2013 legislative session, the Legislature passed H.B. 142, which requires the Public Lands Policy Coordination Office to "conduct a study and economic analysis of the transfer of certain federal lands to state ownership."⁸¹ This further study is necessary and will shed greater insight on this very complicated issue. In the Report on Utah's Transfer of Public Lands Act, the Constitutional Defense Council, the state government office tasked with studying this issue, listed many of the actions the Legislature would have to consider before a land transfer could be implemented. The nearly 20 actions range from identifying areas that may be managed most effectively by SITLA to increasing funding for state parks to demonstrate Utah's conservation commitments and creating a Utah state public lands management policy act. This highlights how complicated and difficult such a large land transfer would be, and the importance of additional study.

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This research report was written by Utah Foundation Research Director Morgan Lyon Cotti, Ph.D., with assistance from President Stephen Hershey Kroes, Research Analyst Shawn Teigen and Research Intern Robert Richards. Dr. Lyon Cotti or Mr. Kroes can be reached for comment at (801) 355-1400, or by email at steve@utahfoundation.org.

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