

## **\*1068 THE SALE OF OUR LAND: A LOOK AT PUBLIC LAND TRANSFERS**

### **INTRODUCTION**

In 2012, Utah passed H.B. 148 “Transfer of Public Lands Act and Related Study,” which seeks to transfer 31.2 million acres of land currently managed by the federal government to the state of Utah.<sup>1</sup> Since then, nine other states have begun developing similar legislative proposals, and states are spending tax dollars to research whether land transfers would benefit their state, such as increased revenue through mineral extraction or sales to private interests.<sup>2</sup> Utah recently spent \$550,000 on a study, which yielded mixed results on whether it would be fiscally beneficial.<sup>3</sup> This comment will discuss the benefits, risks, and constitutionality of proposals such as Utah H.B. 148, as well discuss whether Arizona’s legislature should pursue a similar strategy.

### **I. THE POTENTIAL BENEFITS**

Supporters of the land transfer argue that it would improve public access, generate more economic growth, and better protect the environment.<sup>4</sup> Conversely, environmentalists fear that the state will sell tracts of the transferred lands for industrial development. However, Utah public lands advisers claim that the report shows that the state would not have to sell a single acre.<sup>5</sup>

**\*1069** In the Utah report, the findings of potential fiscal benefit hinge on oil and gas prices remaining stable, coupled with energy production staying on pace with recent boom years.<sup>6</sup> Economists estimate that the cost to the state could be \$280 million dollars by 2017.<sup>7</sup> The analysts also calculated the revenues generated from mineral and gas leases that the U.S. government collected in 2013 at about \$332 million dollars.<sup>8</sup> Currently, Utah receives 50 percent of the revenue from oil and gas leases on that land and would still need to negotiate for 100 percent of the energy royalties.<sup>9</sup> The report estimates that Utah could make nearly \$390 million dollars on oil and gas leases in 2017 and \$1.15 billion dollars by 2035.<sup>10</sup>

Another method of increasing revenue, if the land transfer goes through, would be by opening areas for energy extraction currently closed by the federal government.<sup>11</sup> The bill excludes national parks and most national monuments from the land transfer with the exception of the Grand Staircase-Escalante National Monument.<sup>12</sup> This area is currently closed for energy extraction, but the report assumes if the state gained control of the monument they would open the area for coal mining.<sup>13</sup>

### **II. THE POSSIBLE RISKS**

While the figures that the Utah report generated sound appealing, they are not without risks. The report took generous

assumptions regarding future values of oil and gas prices. If the current oil and gas boom fails, or if the federal government declines to assign 100 percent of its energy royalties to the state, then the estimated figures will fall significantly short.<sup>14</sup>

The next area of concern regarding land transfers involves fire suppression and prevention costs. If the states become responsible for those lands, then they will also become responsible for fire control. In 2011, the U.S. Forest Service spent \$230 million dollars on fire suppression in Arizona alone.<sup>15</sup> To put that in perspective, that is \$1 million dollars more than Arizona's law enforcement budget for the entire state.<sup>16</sup> Another fiscal burden the states would be forced to carry would be losing the Payments in Lieu of Taxes program for federal lands. This program operates to offset the absence of property taxes for the federal land by directly \*1070 paying the states.<sup>17</sup> In 2014, Utah received \$37.9 million dollars from these payments.<sup>18</sup> If the land transfer goes through, then Utah will have to make up for those funds.

Several conservation groups have voiced their disapproval of proposals like these. These groups believe that the transfer of land ownership will result in a loss of access to hunting and fishing areas. For example, if the states choose to extract resources from the land, or if they sell tracts to private interests, it could result in restricted public access.<sup>19</sup> Outdoor conservation groups are a key partner in conservation efforts because of the revenue and jobs they contribute to the state economy.<sup>20</sup> Outdoor recreation in these Western states support \$646 billion dollars in revenue and 6.1 million jobs annually.<sup>21</sup>

### III. THE CONSTITUTIONAL ISSUES

This is not the first time that the federal government has faced state attempted land transfer. In the 1970's, a similar strategy was used during the "Sagebrush Rebellion."<sup>22</sup> The goal of these "Sagebrush Rebels" was to establish state or local control over federal land and management.<sup>23</sup> Ultimately they were not successful in their legal challenges, based on constitutional grounds.<sup>24</sup>

A modern revisit to the constitutional issues will likely end with the same result. The Property Clause of the U.S. Constitution 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; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."<sup>25</sup> The text makes it clear that only Congress has the power to initiate a sale or transfer of federal public lands. This was echoed in the 1840 case, *United States v. Gratiot*, where the Court held that the power over the public lands is vested in Congress by the Constitution without limitation.<sup>26</sup> A century later, the Court held that, "Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy."<sup>27</sup> The law has not changed regarding \*1071 federal control of the public lands, and Utah will likely meet the same fate as the "Sagebrush Rebels."

Further, the Enabling Acts, such as the June 1910 Act for Arizona, which the states had to adopt prior to being granted statehood, include clauses that forever disclaim right and title to unappropriated and ungranted public lands.<sup>28</sup>

### IV. CONCLUSION

The findings of the Utah report paint a bleak future for the residents of Utah if the land transfer were to happen. Financially it does not add up, and the projections for profit are optimistic at best. The combination of losing federal support, coupled with the added costs of solely managing the proposed transferred land, would likely lead to sales of land to private interests leaving the residents of Utah to suffer.

According to polls in Arizona, 71 percent of respondents believe that public lands belong to the country as a whole, with only 22 percent saying that the lands belong to Arizona.<sup>29</sup> Polling data also shows that in Arizona, voters approve of how the National Park Service and the U.S. Forest Service are doing their jobs with a 75 percent approval rating.<sup>30</sup> The concern on the impact of outdoor recreation is also prevalent in Arizona, in fact, 88 percent of Arizona residents believe that public lands are essential to the economy.<sup>31</sup> If private interests bar access to these public lands, it could have a significant impact on the state's economy. In Arizona, outdoor recreation generates \$10.6 billion dollars in consumer spending.<sup>32</sup> A land transfer in Arizona would have a drastic impact on Arizona's economy, and on the residents as well as the visitors who enjoy their public lands. Based on Utah's research, together with Arizona's public opinion, it is reasonable to conclude that transferring land from federal to state control would not be beneficial for Arizona's residents.

## Footnotes

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- <sup>1</sup> UTAH'S PUBLIC LANDS POLICY COORDINATING OFFICE, AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH, (Nov. 2014), <http://publiclands.utah.gov/wpcontent/uploads/2013/08/Report-on-Utahs-Transfer-of-Public-Lands-Act-H.B.-148.pdf>.
- <sup>2</sup> Claire Mosher, *The Quiet Plan To Sell Off America's National Forests*, THINK PROGRESS, (Mar. 16, 2015, 8:00 AM), <http://thinkprogress.org/climate/2015/03/16/3633814/gop-budget-public-lands/>.
- <sup>3</sup> Michelle L. Price, *Study: Utah could manage federally controlled land*, SALT LAKE TRIBUNE, Dec. 1, 2014, <http://www.sltrib.com/home/1894392-155/study-utah-could-manage-federally-controlled>.
- <sup>4</sup> David DeMille, *Study: Utah could profit from public lands transfer*, THE SPECTRUM, (Dec. 1, 2014, 6:18 PM), <http://www.thespectrum.com/story/news/local/2014/12/01/study-utah-profit-public-lands-transfer/19760379/>.
- <sup>5</sup> Brian Maffly, *Economists: Transferring federal lands could generate revenue for Utah*, SALT LAKE TRIBUNE, Dec. 1, 2014, <http://www.sltrib.com/news/1894004-155/economists-transferring-federal-lands-could-generate>.
- <sup>6</sup> *Id.*
- <sup>7</sup> *Id.*
- <sup>8</sup> *Id.*
- <sup>9</sup> Price, *supra* note 3.
- <sup>10</sup> *Id.*
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.*
- <sup>13</sup> *Id.*
- <sup>14</sup> Maffly, *supra* note 5.
- <sup>15</sup> OUR AMERICAN PUBLIC LANDS, <http://www.americanpubliclands.com/wpcontent/uploads/2015/03/Arizona.pdf> (last visited Apr. 6, 2015).
- <sup>16</sup> *Id.*

- 17 *Our Public Lands Not For Sale*, BACKCOUNTRY HUNTERS & ANGLERS, [http://www.backcountryhunters.org/images/Public\\_Lands\\_Report.pdf](http://www.backcountryhunters.org/images/Public_Lands_Report.pdf) (last visited Apr. 6, 2015).
- 18 *Id.*; see also Maffly, *supra* note 5.
- 19 *Not For Sale*, *supra* note 17.
- 20 Anthony Licata, *This is Our Land*, FIELD & STREAM, <http://www.fieldandstream.com/blogs/the-conservationist/this-is-our-land> (last visited Apr. 6, 2015).
- 21 *Not For Sale*, *supra* note 17.
- 22 Ralph Graybill, *Public Land Transfer Laws: Not Constitutional Then, Not Constitutional Now*, AMERICAN CONSTITUTION SOCIETY (Apr. 7, 2015), <https://www.acslaw.org/acsblog/public-land-transfer-laws-not-constitutional-then-not-constitutional-now>.
- 23 ROSS W. GORTE, CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA (2012).
- 24 *Id.*
- 25 U.S. CONST. art. IV, § 3, cl. 2.
- 26 *United States v. Gratiot*, 39 U.S. 14 Pet. 526, 527-534 (1840).
- 27 *United States v. City & County of San Francisco*, 310 U.S. 16, 30 (1940).
- 28 Enabling Act of June 20, 1910, § 19, 36 U.S. Stat. 557, 568-579 (1910).
- 29 Ralph Maughan, *Legislative moves to give public lands to the states advance despite little evidence of public support*, THE WILDLIFE NEWS, (Apr. 6, 2015), <http://www.thewildlifeneeds.com/2015/03/18/legislative-moves-to-give-public-lands-to-the-states-advance-despite-little-evidence-of-public-support/>.
- 30 OUR AMERICAN PUBLIC LANDS, *supra* note 15.
- 31 *Id.*
- 32 *Id.*