Toward a Balanced Public Lands Policy

A Case Statement for the H.B. 148:

Utah's Transfer of Public Lands Act

November, 2012

Submitted by the Constitutional Defense Council

Utah, the West and the Nation as a whole are at a crossroad with respect to the ownership and management of the public lands. Re-examination of public lands policy has become an economic, education, resource stewardship, and employment imperative. We can continue on the present path of economic inefficiency and bureaucratic dysfunction in which the public lands deteriorate, or we can, through careful examination and good-faith discussion, develop a new model for public land management and use, a model that restores the forests and rangelands, promotes the responsible development of mineral and energy resources, enhances the economy at all levels of government, and also insures that those public lands of greatest scenic and natural beauty are forever protected for the use and enjoyment of all Americans. The issues are complex and significant, and their resolution requires bold actions that will call into question policies and ideas that have dominated the last few decades. The passage of H.B. 148, *"Transfer of Public Lands Act and Related Study,"* by the Utah Legislature in its 2012 General Session and signed into law by Governor Herbert, provides the basis for such a bold action. The Utah Constitutional Defense Council (CDC) believes that H.B. 148 can serve as the catalyst for an open and honest discussion of a public lands policy suitable for the twenty-first century.

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At the outset, it is important to understand which *"public lands"* H.B. 148 addresses. H.B. 148 expressly excludes from any such transfer national parks, all national monuments (except the Grand Staircase-Escalante National Monument), specific Congressionally-designated wilderness areas, Department of Defense areas and tribal lands. Primarily, the lands being studied for transfer are public lands presently administered by the Bureau of Land Management (BLM) and the United States Forest Service (USFS).

Legal justification for the transfer of the public lands into State ownership is based on the history of federal land policy. From the inception of this Nation and through much of its history, it was the policy of the federal government to dispose of the public lands both to pay off federal debt and to encourage the settlement of western lands for the benefit of the states and the nation. Indeed, most of the states east of the Colorado-Kansas state line have very little federal public lands within their

borders as a result of the historical implementation of this policy. This policy of disposal was very much a part of the various enabling acts that authorized new states to join the Union. In Utah's Enabling Act, the citizens of Utah agreed to *"disclaim title"* to, and agreed to refrain from taxing the public lands *"until the title thereto shall have been extinguished by the United States."* Significantly, these terms for disposal of the public lands in Utah's Enabling Act are the same terms found in Enabling Acts for many states east of Colorado where the federal government carried out a timely disposal of the public lands. This disclaimer of title was only intended to facilitate the disposal of the public lands so that, eventually such lands would contribute to the revenue bases of federal, State and local governments.

The required disposal of the public lands by the United States over time was a significant *benefit of the bargain* made by the State of Utah with the federal government at the time of statehood. In addition to the future expectation of taxable lands, Utah was also promised 5% of the proceeds from the sale of the public lands held by the federal government *"which shall be sold"* following statehood. The subsequent and unilateral termination of the disposal policy to one of permanent retention by the federal government is a repudiation of Utah's statehood bargain. Lands which, at the time of statehood, were anticipated to be a source of revenue are now largely unproductive. The subsequent actions of the federal land management agencies have reduced the ability of the citizens of Utah to make a living from the land, denied the Nation much needed energy and mineral resources, limited the State's ability to fund education and have led to poor stewardship of the land.

The question of whether the Property or Supremacy Clauses of the United States Constitution permit this unilateral reversal in federal land policy or repudiation of the terms of the State's enabling act is not resolved, because no federal appellate court has directly addressed this issue. However, the larger and more significant question is whether the shift from disposal to permanent federal retention of a large portion of public lands in the Western States is good public policy today. This is not a new question. In the 1840s and 1850s, Illinois, Missouri, and several other States, repeatedly complained to Congress that they could not educate their children, provide economic opportunities for their citizens, and conduct their affairs as sovereign States because the federal government had failed for decades to dispose of the public lands that comprised nearly 90% of the lands in their States. However, these "Western States" banded together and succeeded in compelling the federal government to timely dispose of their public lands.

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. For example, decades of misguided fire-suppression policies, severe cutbacks in logging and inadequate funding for forest restoration, have exposed our national forests and our critical watersheds to the risk of calamitous wildfires, declining forest productivity, disease and insect infestations. In contrast, forestry efforts on private lands, and in other countries such as Canada, are regenerating healthy productive forests and, thereby, contributing to economic prosperity.

In fact, federal management of the public lands has proven to be costly, inefficient and, at times, even dysfunctional, resulting in a resource that is both less productive and in environmental decline. The public lands presently do not pay for their own management costs and must be heavily subsidized by the American taxpayer. Present programs and restoration efforts are underfunded and, given the size

and scope of the federal deficit, it is likely that even fewer dollars will be appropriated for the public lands in the years ahead. Meanwhile, federal grazing policies are leading to a general decline in forage productivity and the ability of the land to support both livestock and wildlife. In contrast, cooperative stewardship efforts on private lands, such as the Deseret Land and Livestock operation in Summit and Rich Counties, are clear examples of proper stewardship, unhindered by bureaucratic regulation, which create a haven for wildlife and livestock alike.

Utah contains world-class energy resources. In May of 2012, the U.S. Government Accountability office provided testimony to Congress that oil shale deposits located in Utah, Colorado and Wyoming contained three trillion barrels of oil, half of which may be recoverable, and is an amount which approximately equals the entire world's proven oil reserves. A large majority of this energy resource is locked up in federally controlled land. It is estimated that two-thirds of Utah's energy resources are located on federally-owned lands. 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 the Utah State Institutional Trust Lands Administration (SITLA) for the benefit of Utah's schools. To further illustrate this disparity, from 1998 to 2001, mineral production on federal land returned five dollars for every dollar spent, whereas States that produce minerals on their own lands see a return of forty-five dollars for every dollar spent.

While these results are disturbing, they reflect more systemic problems. Federal public lands policy is a jumble of inconsistent, sometimes conflicting, statutes, regulations and judicial pronouncements that have evolved *ad hoc* over the past century. The four federal public lands agencies (BLM, USFS, the National Park Service and the Fish and Wildlife Service) each have their own budgets, missions, objectives, processes and governing regulations which may or may not be complementary. Because most revenues that flow into these agencies are returned to the general fund, funding for federal land management predominantly comes in the form of annual

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appropriations from Congress. Thus funding decisions are uncertain and become ensnarled in the push and pull of routine politics. Appropriations are directed more toward satisfying political constituencies than in addressing the environmental and economic needs on-the-ground. Furthermore, federal land policies change with each presidential administration, leaving land managers with no long-term continuity. As long as policy and funding decisions are left in the hands of remote officials in Washington D.C., who have little understanding of the needs and desires of those with local interests who actually live, work and recreate on the public lands, land policy will continue to be buffeted by political winds. In contrast, bringing these decisions back to the State can better focus management on the most important priority: proper stewardship of the land. Who better to manage the lands than Utahns who have worked the land for generations, and who treasure the great beauty of the land?

Federal land decision-making is also burdened by an administrative process that needlessly complicates and delays necessary actions The National Environmental Policy Act (NEPA), for example, was enacted to ensure that environmental impacts were taken into account by public decision makers. Likewise, land use planning under the National Forest Management Act (NFMA) and the Federal Lands Policy Management Act (FLPMA) attempts to make the process of public land decision-making better informed and more rational. While the intent of such procedural requirements is laudable, in practice these procedures have become an obstacle and a stumbling block to effective land management. These problems have long been widely recognized by scholars and other students of public lands policy. Indeed, even the Forest Service acknowledged in its own 2002 study, The Process Predicament:

Statutory, regulatory and administrative requirements impede the efficient, effective management of the National Forest System. As long as they do, the Forest Service's ability to achieve healthy, resilient ecosystems and otherwise meet its multiple use mission will remain in doubt, undermining public confidence in the agency.

With all the procedural requirements governing activities on the public lands, many decisions are long delayed. The mandatory pre-decisional study and analysis, coupled with post-decisional appeals and litigation, makes it almost impossible in practice for public land managers to be responsive to needs-on-the ground as they arise. The delays not only jeopardize the health of the lands, they also drive away investment dollars and employment opportunities that would otherwise be committed to resource rehabilitation and development. Paradoxically, delays occasioned by these protracted decision-making challenges have often led to the destruction or diminishment of the very ecosystems sought to be protected. Rather than foster cooperation and early dispute resolution, the existing process actually deters such collaboration.

Given the failings of existing federal lands policy - how would the transfer of the public lands into State ownership make for better policies?

Utah has a proven record of efficient and fiscally responsible management. The *"best managed State"* in the country prides itself in its history of sound fiscal decision-making. In the area of land management, on its own State lands, it has effectively balanced the multiple interests of farmers, ranchers, recreationists, oil and gas developers, miners, hunters, fisherman and tourists alike. Through existing State agencies, including the Department of Natural Resources, the Department of Agriculture and Food, SITLA and the Department of Environmental Quality, Utah already has the technical expertise to properly manage the many resources as well as the complex environmental and social issues related to the use of lands in Utah. Multiple-use and sustained yield have long been mandates in Utah's land strategies, and Utah has proven itself to be a good steward of the land.

As America's leading political thinkers have recognized since the founding years, the closer decision-making is to the land and to the people who make use of the land, the more informed it will be as to the conditions of the land and the needs and desires of those who live, work and recreate there. Accordingly, decisions made by State and local officials whose lives and livelihoods depend upon the wise stewardship of these lands will better reflect local needs and desires. Improved land management will also serve the national interest in maximizing the economic productivity and environmental benefits of the lands. Processes are already in place in many of the previously mentioned agencies of Utah government to ensure ample public participation both before and after decisions are made. For example, compared to the federal system, State permitting processes are much more efficient, while still providing equivalent protections.

Before fully informed judgments can be made as to the ideal structure of public land management and the configuration of lands transfers to the State, Utah requires additional information and analysis. Present and potential revenues must be measured and the State must study mechanisms to formalize and protect existing interests, such as mineral and grazing leases. State and county revenue sharing must be protected. These and many other considerations must be thoughtfully reviewed and understood. Accordingly, the CDC is recommending the creation of a *Public Lands Interim Commission* to conduct a full management study and economic analysis of the issues, and to then make recommendations concerning land transfers, management policy and the eventual creation of a permanent public lands agency in Utah.

H.B. 148 is neither a *"land grab"* nor a *"political stunt"* as some have alleged. Rather, it is an earnest effort to draw attention to a federal public lands policy that does not manage for multiple use, does not pay for itself, does not

protect the land and does not meet today's challenges. Under a new public lands system, the lands will remain public. The CDC believes the lands should be retained in State ownership and control so that they can forever benefit not only the people who live, work and recreate on them, but for all Utahns who seek an education for their children and an enhancement in their lives. Under this new paradigm, Utah public land use decisions will be governed by a commitment to clean air and water, healthy and productive lands, abundant and diverse wildlife populations and conservation of unique and sensitive areas. The intent of H.B. is to set in motion a process by which, after decades of neglect and dysfunction, Utah's rights and needs can be satisfied and our public lands can receive the stewardship they deserve. As this Nation of equal states finds itself over 226 years of age, it is time to evaluate whether federal ownership of more than half, and in some cases, three-quarters of the public lands in the Western States, is appropriate or reasonable. This process must address the complexities of public lands policies, and it must acknowledge the many voices of those who live, work and recreate on the public lands. The CDC commends and fully supports the pathway to a balanced and constructive public lands policy that H.B. 148 envisions and calls upon State and local government officers, education and community leaders to engage in a dialogue that leads to a solution big enough to address Utah's pressing needs for education equality, economic self-reliance, and a modern public lands system that will protect the environmental quality of our cherished lands and resources.

With proper discussion and analysis, and a good faith dialogue with the federal government, the CDC firmly believes that a more balanced public lands policy can be achieved. A sensible reassessment of current land ownership patterns can provide us with an unprecedented opportunity to restore and improve the management of the public lands in Utah, and will provide a firm commitment that future generations will be able to inherit land and resources that will benefit and sustain them.

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