"A Legal Overview of Utah's H.B. 148 – The Transfer of Public Lands Act"

Author: Donald J. Kochan
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The Utah Transfer of Public Lands Act ("TPLA") is distinct from prior state efforts to resolve the issue of federal control over more 50% of all lands in the West. The U.S. Supreme Court has repeatedly recognized that the contracts of statehood, like the Utah Enabling Act ("UEA"), are "solemn bilateral compacts" between sovereigns that are serious and enforceable. Read as a whole, the plain language of the UEA reflects not just a duty on the part of Utah to give clean title to the federal government (i.e. "forever disclaim all right and title") ***but also*** *a duty on the part of the federal government to timely dispose of the public lands ("**until the title thereto shall have been extinguished** by the United States) – otherwise, Utah would never realize its benefit of its bargain in this "solemn agreement" – a part of the proceeds of sale directly to fund education and the ability to tax the lands to pay for essential public services.*

I. The Transfer of Public Lands Act—H.B. 148

Transfer of Public Lands Act and Related Study ("TPLA"), HB 148 2012, has three basic parts, (1) the *scope* part explaining the breadth of the TPLA by defining terms and identifying exceptions; (2) the *demand* part; and (3) the pre- and post-extinguishment *planning and management* part, which describes the entities that will govern and prepare for a transition of ownership into State hands. (Utah Code §§ 63L- 6-101 through 104)

The definitions provide that for purposes of the TPLA "Public lands means lands within the exterior boundaries of [Utah] *except,*" private lands, Indian lands, lands held in trust for the state, lands reserved for state institutions, a few other lands with distinct ownership characteristics, and finally and most significantly certain identified federally controlled areas of the State including the National Parks, National Monuments, Wilderness, and several other special-designation federal holdings. Most of the federal lands within the State of Utah that have received a heightened status of protection are not subjects of the TPLA.

The heart of the TPLA is in the "demand" section. Utah Code § 63L-6-103 (1) states: ***"****On or before December 31, 2014, the United States shall: (a) extinguish title to public lands; and (b) transfer title to public lands to the state."* In other words, federal public lands become state public lands.

II. Historical Predecessors to the TPLA/H.B. 148

Utah's reliance on the federal government's promise to dispose of the public lands it acquired when Utah became a state is evident in the 1915 Senate Joint Memorial 4, which reads in part:

> In harmony with the spirit and letter of the land grants to the National government, in perpetuation of a policy that has done more to promote the general welfare than any other policy in our national life, and in conformity with the terms of our Enabling

> Act, we, the members of the Legislature of the State of Utah, memorialize the President and the Congress of the United States for the speedy return to the former liberal National attitude toward the public domain, and we call attention to the fact that the burden of State and local government in Utah is borne by the taxation of less than one-third the lands of the State, which alone is vested in private or corporate ownership, and we hereby earnestly urge a policy that will afford an opportunity to settle our lands and make use of our resources on terms of equality with the older states, to the benefit and upbuilding of the State and to the strength of the nation.

Across the 20th century, there were increasing legislative and regulatory movements toward federal retention of public lands, in many ways critically culminating in the Federal Land Policy and Management Act of 1976 ("FLPMA") which ultimately provided that "Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership ..."

A variety of legal maneuvers were tried by states and others to diminish federal control over public lands, although none looked exactly like the TPLA. For example, while Nevada passed a law declaring ownership of certain federal lands and while that law was invalidated by a federal district court, the TPLA does not "declare" that Utah owns land and makes no effort to *take* land away from the federal government. Instead, the TPLA merely articulates the federal government's duty to dispose and demands that it comply.

The TPLA is sufficiently distinct and can be studied effectively in isolation as well. Although some have called the TPLA a "new Sagebrush Rebellion," the nature of the TPLA is different from measures that have come before it and the new law involves some very unique legal concerns.

III. A Legal Analysis of the Transfer of Public Lands Act (H.B. 148)

A. An Enforceable Compact/Contract Theory of the Utah Enabling Act ("UEA") with a Federal "Duty to Dispose"

A contract-based theory interpreting Utah's Enabling Act is one of the strongest arguments to support the validity of Utah's demand. The TPLA only seeks to enforce the promise made when Utah became a state that the federal government would dispose of the public lands – a promise the federal government has been unwilling to honor. The Supreme Court has consistently held that the federal commitments made to sovereign states at the time of their entry into the Union are serious and enforceable. (Hawaii v. Office of Hawaiian Affairs). Furthermore, as the U.S. Supreme Court explained in *Andrus v. Utah*, promises in Enabling Acts are "'solemn agreement[s]' which in some ways may be analogized to a contract between private parties," as well as "solemn bilateral compacts between each State and the Federal Government" where both parties have corresponding rights and duties. The Court in *Andrus* also recognized that these compacts anticipate remedies for breach – even against the federal government if it fails to perform duties arising under the compact.

Sections 3 and 9 of the UEA are the critical sections establishing a contractual "duty to dispose" on the part of the federal government. Section 3 provides, in part:

> 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 to all lands lying within said limits owned or held by any Indian or Indian tribes; *and that* ***until the title thereto shall have been extinguished*** *by the United States, the same shall be and remain subject to the disposition of the United States*, 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;

The "forever disclaim" language of section 3 leads some to believe that Utah's case for upholding the TPLA is a dead letter. However, reading this section in context shows that the parties anticipate that title will at some point be extinguished (the "until the title thereto shall have been extinguished" language together with the discussion of "disposition", *i.e.* disposal). The U.S. Supreme Court has repeatedly rejected such narrow contract interpretations that seek to look at "a part only" or "a single sentence."

Section 3 reflects the bargained-for purpose of the UEA: The federal government needed clean and certain title to public lands so that it could readily dispose of these properties to *willing* buyers for the highest price possible which directly benefited the state of Utah because it was to receive a percentage of such sales under Section 9 to fund education and would thereafter be able to tax the lands disposed of. Thus, Utah had a selfish interest in wanting the federal government to have certain title because it increased the state's own gains under the agreement. Consider Section 9 of the UEA, which provides:

> SEC. 9. 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.

The express language of Section 9 entitles the State to proceeds from disposals. This means that the State is invested in and *relying upon the existence of disposal*, which, in consideration for this percentage of the proceeds, the State agreed to help facilitate disposals by disclaiming rights to the unappropriated lands so as to give the federal government the valuable commodity of certain title attached to the property disposed of.

Basic rules of construction that require harmonization of Section 3 with Section 9 reflect a "duty to dispose." If the federal government could retain the property, the State would never get any benefit from Section 9. It is impracticable to believe that the State intended to agree to disclaim rights in return for a cut of the sales of those lands yet intended no corresponding obligation that the federal government actually dispose of such lands.

The words in Section 9 proclaiming that the lands ceded in Section 3 "*shall be sold"* indicates that disposal was not only anticipated but demanded and expected as a condition of the agreement. This mandatory language removes from the federal government the choice to never dispose.

The TPLA calls for the disposal of lands that by the very nature of their acquisition came with an encumbrance attached – a compact and promise made between two sovereigns where the federal government committed itself to disposal and promised that it would exercise its disposal obligations in a manner so that both a percentage of the proceeds from the sales would be shared with the State and the State thereafter would have the capacity to tax such lands when disposed into private hands.

Utah would not be the first to successfully advance this interpretation of the "consideration" for entering an enabling act. In 1828, for example, Representative Joseph Duncan of Illinois, in a Report to Congress from the Committee on Public Lands, identified a duty to dispose of federally held lands by terms of the rather uniform enabling acts in consideration for the state's having given up rights to such properties and for temporarily surrendering the rights to tax such properties and obtain revenue. His statement argued, in part:

> If these lands are to be withheld, which is the effect of the present system, in vain may the People of these States expect the advantages of well settled neighborhoods, so essential to the education of youth … Those States will, for many generations, without some change, be retarded in endeavors to increase their comfort and wealth, by means of works of internal improvements, because they have not the power, incident to all sovereign States, of taxing the soil, to pay for the benefits conferred upon its owner by roads and canals. *When these States stipulated not to tax the lands of the United States until they were sold, they rested upon the implied engagement of Congress to cause them to be sold, within a reasonable time.* No just equivalent has been given those States for a surrender of an attribute of sovereignty so important to their welfare, and to an equal standing with the original States.

Courts generally err on the side of a contract interpretation that ensures that each party receives the benefit of the bargain struck in the written instrument. The State of Utah can be treated fairly under the UEA with some benefit of the bargain protected *only if it can impose a duty to dispose*, as explicitly included in Sections 3 or 9 or as implicitly mandated within a comprehensive reading of the whole of the UEA. If the federal government does not dispose of the public lands then the State will not receive its anticipated percentage of the proceeds of sales and will be unable to realize taxation and productivity benefits from the private owners and their uses of the property.

There is also a strong argument that the intent and expectations of the State of Utah and the federal government at the time of the UEA were informed by the predominant ethic in favor of, and presumptions toward, the disposal of federally controlled public lands into private hands. The expectation of disposal dates back to the intentions regarding the western lands pre-dating the Constitutional Convention and the promises made to the original states that the unappropriated lands would be disposed of. Consider the congressional resolution passed on October 10, 1780:

> Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, . . . *shall be disposed of* for the common benefit of the United States, 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* . . . That the said lands shall be granted and settled at such times and under

> such regulations as shall hereafter be agreed on by the United States in Congress assembled.

Utah became a State during this disposal era in public lands law. The U.S. Supreme Court has explained that "The intention of the parties is to be gathered, not from [a] single sentence [], but from the whole instrument read *in the light of the circumstances existing at the time of negotiations leading up to its execution.*" The UEA was entered into against a backdrop of an ethic of disposal. Consequently, this ethic informed the expectations of the parties and is relevant in interpretation.

The compact-based duty-to-dispose theory is, furthermore, supported by past statements of officials recognizing its logic and historical underpinnings. For example, President Andrew Jackson made an eloquent and persuasive defense of the compact-based duty to dispose in a pocket veto message to Congress where he refused to sign legislation passed by Congress that would have used proceeds from disposing of public lands for certain general federal purposes rather than complying with terms of disposal set out in compacts between the federal government and certain states.

Jackson started his rather long statement with a history lesson on "the manner in which the public lands upon which it is intended to operate were acquired and the conditions upon which they are now held by the United States." He explained that the original states were induced into ceding their land to the federal government by the promise that the federal government would eventually dispose of all of these lands. For example, the deed of cession from Virginia provided that the lands "*shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.*"

Jackson described the commitment to dispose in agreements with the original states as "solemn compacts" where "[t]he States claiming those lands acceded to those views and transferred their claims to the United States upon certain specific conditions, and on those conditions the grants were accepted." Jackson concluded his veto message with a strong statement that the agreements with the original states for cession of their rights to Western lands and the commitments made to new states could only be read as creating a duty to dispose and an obligation to "abandon" the property that the federal government cannot, or no longer has a financial need to, dispose of:

> 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.*

B. Distinguishing Cases and Identifying Dicta: The Limited Legal Commentary and Arguments against the Validity of the TPLA

Much of what is cited as "precedent" against the TPLA is really only judicial "over-speak." The quotes are from "dicta" having nothing to do with the actual resolution and holding of the cases.

Such cases generally address only what a state may or may not do while the federal government is an owner of public lands but do not address the federal government's independent duty to dispose. Most of the cases decided across the years under the Property Clause have focused on the state's obligations and commitments under the compacts – such as the obligation not to intervene in Federal use or disrupt the sanctity of federal disposal agreements – but very little case law has examined the flip side of the compacts: the federal government's obligations and commitments to dispose. A compact is not a one-way street.

C. The Equal Footing Doctrine, Federalism, Pollard-Based Interpretation of the Property Clause Power and Other Legal Arguments

Separately and independently, the Equal Footing Doctrine and/or basic tenets of Federalism might create independent duties for the federal government requiring it to dispose of public land holdings wholly apart from (and perhaps in addition to) a compact-based duty to dispose arising from the Enabling Act.

The Equal Footing Doctrine and Federalism principles can be employed as background principles that color an interpretation of the Enabling Act that finds the existence of a compact-based duty to dispose. These principles could help support efforts to resolve any ambiguities in the Enabling Act. These policies generally weigh in favor of greater state autonomy and can therefore be used to assist in distinguishing cases where broad federal powers were stated to exist … from a compact-based *duty to dispose*. … Such a duty to dispose is designed, like these principles, to limit federal power. Importantly, these Equal Footing and Federalism doctrines … could help tip the compact theory of the Enabling Act towards the State's position if there is some reluctance to accept an interpretation finding a compact-based duty to dispose.

D. A Few Thoughts on Justiciability Concerns

The federal government has an independent obligation to live up to its commitments that requires political will on the part of legislators and pressure applied and accountability demanded by the electorate. There are many obligations in our constitutional scheme that require self-enforcement by political actors out of their oath and constitutional duties, irrespective of whether a court order can or will compel the action.

Conclusion

There is a credible case that rules of construction favor an interpretation of the Utah Enabling Act that includes some form of a duty to dispose on the part of the federal government. Other theories may also support the TPLA demand. At the very least, it is clear that the law is not "clearly" unconstitutional as some opponents contend. The legal arguments in favor of the TPLA are serious and, if taken seriously, the TPLA presents an opportunity for further clarification of public lands law and the relationship between the states and the federal government regarding those lands.