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PRIVILEGED AND CONFIDENTIAL

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MEMORANDUM

TO: Jerimiah L. Rieman
Natural Resource Policy Advisor

FROM: Jeremiah I. Williamson
Assistant Attorney General

CC: Shawn Reese
Policy Director

RE: Utah Transfer of Public Lands Act

This memorandum responds to your inquiry concerning Wyoming's legal perspective on the Utah Transfer of Public Lands Act, Utah Code Ann. §§ 63L-6-101 through -104 (2012).

Utah first attempted to wrest control of federal lands within its borders from the federal government during the late 1970s and early 1980s, in what has come to be known as the Sagebrush Rebellion. Utah recently renewed that effort by enacting two statutes. In 2010, the Utah legislature authorized the Utah attorney general to commence proceedings to condemn federal public lands within the state. In 2012, the Utah legislature enacted the Transfer of Public Lands Act, Utah Code Ann. §§ 63L-6-101 through -104, which commanded the federal government to convey ownership of federal public lands in Utah to the state.

Utah supports its recent legislation with two legal theories: first, that the Enclave Clause of the United States Constitution prohibits the federal government from owning public lands without state consent; and, second, that Utah's statehood act requires the federal government to sell all public lands within the state. The two legal theories underpinning Utah's efforts would also apply to Wyoming. But because the legal bases for Utah's demands depend upon a repeatedly rejected reading of the United States Constitution and a strained interpretation of Utah's statehood act, Utah's claims will likely fail in court. For similar reasons, analogous claims made on Wyoming's behalf would also likely prove unsuccessful.

I. The Enclave Clause

Utah's most recent effort to assume control of federal lands within its borders began with the 2010 passage of Utah Code Ann. § 78B-6-503.5. That statute authorizes the Utah attorney general to bring suit against the federal government to condemn "property possessed by the federal government unless the property was acquired by the federal government with the consent of the Legislature and in accordance with the United States Constitution Article I, Section 8, Clause 17." The statute's express reference to the Enclave Clause of the United States Constitution and emphasis on federal lands owned without the consent of the state indicate Utah's reliance on a particular interpretation of the United States Constitution to support its effort.

When the United States intends to obtain land within a state over which the United States will exercise exclusive jurisdiction, the Enclave Clause requires the United States to obtain the state's consent. U.S. Const. art. I, § 8, cl. 17. Typical examples of enclaves over which the United States exercises exclusive jurisdiction include military bases, e.g., *McQueary v. Laird*, 449 F.2d 608, 610-11 (10th Cir. 1971), and water projects, e.g., *James v. Dravo Contracting Co.*, 302 U.S. 134 (1934). Utah premised its 2010 legislation on the theory that the Enclave Clause is the only constitutional authority for federal land ownership. *See* Utah Legislature, 2010 Session, Floor Debates for House Bill 143, Part 2, at 1:46:00 (Feb. 25, 2010) (statements of Rep. Christopher Herrod, chief sponsor) [hereinafter "Floor Debates"]. In accord with this theory, Utah legislators concluded that, because the United States did not purchase the federal public lands within Utah's borders from the state with the state's consent, federal ownership of those lands is unconstitutional. *Id.*

The courts, however, have repeatedly rejected the interpretation of the Enclave Clause that Utah advances. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 541-44 (1976) (stating "This argument is without merit."); *Utah Power & Light Co.*, 243 U.S. 389, 404 (1917); *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990). The Enclave Clause applies only where the federal government intends to exercise exclusive jurisdiction over land it owns within a state. *Kleppe*, 426 U.S. at 542-43. Where jurisdiction on federal land is co-extensive with the state, and the sole issue is federal land ownership, the

Enclave Clause does not apply. *Id.* Instead, the Property Clause controls. U.S. Const. art. IV, § 3, cl. 2; *see also Watkins*, 914 F.2d at 1554. And, as the United States Supreme Court has repeatedly observed, federal power under the Property Clause "is without limitations." *Kleppe*, 426 U.S. at 539; *United States v. San Francisco*, 310 U.S. 16, 29 (1940).

Representative Herrod, the chief sponsor of the Utah bill, apparently recognized the conflict between the eminent domain bill and United States Supreme Court constitutional jurisprudence. In the floor debates on the condemnation bill, Representative Herrod acknowledged that eminent domain proceedings against federal public lands could succeed only upon a reversal of United States Supreme Court precedent. *See* Floor Debates, at 1:56:30. In support of his belief that a reversal of precedent was probable, Herrod asserted that the controlling cases were close, 5-4 decisions. *Id.* In reality, however, the Supreme Court unanimously decided both controlling cases. *See Kleppe*, 426 U.S. 529; *Utah Power & Light*, 243 U.S. 389. Reversal of those precedents is therefore unlikely.

II. The Utah Statehood Act

More recently, Utah enacted the Transfer of Public Lands Act, Utah Code Ann. §§ 63L-6-101 through -104 (2012), which provides that "On or before December 31, 2014, the United States shall extinguish title to public lands and transfer title to public lands to the state." *Id.* § 63L-6-103(1). The Act further requires that, if the state transfers title to any lands received from the federal government pursuant to the Act, then the state shall retain five percent of the net proceeds of the sale and return the remainder to the United States. *Id.* § 63L-6-103(2).

The five-percent net proceeds retention provision ostensibly derives from Utah's statehood act, which provides as follows:

> That five per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State.

28 Stat. 107, § 9 (1894). Because both the Transfer of Public Lands Act and Utah's statehood act provide for Utah to receive five percent of the net proceeds of federal public land sales, Utah apparently premises its demand that the federal government relinquish ownership of public lands on an interpretation of the statehood act. Specifically, Utah interprets the aforementioned statehood act phrase "shall be sold by the United States subsequent to the admission of said State" to require the federal

government to sell all public lands within the state. *Cf.* Floor Debates, at 1:50:40 (referring to "shall be sold" language while discussing 2010 eminent domain legislation).

Assessing the validity of Utah's argument requires interpreting Utah's statehood act. The courts have not crafted a clear set of rules for interpreting statehood acts. *Alaska v. United States*, 35 Fed. Cl. 685, 699 (Fed. Cl. 1996). Typically, courts interpret land grant provisions of statehood acts analogously to contracts, and other provisions similarly to routine legislation. *See Andrus v. Utah*, 446 U.S. 500, 507 (1979); *United States v. Morrison*, 240 U.S. 192, 201 (1915); *Alaska v. Andrus*, 429 F. Supp. 958 (D. Alaska 1977), *aff'd* 591 F.2d 537 (9th Cir. 1979).

Regardless of whether the provision is contractual or statutory, the interpretive analysis begins with the plain language of the act. *Branson School Dist. RE-82 v. Romer*, 161 F.3d 619, 637 (10th Cir. 1998) (citing *Ervien v. United States*, 251 U.S. 41, 47-48 (1919)). Courts interpret terms according to their generally accepted meaning at the time of enactment. *Dep't of Labor v. Greenwich*, 512 U.S. 267, 275-76 (1994) (internal citations omitted). If the act is ambiguous or silent, then the courts look to its purposes, determined by reference to the act's terms and legislative history. *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295, 305-06 (1976).

The language underlying Utah's demand that the federal government convey to the state all federal public lands within Utah is arguably unambiguous. Section 9 of Utah's statehood act contemplates the payment to Utah of proceeds from lands "which shall be sold by the United States subsequent to the admission of said State into the Union[.]" Utah interprets the word "shall" to mandate that the United States sell public lands, consistent with modern day usage of the term "shall." *See, e.g., United States v. Johnson*, 941 F.2d 1102, 1111 (10th Cir. 1991) ("Shall is not a permissive word."). However, this interpretation is not consistent with the historical usage of the term "shall" to represent future possibility. *See Fex v. Michigan*, 507 U.S. 43, 47 n.2 (1993) (discussing futurity use of "shall"); *Gray-Bey v. United States*, 201 F.3d 866, 871 (7th Cir. 2000) ("I shall go to the opera" as an example of futurity). Read in light of the historical usage of "shall" to indicate futurity, Section 9 unambiguously requires that *if* the federal government sells public lands within Utah, then Utah is entitled to five percent of the net proceeds. It does not provide that the United States *must* sell public lands within Utah.

Even if Section 9 were ambiguous, another term of Utah's statehood act contradicts the interpretation Utah advances. Section 3 provides that the people of Utah "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." 28 Stat. 107, § 3. Read in light of this broad disclaimer, it is unlikely that a court would interpret Section 9 to require the federal government to

sell all public lands within Utah.[1] Moreover, a federal court relied on Section 3 of Utah's statehood act to reject the claim that Utah's power of eminent domain applies to federal public lands. *Utah Power & Light Co. v. United States*, 230 F. 328, 339 (8th Cir. 1915), *modified on other grounds*, 242 F. 924 (1917). Yet, that is precisely what Utah today proposes.

Because Utah's interpretation of Section 9 of the statehood act cannot be sustained, an attempt to enforce the Utah Public Lands Transfer Act in court will likely fail.

III. Implications for Wyoming

Wyoming's statehood act should be interpreted according to the rules of construction identified above. Courts enforce plain terms according to their meaning at the time of enactment. *Branson School Dist. RE-82*, 161 F.3d at 637; *Greenwich*, 512 U.S. at 275-76. Where the act is ambiguous or silent, courts will glean its meaning from its purpose, by reference to its terms and legislative history. *Alamo Land & Cattle Co., Inc.*, 424 U.S. at 305-06.

Section 7 of Wyoming's statehood act is identical to Section 9 of Utah's statehood act. However, for Wyoming the statehood act argument is slightly different than it is for Utah. As noted, Utah's statehood act includes a broad disclaimer of claims to federal lands. 28 Stat. 107, § 3. Essentially identical provisions appear in the statehood acts of Nevada, Colorado, Montana, Washington, North Dakota, South Dakota, New Mexico, and Arizona. *See* 13 Stat. 30, § 4 (1863); 18 Stat. 474, § 4 (1874); 25 Stat. 676, § 4 (1889) ; 36 Stat. 557, §§ 2, 20 (1909). Yet the statehood acts of Wyoming and Idaho, which Congress enacted in the same year, contain no such disclaimer.[2]

When Congress uses language in one statute but fails to do so in an analogous act, that omission suggests that Congress intended different meanings in the two acts. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004); *Paragon Jewel Coal Co. v. C.I.R.*, 380 U.S. 624, 637 (1965). The statehood acts of Nevada, Colorado, Montana, Washington, North Dakota, and South Dakota, all of which preceded enactment of Wyoming's statehood act, include the broad disclaimer provision, as does every statehood act following Wyoming's and Idaho's. Thus, the absence of the disclaimer in Wyoming's statehood act may have some interpretive significance. Clearly Congress knew how to use such a broad disclaimer, given its use in other statehood acts. But Congress nonetheless chose not to use such a provision for Wyoming and Idaho. The significance

[1] Rep. Herrod asserted that the disclaimer of "right and title" did not apply to "soil." Floor Debates, at 2:23:26.

[2] The Wyoming and Idaho statehood acts do contain a more limited disclaimer that applies to federal land grants. 26 Stat. 222, § 12; 26 Stat. 215, § 12.

of that omission may be that Congress intended the term "shall" in Section 7 of the Wyoming Statehood act, which is identical to Section 9 of the Utah statehood act, to have a different meaning than it did in identical provisions in almost every other western statehood act.

However, the Wyoming Constitution does include the broad disclaimer provision. *See* Wyo. Const. art. 21, § 26 ("The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof..."). Wyoming's founders expressly understood this provision to disclaim all interests in public lands. *See Journal of the Constitutional Convention, State of Wyoming* 197-98 (1889). As evidence of the intent of one of the parties to the agreement to admit Wyoming into the Union, Wyoming's constitutional disclaimer will likely have the same legal effect as Utah's similarly worded statehood act provision. The reference to the Wyoming Constitution in the Wyoming statehood act reinforces this point. *See* 26 Stat. 222, § 1.

IV. Conclusion

If Utah's statehood act argument succeeds, that success would have widespread ramifications across the West because the statehood act of every western state contains language identical to the provision upon which Utah relies. *See* 26 Stat. 222, § 7 (1890) (Wyoming); 26 Stat. 215, § 7 (1890) (Idaho); 13 Stat. 30, § 10 (1863) (Nevada); 18 Stat. 474, § 12 (1874) (Colorado); 25 Stat. 676, § 13 (Montana, Washington, North Dakota, and South Dakota); 36 Stat. 557, § 9 (1909) (New Mexico); 36 Stat. 557, § 27 (1909) (Arizona). Similarly sweeping consequences would follow from success on Utah's Enclave Clause argument, because the Clause applies equally to all states.

Still, Utah's attempt to take control of federal lands within its borders is highly unlikely to succeed in court because its legal theories rest on weak foundations. Utah's Enclave Clause interpretation has been rejected repeatedly, and Utah relies on an unpersuasive reading of its statehood act. Success is similarly unlikely for Wyoming because of the disclaimer contained in the Wyoming Constitution.