WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE May 22, 2013

TO Members, Task Force on Transfer of Public Lands

FROM Josh Anderson and Matt Obrecht[1], LSO Staff Attorneys

SUBJECT Utah Land Transfer of Public Lands Act, Utah 2012 HB 148

The Task Force on the Transfer of Public Lands will hear testimony on the Utah Land Transfer of Public Lands Act, Utah 2012 HB 148[2] which requires the Federal government to transfer certain federal lands to the State of Utah, to be finally disposed of by the State. While taking no position on the Utah law, it is the duty of Wyoming Legislative Service Office staff to identify potential areas of constitutional concern with this topic under consideration by the Task Force. This memorandum discusses likely conflicts with the United States Constitution and the Constitution of the State of Wyoming if a similar piece of legislation were introduced and passed in Wyoming.

United States Constitution

Property Clause

The United States Constitution provides that: "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." U.S. Constitution, Article 4, Section 3, Clause 2. That clause is commonly known as the Property Clause.

In an early case examining that power, the U.S. Supreme Court held that "The law of 1807 authorizing the leasing of the lead mines, was passed before Illinois was organized as a state; and she cannot now complain of any disposition or regulation of the lead mines previously made by Congress. She surely cannot claim a right to the public lands within her limits. It has been the policy of the government, at all times in disposing of the public lands, to reserve the mines for

[1] This memo is substantially similar to a memo provided by Matt Obrecht to the Joint Minerals Committee in October of 2012 with portions written by Matt Obrecht and Josh Anderson.

[2] A copy of Utah 2012 HB 148 is included with this memo for the convenience of the Task Force members.

the use of the United States." U.S. v Gratiot, 39 U.S. 526, 538 (1840). In another case, the Supreme Court stated that "…federal legislation [under the Property Clause] necessarily overrides conflicting state laws under the Supremacy Clause." Kleppe vs. New Mexico, 426 U.S. 529, 543 (1976).

In another early case discussing the Property Clause, the Court described the breadth of the property power of Congress. "Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made." Gibson v. Chouteau, 80 U.S. 92, 99 (1871). The United States was not required to hold public lands it received in various treaties with foreign nations or sovereign tribes for the establishment of future states. United States v. Gardner, 107 F.3d 1314, 1318 (9th Cir. 1997). The United States Supreme Court has continued to hold that federal power under the Property Clause over public lands is "without limitation". Kleppe, 426 U.S. at 539 (U.S. 1976).[3] Additionally, under the Property Clause Congress is primarily entrusted with the decision whether to dispose of federal lands. Id. at 536. Absent a clear indication to the contrary, a court is not likely to assume that Congress has used its powers under the Property Clause to dispose of lands from the public domain. Congress "may deal with [its] lands precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale." United States v. Gardner, 107 F.3d 1314, 1318 (9th Cir. 1997) citing Light v. United States, 220 U.S. 523, 536, 55 L. Ed. 570, 31 S. Ct. 485 (1911).

Supremacy Clause

The Supremacy Clause, Article VI, Clause 2 of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Wyoming Constitution in Article 1 Section 37 and in Article 21 Section 24 also state that "The State of Wyoming is an inseparable part of the federal union and the constitution of the United States is the supreme law of the land."

[3] Kleppe cites numerous U.S. Supreme Court cases for the proposition that Congress' power under the Property Clause is very broad: Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275, 294-295 (1958); Alabama v. Texas, 347 U.S. 272, 273 (1954); FPC v. Idaho Power Co., 344 U.S. 17, 21 (1952); United States v. California, 332 U.S. 19, 27 (1947); Gibson, supra at 99 (1872); Gratiot, supra, at 537.

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To the extent that a state law would be found to conflict with Congress' property power, the supremacy clause would apply and the federal legislation would necessarily override the conflicting state law under the Supremacy Clause. Kleppe, 426 U.S. at 543. "A different rule would place the public domain of the United States completely at the mercy of state legislation." Id. (quoting Camfield v. United States, 167 U.S.at 526).

Given United States Supreme Court precedent under both the Property Clause and the Supremacy Clause, in the event that a bill similar to Utah HB 148 were to become law in Wyoming and was challenged, it is likely that a reviewing court would hold that requiring the United States to dispose of land in a certain manner unconstitutionally interferes with Congress' power under the Property Clause.

Wyoming Act of Admission

It may be argued that Congress exercised its authority under the Property Clause and agreed to dispose of federal lands in the State of Wyoming in the Wyoming Act of Admission. This argument is unpersuasive given the history of land development in the western United States and other federal legislation.[4] The Wyoming Act of Admission, Section 7 states:

> Five per cent of the proceeds of the sales of public lands lying within said state 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 state, to be used as a permanent fund, the interest of which only shall be expended in support of the common schools within said state.

First, it must be noted that every western state's statehood act includes similar language to Section 7.[5] Despite this fact, the federal government has not disposed of or relinquished control over vast amounts of property in these western states. Despite repeated efforts by some western states to exert ownership control over federal lands, the courts have continued to reaffirm the federal government's jurisdiction over these lands.[6] A federal court decision has not been found by LSO staff which could serve as persuasive precedent for the argument that Section 7 of the Wyoming Act of Admission or its counterparts in other statehood acts require the federal government to dispose of its holdings in the western states.

Some have advocated for a reading of the first usage of the term "shall" in similar sections in other statehood acts as a mandated directive to the federal government to dispose of federal lands

[4] The Wyoming Act of Admission is a piece of federal legislation [26 Statutes at Large 222, Chapter 664], passed by Congress and signed into law by President Benjamin Harrison on July 10, 1890.
[5] See the following statehood acts: New Mexico and Arizona Enabling Act, 36 Stat. 557, § 27 (1909); Colorado Enabling Act, 18 Stat. 474, §12 (1874); South Dakota, Montana, and Washington Enabling Act, 25 Stat. 676, §§10, 13 (1889); Utah Enabling Act, 28 Stat. 107, § 9 (1896).
[6] See generally Kleppe, supra and the case cited therein for the proposition that Congress has authority to own, manage and regulate federal lands.

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within the state. But reliance on other states' acts of admission must be undertaken with caution due to slightly different wording in the Wyoming Act of Admission from statehood acts of other western states. [7] A literal reading of Section 7 of the Wyoming Act of Admission in which the first usage of the term "shall" is read as a mandatory directive would require that "[f]ive per cent of the *proceeds* of the sales of public lands lying within said state *shall be sold* by the United States…" (emphasis added). The section appears to require (if the word "shall" is read as a mandatory directive) that five percent of the *proceeds* of the sale of public lands in Wyoming be *sold* and placed in the common school permanent fund. Congress could not have intended for the proceeds of federal land sales to again be sold before deposit in the common school fund. Such a literal reading of this section would render an absurd result, which a reviewing court will avoid if other interpretations are possible. See Griffin v. Oceanic Contractors, 458 U.S. 564, 575 (U.S. 1982).

As written in 1890, the language of Section 7 was most likely not understood to require the federal government to dispose of all public lands in Wyoming. While use of the term "shall" may imply a directive to the federal government to dispose of public lands within the state that is almost certainly not the correct interpretation of this section. Section 7 states in relevant part "Five per cent of the proceeds of the sales of public lands lying within said state shall be sold by the United States subsequent to the admission of said state into the union…"(emphasis added). In its modern usage, the word "shall" is employed to require or mandate that a certain specified act occur.[8] However, past usage of the term "shall" was to denote a future possibility and was not always understood to be mandatory.[9] A proper interpretation of the requirements of §7 of the Wyoming Act of Admission would appear to require that *if* the federal government disposes of public lands in Wyoming, five percent of the proceeds of the sale of this land *shall* be paid to the state, to be used as a permanent fund the interest on which is to be expended in support of the common schools. Not only is this interpretation consistent with how the law has been interpreted since 1890, it renders Section 7 consistent with other parts of the Wyoming Act of Admission and does not lead to the absurd result noted above.

The Wyoming Act of Admission, Section 12 states that "The state of Wyoming shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act; and the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the state may provide."

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[7] Compare Wyoming Act of Admission [26 Stat. 222 §7] with the Idaho Act of Admission [26 Stat. 215, §7]: The language employed in the Idaho Act of Admission states: "Five per cent 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…" (emphasis added). The word "which" does not appear in Section 7 of the Wyoming Act of Admission.

[8] See Gonzalez v. Thaler, 132 S. Ct. 641, 644 (U.S. 2012); "The word 'shall'…underscores the rule's mandatory nature…."

[9] See Fex v. Michigan, 507 U.S. 43, 47 n.2 (1993) on the use of shall to denote a futurity; Gray-Bey v. United States, 201 F.3d 866, 869 (7th Cir. 2000); "the use of "shall" in the Constitution is not always or necessarily understood to be mandatory."

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Thus, the plain language of Section 12 would conflict with a reading of Section 7 which requires the federal government to dispose of public lands to the state. A reviewing court will interpret ambiguous language in a manner so as to give effect to all provisions of the law. Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 174 (U.S. 2009). Interpreting Section 7 to provide for a future possibility that the federal government may dispose of lands in Wyoming gives full effect to the provisions of Section 12 stating that the State of Wyoming is not entitled to any future or other grants of federal land.

For the foregoing reasons, it is likely that a court would rule that Section 7 of the Wyoming Act of Admission does not require Congress to dispose of all federal public lands in Wyoming.

Wyoming Constitution

In the unlikely event that a court holds that Section 7 of the Wyoming Act of Admission requires the federal government to dispose of all federal public lands within the state, state legislation *requiring* that the federal government transfer that land to ownership of the state of Wyoming, would likely be unconstitutional under Article 21, Section 26 of the Constitution of the State of Wyoming. Article 21, Section 26 provides in relevant part:

> 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**, 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 that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States;

Like the land disposal language of Section 7 of the Wyoming Act of Admission, the bolded phrase "disclaim all right and title to the unappropriated public lands" language in Art. 21, Sec. 26 of the Wyoming Constitution is contained within all western states' constitutions or statehood acts.[10] The courts have held this language prevents state legislation from restricting the United States' ownership interest over federal lands[11] and a state's attempt to exert the power of easement over federal lands.[12] It is no great stretch of reasoning to assume that a court would find that the plain language of Art. 21, Sec. 26 would render unconstitutional state legislation requiring that the federal government grant title to all federal lands in Wyoming to the State of Wyoming.

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[10] See Nevada, 13 Stat. 30, §4 (1863); Colorado, 18 Stat. 474, §4 (1874); North Dakota, South Dakota, Montana, and Washington, 25 Stat. 676, §4 (1889); New Mexico and Arizona, 36 Stat. 557, § 2, 20 (1909); Utah Enabling Act, 28 Stat. 107, § 3 (1896).

[11] Shannon v. United States, 160 F. 870, 874 (9th Cir. Mont. 1908).

[12] Utah Power & Light Co. v. United States, 230 F. 328, 339 (8th Cir. 1915), *modified on other grounds*, 242 F. 924 (1917).

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There has also been some discussion that the second bolded phrase from above which states "until the title thereto shall have been extinguished by the United States" provides a requirement that the United States has an obligation to extinguish title to the land. First, as noted above, the term "shall" in this instance may have been used to denote a future possibility and not necessarily understood to be mandatory. If that is the case, one reading of that clause is simply that title shall be subject to the control of the United States until the United States chooses to dispose of it without any requirement to ever do so. Second, even if that clause is read as a mandatory provision, that provision does not provide any additional parameters including any time or manner of the disposition of the land. It seems possible that even if a court were to hold that such language did create an obligation of the United States to dispose of the land, an effort of Wyoming to direct the time and manner of that disposal would still be overbroad when read in conjunction with the rest of that sentence as well as in conjunction with Section 12 of the Act of Admission and the Property Clause of the United States Constitution.

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