

LEGAL ANALYSIS
OF THE
LEGAL CONSULTING SERVICES TEAM
PREPARED FOR THE
UTAH COMMISSION FOR THE STEWARDSHIP OF PUBLIC LANDS

Pursuant to the
Legal Consulting Services and Relations Services Agreement: 2015-01
with the

Davillier Law Group, LLC
New Orleans, Louisiana

DELIVERED DECEMBER 9, 2015

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EXECUTIVE SUMMARY

1. Summary of Conclusion

Our task is to evaluate alternative legal theories that Utah may use in court to attempt to gain ownership or control of the public lands with its borders. The Legal Consulting Services team has reviewed the historical record regarding public lands, evaluated various legal theories, taken into account strengths and weaknesses of various arguments, analyzed procedural options available to the State of Utah, and considered the cost of pursuing such litigation. Based on that review and evaluation, it is the opinion of the Legal Consulting Services team that legitimate legal theories exist to pursue litigation in an effort to gain ownership or control of the public lands.¹ We caution, however, that litigation is time consuming, expensive, and never certain in outcome. We further caution that the federal government will most likely vigorously oppose this effort, raising substantive and procedural hurdles to achieving such an outcome. In the interest of preserving attorney client privilege, this public document does not discuss all anticipated defenses and counterarguments thereto.

2. Summary of Applicable Legal Theories

We believe that three primary legal theories are available to Utah to attempt to gain ownership or control of the public lands. These are:

- The Equal Sovereignty Principle
- The Equal Footing Doctrine
- The Compact Theory

We believe all three legal theories have a credible support, and have value as the basis for claims in litigation.

¹ The conclusions appearing in this Executive Summary are supported and documented in the body of the Legal Analysis that follows.

i) *The Equal Sovereignty Principle*

The Equal Sovereignty Principle was recently highlighted by the Court in *Shelby County v. Holder*,² which challenged the Voting Rights Act's requirement that certain States pre-clear their voting laws with the Department of Justice.³ The Court emphasized the Constitutional requirement that the States in our federal system be equal in sovereignty. The Court applied a heightened level of scrutiny to the pre-clearance requirements because they treated Alabama as unequal in sovereignty, and ruled that the pre-clearance provisions were unconstitutional under the Equal Sovereignty Principle. For the reasons discussed in detail below, we feel that Section 102 (a) (1) of the Federal Land Policy and Management Act of 1976 ("FLPMA"), which reversed almost two hundred years of federal public lands policy from one of disposal to one of near permanent retention, treats Utah as unequal in sovereignty as compared to the States with dominion over the land within their borders.

This argument, if adopted by the Court, would most likely result in a declaration that the United States cannot forever retain the public lands within Utah's borders, not an order transferring the public lands to the State of Utah. Therefore, should the Court be persuaded by this argument, a subsequent political solution negotiated by all stakeholders would most likely be required to resolve the issue. A possible outcome of that political process could be Utah's ownership of those lands.

ii) *The Equal Footing Doctrine*

The Equal Footing Doctrine is based upon the Equal Sovereignty Principle. It requires that States newly admitted to the Union receive all incidents of sovereignty enjoyed by the

² 133 S.Ct. 2612 (2013)

³ The Voting Rights Act of 1965, 42 USC § 1973 *et seq.*

thirteen original States. The Equal Footing Doctrine considers only sovereign and political rights of the newly admitted States, not economic or geographical differences. The original thirteen States stepped into the shoes of the Crown with regard to dominion over public lands within their borders. Similarly, Vermont, Kentucky, Tennessee, Maine, Texas and Hawaii all came into the Union with dominion over their public lands. As discussed below, dominion over land has historically been viewed as a key incident of sovereignty, and denial of that dominion negatively impacts sovereignty in a variety of ways. Therefore, in order for Utah to have been admitted as a co-equal sovereign of the States with dominion over public lands within their borders prior to Utah's admission, Utah also should have received upon admission dominion over the land within its borders. A ruling by the Court based upon the Equal Footing Doctrine argument would logically result in the transfer of public lands to the State of Utah.

iii. *The Compact Theory*

The Compact Theory posits that the Utah Enabling Act was an offer, and Utah's acceptance of that offer created a solemn compact. Implicit in that compact was the duty of the United States to timely dispose of the public lands within Utah's borders as it had done with States admitted prior to Utah. There is historical support for the position that the United States promised to dispose of the public lands, maintained a policy requiring disposal of public lands, and acted upon that policy from 1784 through the date of Utah's admission. There is historical evidence that Utah and the United States both expected, at the time of Utah's admission, that the public lands would be disposed of consistent with past practice. There is also historical evidence that the intent of the Property Clause of the Constitution was to dispose of public lands, not to forever retain them. Accordingly, an argument can be made that the United States undertook an obligation to dispose of the public lands within Utah's borders.

Were the Court persuaded by the Compact Theory, the most likely remedy would be to strike down the near permanent retention policy of Section 102 (a) (1) of FLPMA. A new policy with regard to federal lands would then be formed through political negotiation with all stakeholders as described above under the Equal Sovereignty Principle.

iv. *The Property Clause*

The government can be anticipated to argue that the Property Clause grants it plenary power over all federal property, allowing it to permanently retain all federal land as Congress may desire. However, the Court has stated on several occasions that it has never fully explored the scope of power granted by the Property Clause. The Court has never ruled on whether the Property Clause permits the federal government to forever retain the majority of land within the borders of a State. The key Property Clause cases were decided when the policy of the United States required the disposal of public lands. An historical, constitutional, and jurisprudential argument can be made that the Framers intended only to grant the power to regulate public lands in the context of their disposal, not to permanently retain the majority of the land within a State. The historical evidence and jurisprudence supporting the Equal Sovereignty Principle, the Equal Footing Doctrine, and the Compact Theory tend to support this interpretation of the Property Clause.

3. *Summary of Recommendation*

Based upon our conclusion that legitimate legal bases exist to attempt to gain ownership or control over Utah's public lands, or to attempt to overturn Section 102 (a) (1) of FLPMA requiring the near permanent federal retention of Utah's public lands, the Legal Consulting Services team recommends Commission and Legislature urge the Governor and the Attorney General of the State of Utah to consider instituting litigation against the United States of

America under the Original Jurisdiction of the United States Supreme Court. The goal of such litigation would be to attempt to gain ownership of and control over the public lands, and/or to enforce the provisions of the Transfer of Public Lands Act and Related Study (“TPLA”), and/or to seek a declaratory judgment that Section 102 (a) (1) of FLPMA be struck down. We recommend considering actions under the Constitution directly, as well as under the Administrative Procedures Act. We further recommend that the Commission authorize the Legal Consulting Services team to prepare a private memorandum fully addressing anticipated substantive and procedural defenses to Utah’s claims, together with a model Complaint, for confidential consideration by the Attorney General in his analysis of this matter.