S.J. QUINNEY COLLEGE OF LAW

LEGAL STUDIES RESEARCH PAPER SERIES

The Transfer of Public Lands Movement: Taking the 'Public' Out of Public Lands

Robert B. Keiter
John C. Ruple

S.J. Quinney College of Law research paper No.99

S.J. Quinney College of Law
University of Utah
Salt Lake City, UT 84112

The Transfer of Public Lands Movement: Taking the 'Public' Out of Public Lands

Robert B. Keiter *
John C. Ruple **

January 28, 2015

Wallace Stegner Center
for Land, Resources and the Environment
UNIVERSITY OF UTAH S.J. QUINNEY COLLEGE OF LAW

Stegner Center White Paper No. 2015-01

This white paper is a follow-up to our 2014 legal critique of Utah's Transfer of Public Lands Act (TPLA), which demands title to 31.2 million acres of federal public lands in Utah.[1,2] In our earlier work we concluded that Utah previously disclaimed all legal rights to title to additional lands, and that "[t]he federal government has absolute control over federal public lands, including the constitutional authority to retain lands in federal ownership."[3] Despite its weak legal case, Utah remains dedicated to a public land takeover, and other Western states are poised to follow.[4] This white paper therefore addresses how a public lands takeover would impact land management and access. While we focus on the TPLA, the lessons learned have broader applicability, first because the TPLA serves as the model for other state's Transfer efforts, and second because the TPLA will likely be the first such effort to face a legal challenge.

It is useful to consider how public lands would be managed if transferred to the states. Transfer backers regularly claim that states are dedicated to multiple-use management and would be more efficient owners. The TPLA, however, does not address the balance between development and preservation, include a multiple-use management mandate, or define multiple-use in the eyes of the state. The public is therefore left to guess what future state management would entail.

Comments by key officials also blur the line between the two primary models for government land management: federal public land management that involves balancing multiple uses, and state trust land management that maximizes revenue generation. Claiming a commitment to public access and multiple-use management while touting economic benefits based on a revenue maximization model, as Transfer backers do, hides the profound differences between these management models.

In the end, the important question is not who should manage public lands, but the mandate these lands should be managed under. As the conservative Cato Institute concluded in response to earlier state efforts to obtain control over public lands:

> Examination of state land management policies indicates that state governments are no better managers than are federal bureaucrats. They are just as economically inefficient, ecologically short-sighted, and politically driven as their federal counterparts. . . . The fundamental problem is, not federal incompetence, but the political allocation of natural resources to favored constituencies, which subsidizes some at the expense of others and inflicts harm on both the ecological system and the economy as a whole. Transferring land to the states will only change the venue of those political manipulations.[5]

Given the profound importance of management direction, the public deserves to understand state intentions and the tradeoffs they entail. The public also deserves an open and transparent process guaranteeing all a voice in land management decisions.

To encourage dialogue on these important issues, this white paper explains the difference between federal and state government agencies' statutory management mandates, what Transfer legislation and proponents say about state management of acquired lands, and the implications for uses that do not generate a market rate of return. Our analysis also highlights several constituents that will experience a change in access to what were formerly public lands under the kind of "political allocation of natural resources" that is likely to occur if states take over public lands. We conclude that management of what were previously public lands would change dramatically under state ownership as states struggle to offset millions of dollars in new management costs, emphasizing commodity production over resource protection.

Future management of targeted lands. Public lands, under the TPLA, are made up primarily of Bureau of Land Management (BLM) and the U.S. Forest Service (USFS) managed lands, excluding federally designated Wilderness Areas.[6] The BLM and USFS operate under a statutory multiple-use mandate, requiring them to balance resource extraction and preservation.[7] Specifically, under the Federal Land Policy and Management Act (FLPMA):

> '[M]ultiple use' means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people . . . a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, wildlife and fish, and natural scenic, scientific and historical values . . . *with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return of the greatest unit output*.[8]

Although Transfer proponents claim to support multiple-use management, the TPLA states only that the Constitutional Defense Council will create a Public Lands Commission to "address the management of public lands and the management of multiple uses of public lands, including addressing managing open space, access to public lands, local planning, and the sustainable yield of natural resources on public lands." [9] Related legislation calls for the Director of Utah's Public Land Policy Coordination Office (PLPCO) to "recommend the optimal use of public lands following the transfer of public lands."[10] Neither body has proposed legislation responding to their charge or defining the appropriate balance between competing uses.[11]

Statutory ambiguity aside, it is clear that if states acquire public lands, management emphasis will shift towards commodity development. PLPCO's Director, Kathleen Clarke, noted recently the "potential for variation in management scenario that would invite significantly more revenue" if Utah takes over public lands.[12] As Ms. Clarke explained, the state could increase oil, gas, and mineral development on public lands that are currently unavailable for development.[13]

Representative Ken Ivory, the TPLA's author and main proponent, argues that Utah could generate more revenue from transferred lands than the federal government produces under BLM or USFS management. [14] Representative Ivory argues that Washington State generated 1,283 times more revenue per acre from its forests than the USFS. [15] This is not surprising as Washington State's trust land management is "designed to achieve the maximum effective development and use of such lands and resources."[16] "Maximum effective development" is not multiple-use management and means that less profitable uses will suffer.

It is unwise to confuse the multiple-use mandate applicable to federal public lands, which protects non-revenue producing resources rich in natural, scenic, scientific, and historical value, with the revenue maximization mandate employed by state trust land managers. Trust lands were statutorily granted to the states by the United States in order to generate revenue to support schools and public institutions.[17] The Utah School and Institutional Trust Lands Administration (SITLA) manages Utah's trust lands, and like other states' trust lands administrators, must manage trust lands in the most "prudent and profitable manner possible" to support public schools and institutions.[18] By law, SITLA must "obtain the optimum values from the use of trust lands and maximize revenues for the trust beneficiaries, including the return of not less than fair market value

for the use, sale, or exchange of school and institutional trust assets."[19] Notably, SITLA's "beneficiaries do not include other governmental institutions or agencies, the public at large, or the general welfare of the state."[20] As the Utah Supreme Court made clear, SITLA's "trust obligations take priority and must first be met before consideration can be given to multiple-use sustained yield."[21] State trust lands simply are not multiple-use lands, and management priorities will change dramatically if trust land management principles are applied to what are now public lands. If this is the model Transfer advocates propose, then the public needs to be told that in no uncertain terms.

To be clear, we are not criticizing state trust land managers. They do a good job fulfilling the mandates set forth in state statutes, state constitutions, and statehood enabling acts. Our concern is with Transfer advocates' reliance on trust land management to demonstrate economic benefits while touting a commitment to public access and multiple-use management. These two mandates are not interchangeable.

To avoid confusion over management intent, states pursuing a public land takeover should clearly define future management priorities and their desired balance between revenue generation and resource protection. These priorities can represent a radical change in management direction, as demonstrated by a recent report commissioned by the Nevada legislature. This report concludes that Nevada could obtain up to $1.29 billion annually by putting *all* BLM managed lands to use (excluding National Conservation Areas and congressionally designated Wilderness).[22] These projections are based on managing transferred lands to emphasize revenue production. The report also recommends that Nevada sell 30,000 acres of land during the first year to support up-front management costs,[23] and recommends using transferred lands as collateral against which to issue state revenue bonds.[24] Although such actions may be economically efficient, they do not constitute multiple-use management and may not be in the public interest.

An economic imperative to develop. Utah, like the other states contemplating a public land takeover, must manage newly acquired lands to cover management costs. Indeed, ten of the eleven contiguous Western states have statutory or constitutional balanced budget requirements.[25] Future revenue production from the targeted lands depends on the amount of production that occurs, the price of the commodities produced, and the percent of revenue returned to the state. A recent legislatively commissioned economic analysis completed by a consortium of university economists modeled revenue production under multiple production, pricing, and revenue sharing scenarios — and the results raise serious questions about whether Utah could profitably manage the targeted lands.

During 2012, management of the targeted lands within Utah cost the federal government $247 million[26] — an expense that Utah would inherit if it acquires these lands. In addition, Utah receives approximately $35 million annually in federal payments from these lands, offsetting property taxes foregone due to the non-taxable nature of federal lands.[27] But Utah would no longer receive these payments if lands were transferred out of federal ownership, and Utah has signaled its intent to indemnify local governments for their lost revenue.[28] Accordingly, should Utah take over public lands, new management expenses and lost revenue represent a $282 million annual cost to the state.

How Utah would cover these expenses is unclear. During 2013, mineral leasing (primarily oil, natural gas, and coal) produced 93-percent of all revenue from the targeted public lands (accounting for $308 million of the total $332 million produced from these lands).[29] Under the federal Mineral Leasing Act, almost half of this revenue is distributed to the state where the development occurred.[30] In 2013, this represented $150 million in payments to Utah.[31] Accordingly, to maintain current revenue levels and to offset new

management expenses, Utah would need to generate $432 million annually from the acquired lands — $247 million for new management costs, plus $35 million to offset lost payments to the state, plus $150 million to maintain programs currently funded by federal Mineral Leasing Act revenue. Generating $100 million *more* per year from the same lands will necessitate increased development.

With 93-percent of revenue from these lands tied to mineral development, Utah's ability to break even links directly to future mineral production volumes, prices, and revenue sharing. As of January 5, 2015, West Texas Intermediate (WTI) crude oil sold for $50.05 per barrel and natural gas sold for $3.05 per thousand cubic feet.[32] The U.S. Energy Information Administration (EIA) "expects global oil inventories to continue to build in 2015, keeping downward pressure on oil prices." Accordingly, the EIA "expects WTI crude oil prices to average $55/bbl in 2015," noting "very high uncertainty in the price outlook." Natural gas prices are also projected to remain low.[33]

Utah crude oil sells at a discount compared to WTI. This discount fluctuates over time, averaging $10.26 per barrel between January 2004 and July 2014.[34] With WTI currently selling for around $50 per barrel and prices projected to increase by $5 per barrel through 2015, it follows that Utah crude oil will continue to sell for between $40 and $45 per barrel during 2015. Longer-term projections show decreasing production and rising prices, but uncertainty increases with projection length, and longer-term projections have not been updated to reflect recent market changes.[35]

Low hydrocarbon prices mean low mineral royalty revenue. Recent economic modeling by a panel of university economists considered a scenario under which oil sells for an average of $62 per barrel (Utah First Purchase Price), $3.30 per thousand cubic feet of natural gas, and Utah increases the projected number of wells drilled by 15%. Under this scenario, Utah could generate $219 million in revenue during 2017 from the targeted lands.[36] This assumes that Utah receives 50-percent of production royalties from existing wells, and 100-percent of production royalties from wells drilled after transfer occurs.[37] Revenues are projected to peak in 2022 at $250 million but fall thereafter.[38] But, as noted above, oil is not selling for $62 per barrel in Utah. With Utah crude selling around $40 per barrel and no significant price increase anticipated, Utah has almost no chance to generate the $432 million needed to break even.

For Utah to cover management costs from mineral development, one or more of five factors must change: Utah must increase development much faster than the modeled 15-percent increase; commodity prices must increase dramatically; Utah must increase production royalty rates; Utah must capture more than 50-percent of the revenue from existing production; or Utah must dramatically increase coal production. None of these scenarios appears likely.[39]

First, increasing development by significantly more than 15-percent annually would almost certainly generate strong public opposition and litigation. Second, commodity prices are not projected to increase, let alone at the dramatic rate needed to make development profitable.[40] Third, while Utah could conceivably increase the royalty rate on new production, royalty rates for existing production are set by contract and cannot be changed unilaterally. Because it would take years for the state to begin generating significant revenue from new leases,[41] increasing royalty rates would produce only limited short-term benefits. Fourth, the United States has historically retained mineral rights when conveying federal public lands to the states in their statehood enabling acts,[42] and to do otherwise now would not be in the fiscal best interests of the United States. Finally, Utah could increase coal production, possibly targeting deposits within the Grand Staircase-Escalante National Monument, but with coal royalties averaging less than $29 million annually,[43] production would need to increase many times over to fill the revenue gap. The ongoing transition from coal to natural gas for

power production makes such an increase unlikely. Furthermore, it is hard to imagine the American public embracing coal production from within a National Monument.[44]

Alternatively, Utah could attempt to increase revenue from non-mineral sources, but with non-mineral revenue accounting for only 7-percent of revenue from the targeted lands,[45] even a tripling of revenue would have little effect. TPLA backers contend that they have no interest in selling off acquired lands and note that, under the TPLA, the state would receive only 5-percent of land sale proceeds.[46] Utah, however, may have little choice but to consider selling land. Notably, the TPLA is not an agreement between the state and federal government, so Utah could unilaterally amend the TPLA and attempt to retain a greater share of sale proceeds.[47] Such an amendment and subsequent sales could create a sizeable new source of revenue, and a strong incentive to sell transferred lands, especially when Utah faces a massive revenue shortfall.

These kinds of fiscal challenges are not unique to Utah. In timber-rich Idaho, the cost of managing transferred public lands would exceed revenue under all but the most optimistic scenario. According to a legislatively-commissioned report:

> The total net cost to the State of Idaho for the [Idaho Department of Land] transfer proposal would range from a loss of $111 million/year under the low-end scenario to a loss of $60 million/year under the medium scenario to a gain of $24 million/year under the high-end scenario. Only under the high-end scenario . . . would the state realize a gain after covering costs of wildfire, recreation, highway maintenance and payments to counties.[48]

In short, the economic shortfall that would occur under all but the most optimistic of scenarios, and its associated imperative to develop public land, should concern everyone who values state fiscal responsibility or our public lands.

Public access at risk. A management mandate that emphasizes revenue production, whether driven by ideology or necessity, would impact access to the transferred lands. Increased mineral development would displace other users, and land managers would likely increase access fees. In Montana, Nevada, New Mexico, Utah, and Wyoming, upwards of 75-percent of hunters utilize public lands. In Colorado, Idaho, and Oregon, the figure is 54-, 66-, and 67- percent, respectively.[49] Access to state trust land is already costly, and it foreshadows additional costs if the transferred lands are managed with an eye towards market efficiency. During 2014, the Utah Division of Wildlife Resources paid $703,550 to SITLA "to provide compensation to Utah's school and institutional trust beneficiaries for public access to school and institutional trust lands for hunting, fishing, trapping, and viewing of wildlife."[50] In addition to Utah, state trust land managers in Colorado, Montana, Nebraska, New Mexico, Oklahoma, and Texas all required some form of payment to hunt, fish, or camp on state trust lands.[51] Arizona, Washington State, Louisiana, and Minnesota also impose recreation user fees.[52]

Two more examples from Utah foreshadow potential impacts on public access. In 2013, SITLA announced an agreement to lease 96,000 acres of state trust land in the Book Cliff Mountains. The lessee, Anadarko Petroleum, would develop oil and natural gas from the tract, generating hundreds of millions of dollars for trust beneficiaries.[53] The area, however, is home to prized mule deer and elk populations and the site of an aggressive effort to recover Bonneville cutthroat trout. Utah's Governor Gary Herbert, Utah Congressman Rob Bishop, and a host of sportsmens' organizations, none of whom had an opportunity to provide input on the transaction, all opposed the lease.[54] Despite this opposition, the SITLA Board voted unanimously to proceed with the lease.[55]

Similarly, in 2005, SITLA offered to lease 356-acres of land near "Little Hole," along the Green River. The Green River is a blue-ribbon trout stream; Little Hole is a key

recreation access point and the parcel provides important winter habitat for deer and elk. The parcel was put up for auction after a developer proposed to build a destination fishing lodge. Trout Unlimited, the Rocky Mountain Elk Foundation, and the Utah Division of Wildlife Resources all opposed the sale.[56] Despite these objections, SITLA auctioned off the property to maximize financial returns for trust beneficiaries. In the end, the Utah Division of Wildlife Resources was forced to pay $1.4 million to purchase the 356-acre parcel, secure access, and prevent development.[57]

Conflicts between revenue maximization and public access occur throughout the West. Wyoming owns trust land inholdings within Grand Teton National Park. State officials lease these inholdings for cattle grazing, but complain that grazing generates little revenue compared with the land's market value. In 2010, Wyoming threatened to sell these inholdings on the open market. Later that year, the Department of the Interior agreed to buy Wyoming's remaining inholdings within the Park for $107 million. The sale foundered for lack of federal funds, with Interior purchasing 86 acres of the inholdings from Wyoming for $16 million during 2012 and agreeing to buy the remaining 1,280 acres for $91 million. That sale fell through due to federal funding constraints. Negotiations now focus on a land exchange, which remains a work in progress, leaving private development within an iconic national park a distinct possibility.[58]

While these transactions exemplify efficient revenue generation, they also show that other values suffer when market efficiency is elevated above multiple-use management. If states take over land management, fiscal realities will force more development. When this happens, hunting, fishing, camping, and other uses that do not directly pay their own way are likely to suffer. This is not a critique of state trust land managers. Our concern is with Transfer advocates' reliance on trust land management to demonstrate economic profitability while touting a commitment to public access and multiple-use management. These two mandates are not interchangeable.

Endangered species concerns. Though many Transfer proponents see the TPLA as a way to avoid the regulatory requirements of the Endangered Species Act (ESA), the TPLA is likely to have the opposite effect. The ESA prohibits actions that harm listed animals or their habitat, and this prohibition is binding on individuals as well as federal, state, and local governments regardless of land ownership.[59] Where federal lands, authorizations, or funds are involved, section 7 of the ESA requires that federal agencies consult with the U.S. Fish and Wildlife Service.[60] The only way for private entities to protect themselves from the ESA's penalties for harming a listed species is to prepare a Habitat Conservation Plan (HCP).[61] HCPs can take years to complete and involve considerable expense.[62] If public lands are conveyed to the states, permittees such as livestock grazers, mineral developers, and ski areas will be forced to prepare HCPs, because the absence of federal involvement will foreclose the more efficient section 7 consultation process.

State management of the transferred lands also will not avoid future ESA listings. While Utah does have a sensitive species program, under state law "[w]ildlife species of concern designations, wildlife habitat designations or management recommendations may not be used by governmental entities as a basis to involuntarily restrict the private property rights of landowners and their lessees or permittees."[63] The state's inability to limit development that could harm sensitive wildlife may make ESA listings more, not less, likely.

In sum, the ESA is likely to become a greater burden if states like Utah take over public lands. Permittees will be forced to navigate a more complex regulatory process and the prospect of listing additional species will grow with increased development and the habitat disruptions that comes with state ownership.

Commodity production impacts. A mandate to ensure that transferred lands generate sufficient revenue to cover management expenses would also impact commodity producers as states replace below market payment requirements with more profitable fee programs. Currently, the USFS and BLM charge $1.35 per animal unit month (AUM) to graze livestock on federal land.[64] By comparison, as of 2011 Arizona charged $2.28/AUM while Idaho, Wyoming, and Washington State charged $5.12, $4.64, and $8.78/AUM, respectively.[65] Colorado's fees vary to address uneven local demand and conditions, averaging $11.88/AUM during 2014.[66] Public land grazers, therefore, should expect their costs to go up if state takeover efforts succeed.

Skiers and snowboarders may fare similarly, as Utah is home to six ski resorts, including Alta and Snowbird, which also operate on leased National Forest System land.[67] Across the eleven contiguous Western states, there are 120 ski resorts operating on our national forests, including iconic resorts like Vail and Sun Valley.[68] Presumably states that acquire public lands would honor existing permit conditions. The terms and conditions the states would impose upon permit renewal are uncertain, but could directly impact resort operators and the millions of skiers and snowboarders who visit our national forests every winter.

Royalties for oil and gas production occurring on formerly public land would also presumably increase. The USFS and BLM charge a 12.5-percent royalty on oil and natural gas production. Within the Intermountain West, states charge 16.67- to 25-percent production royalties.[69] States would likely impose these higher rates on new production from transferred lands. Lease renewals would also presumably prompt rate increases, bringing them into line with market conditions.

Hard rock mineral claimants also face uncertainty. Current federal mining laws allow entities to locate and stake a claim to certain minerals, and to develop those minerals without paying a royalty.[70] Claimants can retain rights to unpatented mineral claims by paying a small annual fee.[71] Individuals and corporations, therefore, may hold valid legal rights to land and minerals, often for many decades. These claims dot the West, including lands targeted by Transfer proponents. It is unclear how these property rights would be impacted if public land is transferred to the states. States would presumably seek to convert claims into leases in order to capture revenue and bring management in line with programs regulating mining on state trust lands, which impose production royalties.[72] However, how the state would proceed and the implications for existing right holders are decidedly unclear.

User fees more closely tracking market rates exemplify efficient management and would raise revenue for states. Such changes, however, would mean higher costs for a large and diverse group of existing public land users. Permittees and commodity producers may become disenchanted with Transfer efforts when confronted with these uncertainties and a potentially steep increase in rental and royalty rates.

The loss of public input. Federal law currently guarantees an opportunity for public input into resource management decisions. That opportunity is not guaranteed under state law. Indeed, the greatest injury from a state public land takeover may be to the public's lost opportunity to provide input on land management decisions.

Under federal law, the BLM and USFS must inventory public lands and the resources they contain.[73] The agencies must then develop and update resource management plans, establishing management priorities and direction.[74] The planning process incorporates the National Environmental Policy Act (NEPA), under which federal agencies must consider carefully and document the environmental impacts of every "major federal actions significantly affecting the quality of the human environment."[75] Under NEPA, federal agencies must solicit public input on the proposed action and alternatives to it, consider those comments carefully, and respond to them.[76]

These federal statutes would not apply to lands acquired by the state. There would be no federal public lands and therefore no obligation to plan for their management. Utah, like other Western states, does not have a comparable planning requirement for state lands. There would also be no major federal action to trigger NEPA's disclosure and public input requirements. Of the eleven Western states, only California, Montana, and Washington have state analogues to the National Environmental Policy Act.[77] Although states will presumably not vest an agency with unlimited discretion or allow agencies to act without any public notice or input, there is currently no guaranteed voice for the interested public.

A report commissioned by Utah's Constitutional Defense Council recognizes these concerns and recommends creating a "State public lands management policy act that outlines an open and public process for land management decisions in Utah that demonstrates a continued commitment to keeping public lands open."[78] But Utah has yet to enact a state public land management policy act and does not have a state environmental policy act creating a transparent public process for weighing environmental tradeoffs. During 2014, the Utah legislature created a "Commission for the Stewardship of Public Lands"[79] to "study and make recommendations regarding the appropriate designation of public lands transferred to the State, including stewardship of the lands and appropriate use of the lands."[80] How these recommendations will translate into state law remains to be seen.

In sum, there are few, if any, substantive guarantees that the public will have a meaningful voice in management of transferred lands. Those who care deeply about these lands must have great faith that the state will manage in their best interest.

Conclusion and recommendations. The statutory ambiguity surrounding the TPLA masks a long list of important policy choices implied by a public land takeover. Given the sobering economic and other realities associated with a state takeover, the state needs to clearly address these policy choices by clarifying their management intentions, including the specific steps the state will take to protect non-market values. Ambiguity does not foster public trust, making an open and transparent public process all the more important.

Even if the TPLA is not the blatant rush towards development that many fear, economic imperatives make anything other than a massive increase in development unrealistic. Although reasonable people can disagree about the appropriate balance in managing competing uses, they deserve the information to evaluate and debate the transfer efforts on its merits. The public also deserves a transparent process that gives them a real voice in deciding how our rich and diverse lands will be managed.

Such a process should begin with enactment of a State Public Land Policy and Management Act establishing clear state management priorities, mandating resource inventories that include biological and ecological resources, and requiring comprehensive and detailed plans for the management of those lands. States should also enact State Environmental Policy statutes, ensuring that environmental impacts are carefully analyzed, and affording citizens a meaningful opportunity to review and comment on state agency actions — including planning efforts for acquired lands. The review under these acts should include evaluating a reasonable range of alternative actions to achieve the objective, identifying viable mitigation measures, and requiring state agencies to consider and respond to substantive public comments. Enactment of such statutes in states seeking to take over public lands would send a much-needed message about transparency, accountability, and commitment to the public interest. It would also help the public make informed choices about the future of these lands.

Thank You

The authors would like to thank Jan Stambro and Michael Hogue from the University of Utah's Bureau of Economic and Business Research, Paul Jakus from Utah State University's Department of Applied Economics, and Therese Grijalva from Weber State University's Department of Economics for their careful review of and thoughtful comments on drafts of this paper. The authors are solely responsible for the opinions and recommendations expressed herein.

Endnotes

* Robert B. Keiter is the Wallace Stegner Professor of Law, University Distinguished Professor, and Director of the Wallace Stegner Center for Land, Resources, and the Environment at the University of Utah's S.J. Quinney College of Law.

** John C. Ruple is a Research Associate Professor of Law at the Wallace Stegner Center for Land, Resources and the Environment at the University of Utah's S.J. Quinney College of Law.

[1] Robert B. Keiter and John C. Ruple, *A Legal Analysis of the Transfer of Public Lands Movement*, STEGNER CENTER WHITE PAPER 2014-02 (2014) *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516004.

[2] H.B. 148, 2012 Gen. Sess. (Utah), codified at UTAH CODE ANN. §§ 63L-6-101—104 (2014).

[3] *Id*. at 6.

[4] Keiter & Ruple, *supra* note 1 at 1.

[5] Randal O'Toole, *Should Congress Transfer Federal Lands to the States?* CATO INSTITUTE POLICY ANALYSIS NO. 276 (1997).

[6] UTAH CODE ANN. § 63L-6-102 (2014).

[7] 43 U.S.C. § 1701(a)(7) (2012) (BLM); 16 U.S.C. § 529 (2012) (USFS).

[8] 43 U.S.C. § 1702(c) (emphasis added) (BLM). Similar requirements are contained in the Multiple-Use, Sustained-Yield Act, which applies to the USFS, *see* 16 U.S.C. §§ 528-31.

[9] H.B. 148, *supra* note 2 at lines 170-72 (enacted but not codified).

[10] UTAH CODE ANN. § 63J-4-606 (2)(b)(ix) (2014).

[11] Utah has enacted a state Wilderness Act. UTAH CODE ANN. §§ 63L-6-1-1 through -109 (2014). No lands, however, have been designated under the Act. Furthermore, "[t]he governor may, within protected [state] wilderness areas, authorize . . . the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in developing water resources, including road construction and essential maintenance." *Id*. at § -106(12). The Utah Wilderness Act therefore does little to mollify concerns over Utah's commitment to development.

[12] *Trib Talk: Transferring federal lands to Utah*, SALT LAKE TRIBUNE May 22, 2014, *at* http://publiclands.utah.gov/kathleen-clarke-interviewed-for-trib-talk/.

[13] *Id*.

[14] Representative Ivory's comments were made during the Sept. 18, 2014 Public Lands Debate, *Who Will Best Manage Public Lands the States or the Federal Government?* which can be viewed at https://www.youtube.com/watch?v=1m631pbW6iU.

[15] *Id*. Representative Ivory's statistics are drawn from, Press Release, House Committee on Natural Resources, State Forests Management Superior to Federal Forests for Job Creation, Revenue Production, Local Economies and Fire Prevention (Feb. 26, 2013), *at* http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=321290.

[16] REV. CODE. WASH. § 43.30.215(2) (2014).

[17] *See e.g*., 28 Stat. 107, 110 (1894) (Utah), 36 Stat. 557, 563-65 (1910) (New Mexico), and 36 Stat. 557, 574-75 (1910) (Arizona). *See generally*, JON A. SOUDER AND SALLY K. FAIRFAX, STATE TRUST LANDS, HISTORY, MANAGEMENT, AND SUSTAINABLE USE, ch. 1 (1996) (discussing statehood enabling act grants).

[18] UTAH CODE ANN. § 53C-1-102(2)(b) (2013); *see also*. SOUDER AND FAIRFAX, *supra* note 17 at chs. 1&2 (1996) (discussing mandate as applied across the West).

[19] UTAH CODE ANN. § 53C-1-302(1)(b)(iii).

[20] *Id*. at § -102(2)(d).

[21] National Parks Conservation Ass'n v. Bd. of State Lands, 869 P.2d 909, 922 (Utah 1994).

[22] A REPORT OF THE NEVADA LAND MANAGEMENT TASK FORCE TO THE NEVADA INTERIM LEGISLATIVE COMMITTEE ON PUBLIC LANDS: CONGRESSIONAL TRANSFER OF PUBLIC LANDS TO THE STATE OF NEVADA, PURSUANT TO AB 227 OF THE 2013 NEVADA LEGISLATIVE SESSION 10 (July 18, 2014).

[23] *Id*. at 3.

[24] *Id*.

[25] NATIONAL CONGRESS OF STATE LEGISLATORS, FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 3 (2010), *available at* http://www.ncsl.org/documents/fiscal/statebalancedbudgetprovisions2010.pdf.

[26] UNIVERSITY OF UTAH, UTAH STATE UNIVERSITY &WEBER STATE UNIVERSITY, AN ANALYSIS OF A TRANSFER OF FEDERAL LANDS TO THE STATE OF UTAH xxvi (2014) (hereinafter ECONOMIC ANALYSIS), *available at* http://publiclands.utah.gov/wp-content/uploads/2014/11/1.%20Land%20Transfer%20Analysis%20Final%20Report.pdf.

[27] *Id*. at xxvii. Note that this includes payments under both the Payment in Lieu of Taxes (PILT) and Secure Rural Schools (SRS) programs.

[28] UTAH CODE ANN. § 63J-4-606(2)(b)(vi)(E) (2014).

[29] ECONOMIC ANALYSIS, *supra* note 26 at xxvi.

[30] 30 U.S.C. §§ 181-287 (2012). The states' 50-percent share is reduced by 2-percent to cover administrative costs incurred by the federal government. *Id.* at § 191.

[31] ECONOMIC ANALYSIS, *supra* note 26 at xxvii. Other federal laws require revenue sharing for non-mineral revenue. *See e.g*., 16 U.S.C. § 715s (2012) (wildlife refuges) and § 500 (national forests), 43 U.S.C. § 315 (2012) (grazing), and 7 U.S.C. § 1012 (2012) (land sales).

[32] Oil and gas spot pricing date was obtained from the U.S. Energy Information Administration *at* http://www.eia.gov/dnav/pet/pet_pri_spt_s1_d.htm (oil) and *at* http://www.eia.gov/dnav/ng/ng_pri_fut_s1_d.htm (natural gas). Natural gas pricing was quoted per million BTUs, and converted to cubic feet based on 1,027 BTUs per cubic foot.

[33] U.S. ENERGY INFORMATION ADMINISTRATION, SHORT-TERM ENERGY OUTLOOK 1, 4, 8 (Jan. 2015) *at* http://www.eia.gov/forecasts/steo/archives/jan15.pdf.

[34] Bureau of Economic and Business Research, University of Utah, Oil & Gas Scenarios Frequently Asked Questions (2014), *at* http://bebr.business.utah.edu/sites/default/files/oil_gas_scenarios_faqs.pdf. Ten dollars per barrel is a conservative estimate because the discount as of July 2014 was $16.86 per barrel, and averaged approximately $15 per barrel during the first half of 2014. *Id*.

[35] U.S. ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2014 MT-27, CP-3 (2014), *at* http://www.eia.gov/forecasts/aeo/pdf/0383%282014%29.pdf.

[36] ECONOMIC ANALYSIS, *supra* note 26 at xxviii. This scenario is not a management recommendation, but rather, one possible outcome. We focus on this scenario because it represents what we believe to be the most likely scenario should the state succeed in its efforts.

[37] *Id*. at xxvii.

[38] *Id*.

[39] Many Transfer backers contend that the states will be more efficient resource managers and able to manage transferred lands at a lower cost. At this time, there is insufficient information to test this argument or quantify potential cost saving. However, we suspect that any gains in efficiency will be more than offset by the costs resulting from more active management and the costs involved in hiring, training, and equipping an expanded workforce.

[40] *See* Short-Term Energy Outlook, *supra* note 33.

[41] Idaho, in evaluating the economic impacts of taking over federal public lands, estimates that "it would take 10-15 years to ramp up to timber harvests on the transferred lands to their full potential. Jay O'Laughlin, University of Idaho College of Natural Resources, *Issue Brief: Would a Transfer of Federal Lands to the State of Idaho Make or Lose Money?* 4 (2014), *at* http://www.uidaho.edu/cnr/pag/publications/pag-issue-briefs. While the time required to increase timber production in Idaho is not a precise indicator of the time required to increase mineral development in Utah, the 10-15 year time horizon indicates the extent of the challenge involved.

[42] *See e.g*., 18 Stat. 474, 476 (1875) (Colorado), 25 Stat. 676, 681 (1899) (North Dakota, South Dakota, Montana, and Washington), 26 Stat. 215, 217 (1890) (Idaho), and 26 Stat. 222, 224 (1890) (Wyoming). *See also*, United States v. Sweet, 245 U.S. 563 (1918) (discussing conveyance of mineral lands within Utah under Utah's statehood enabling act).

[43] ECONOMIC ANALYSIS, *supra* note 26 at xxvii.

[44] It is also noteworthy that when the Grand Staircase-Escalante National Monument was created, the federal government entered into an agreement with the State of Utah to acquire all of Utah's trust land located within the Monument's borders. In return for the

state trust lands and other state inholdings within National Forests, Indian reservations, and National Park Service managed lands, Utah received title to federal public lands elsewhere within the state, substantial coal resources, and $50 million dollars in cash. Pub. L. No. 105-225, 112 Stat. 3139, at § 2(15) (1998). Demanding the return of lands that the state voluntarily conveyed away, and for which the state received fair compensation, hardly seems fair — unless the state proposes to return the compensation it already received.

[45] ECONOMIC ANALYSIS, *supra* note 26 at xxvii.

[46] UTAH CODE ANN. § 63L-6-103(2) (2014).

[47] Utah's statehood enabling act may trump such efforts. The Utah Enabling Act guarantees to the state 5-percent of the proceeds of the sale of federal lands. 28 Stat. 107, 110 (1894). The TPLA's provision to return 95-percent of land sale proceeds to the federal government appears to stem from this requirement.

[48] O'Laughlin, *supra* note 41 at 5.

[49] *Backcountry Hunters Anglers, Our Public Lands Not for Sale* 6 (2014), *at* http://www.backcountryhunters.org/images/Public_Lands_Report.pdf.

[50] Memorandum of Agreement between the Utah School and Institutional Trust Lands Administration and the Utah Department of Natural Resources, Division of Wildlife Resources 1 (2007) (on file with authors).

[51] SOUDER AND FAIRFAX, *supra* note 17 at 271-73.

[52] Western Lands and Communities, *at* http://statetrustlands.org/current-issues/recreational-uses.html.

[53] Amy Joi O'Donoghue, *Is Oil Lease a Choice Between Schoolchildren and Hunters*? DESERET NEWS Aug. 27, 2013, *at* http://www.deseretnews.com/article/865585338/Gov-Gary-Herbert-says-SITLA-decision-on-Book-Cliffs-lease-should-be-reconsidered.html?pg=all.

[54] Amy Joi O'Donoghue, *State School Board Votes in Favor of Oil and Gas Lease*, DESERET NEWS Sept. 6, 2013, *at* http://www.deseretnews.com/article/865585960/State-School-Board-votes-in-favor-of-oil-and-gas-lease.html?pg=all.

[55] *Id*.

[56] Lezlee E. Whiting and Dustin Gardiner, *Plan Angers Anglers*, DESERET MORNING NEWS, July 5, 2006, 2006 WLNR 11556120.

[57] Ben Caballero, *Wildlife Division Buys 356 Acres of Trust Land*, DESERET MORNING News, May 12, 2007, 2007 WLNR 9007881.

[58] Mead Gruver, *Reappraisal in Works for Pricey Grand Teton Tracts*, CASPER STAR TRIBUNE JULY 10, 2014. *See also*, Mead Gruver, *Groups Back Legislation to Help Grand Teton Deal*, Nov. 15, 2011 AP ALERT - WY 23:15:39.

[59] 16 U.S.C. §§ 1538(a)(1)(B) and 1532(16) (2012).

[60] *Id*. at § 1536(a).

[61] *Id*. at § 1539.

[62] *See e.g.*, MANAGEMENT SYSTEMS INTERNATIONAL, AN INDEPENDENT EVALUATION OF THE

U.S. FISH AND WILDLIFE SERVICE'S HABITAT CONSERVATION PLAN PROGRAM 31 (2009) (indicating average HCP completion time for 839 HCPs was over 19 months). *See also*, *Peter Aengst et al., Introduction to Habitat Conservation Planning*, http://www.umich.edu/~esupdate/library/97.07-08/hcp.html ("The development of an HCP typically requires significant scientific baseline collection and analysis, often conducted by outside consultants hired by the applicant. The whole process can take many years and cost millions of dollars.").

[63] UTAH ADMIN. CODE r. 657-48-9(2) (2014).

[64] Bureau of Land Management, Department of the Interior, Press Release: BLM and Forest Service Announce 2014 Grazing Fee, *at* http://www.blm.gov/wo/st/en/info/newsroom/2014/january/NR_01_31_2014.html.

[65] BIOECONOMICS, INC., MONTANA TRUST LAND GRAZING LEASE RATE VALUATION ANALYSIS 9 (2011).

[66] Letter from Matthew A. Pollart, Field Operations Section Supervisor, Colorado State Board of Land Commissioners to State Land Board Lessees re: Changes to Standard Grazing Rates Effective April 1, 2014 (March 24, 2014), *at* http://trustlands.state.co.us/NewsandMedia/Documents/AUM%20Equivalent%20Table%20and%202014%20Grazing%20Rate%20Increase%20Letter.pdf.

[67] Downhill Thrills: Skiing and Boarding in our National Forests, http://www.recreation.gov/marketing.do?goto=acm/Explore_Go_Lists/downhillthrills.htm. *See also*, 16 U.S.C. § 497b (2012) (National Forest Ski Area Permit Act).

[68] *Id*.

[69] CENTER FOR WESTERN PRIORITIES, A FAIR SHARE: THE CASE FOR UPDATING FEDERAL ROYALTIES 3 (2013).

[70] 30 U.S.C. § 29 (2012).

[71] *Id*. at § 28.

[72] *See e.g*., UTAH ADMIN. CODE r. 850-25-100 and -300 (2014) (requiring royalty payments on leased trust lands). As of 1996, all of the eleven contiguous Western states surveyed imposed royalties on hard rock mineral development occurring on state trust lands. SOUDER AND FAIRFAX, *supra* note 17 at 226.

[73] 43 U.S.C. § 1711 (2012) (BLM); 16 U.S.C. §§ 1601 and 1603 (2012) (USFS).

[74] 43 U.S.C. § 1712 (BLM); 16 U.S.C. § 1604 (USFS).

[75] 42 U.S.C. § 102(2)(c) (2012).

[76] 40 C.F.R. §§ 1501.7, 1503.1, and 1503.4 (2014).

[77] Council on Environmental Quality, State NEPA Contacts (2013), *at* http://energy.gov/sites/prod/files/2013/09/f2/States_NEPA_Like_22June2013.pdf.

[78] UTAH CONSTITUTIONAL DEFENSE COUNCIL, REPORT ON UTAH'S TRANSFER OF PUBLIC LANDS ACT, H.B. 148 68 (2012).

[79] H.B. 151, 2014 Gen. Sess. (enacted but not codified).

[80] *Id*.