



# Transfer of Public Lands Movement

A study by the LWV of Grand County for the

## League of Women Voters of Utah

The League of Women Voters of Utah is a non-partisan 501(c)(3) non-profit political organization that encourages the informed and active participation of citizens in government. It works to increase understanding of major public policy issues and influences public policy through education and advocacy.

### INTRODUCTION

What are public lands? Where did they come from? Who owns them? Why are there more of them in the western states than in the rest of the country? What is the Transfer of Public Lands Movement and who is behind it?

The public domain once stretched from the Appalachian Mountains to the Pacific Ocean. Of the 1.8 billion acres of public land acquired by the United States through war, treaty, or purchase, two-thirds were given or sold to individuals, corporations, or to the states. What remained has been set aside for national forests, wildlife refuges, national parks and monuments, Bureau of Land Management (BLM) lands, and other public purposes.<sup>1</sup>

These lands provide timber, minerals, hydrocarbons, rangelands, water resource protection, wildlife habitat, carbon sequestration, recreation, and solace for citizens and visitors from around the world.

### BACKGROUND

The Transfer of Public Lands Movement is an extension of the Sagebrush Rebellion of the 1970s and 80s.

"In 1979, the ... 'sagebrush rebellion' erupted when, under the leadership of a Republican rancher and state assemblyman, Nevada enacted a statute claiming ownership of BLM lands. A few other interior western states (Arizona, New Mexico, Utah and Wyoming) followed suit, with Wyoming also claiming ownership of U.S. Forest Service (USFS) as well as BLM-managed lands. Similar bills were introduced in most of the other western states, but were defeated or vetoed."<sup>2</sup>

Utah is currently at the epicenter of an organized effort to transfer the public lands owned by all Americans into state ownership that could then be a model for other states to follow.

Utah-elected officials and other proponents of the transfer movement are providing the public with information based on “alternative legal theories;” utilizing taxes to pursue a goal of state takeover of U.S. public lands in Utah, and working with members of Congress to undermine U.S. public lands nationwide.

The public lands targeted by proponents of the transfer of public lands movement are primarily Bureau of Land Management (BLM) and the USFS managed lands, but in Utah also include land “under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS) and the Utah portion of the Glen Canyon National Recreation Area, which is part of the National Park Service (NPS).”<sup>3</sup>

## **PURPOSE OF THIS STUDY**

The Transfer of Public Lands Movement study explores how the U.S. public lands came to be and what they provide both economically and culturally, and the consequences to the future of these lands and public access to them, if the Transfer of Public Lands Movement succeeds.

To better understand the organized attempt by transfer proponents to develop a narrative supporting their claims, this study also examines the actions being advanced by those who would claim state ownership of U.S. public lands.

## **LWV POSITION ON TRANSFER OF FEDERAL PUBLIC LANDS**

In June 2020, the League of Women Voters (LWV) adopted a position on the Transfer of Federal Public Lands.

The League believes that federal public lands should benefit all Americans. The lands should remain under the jurisdiction of the federal government with U.S. Forest Service and Bureau of Land Management lands managed according to the Multiple-Use Sustained-Yield policy. We support improvements in management and regulation.

Use the information in this study to engage local, state, and national elected officials in a discussion about the future of U.S. public lands.

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## PART ONE: HISTORY OF US PUBLIC LANDS

### OWNERSHIP OF U.S. PUBLIC LANDS

The U.S. Constitution begins:

We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

[We the people elect our representatives to Congress and under Article IV, Section 3, and clause 2 of the U.S. Constitution]:

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.<sup>4</sup>

Therefore, "we the people" own the U.S. public lands.

### Who manages U.S. Public Lands?

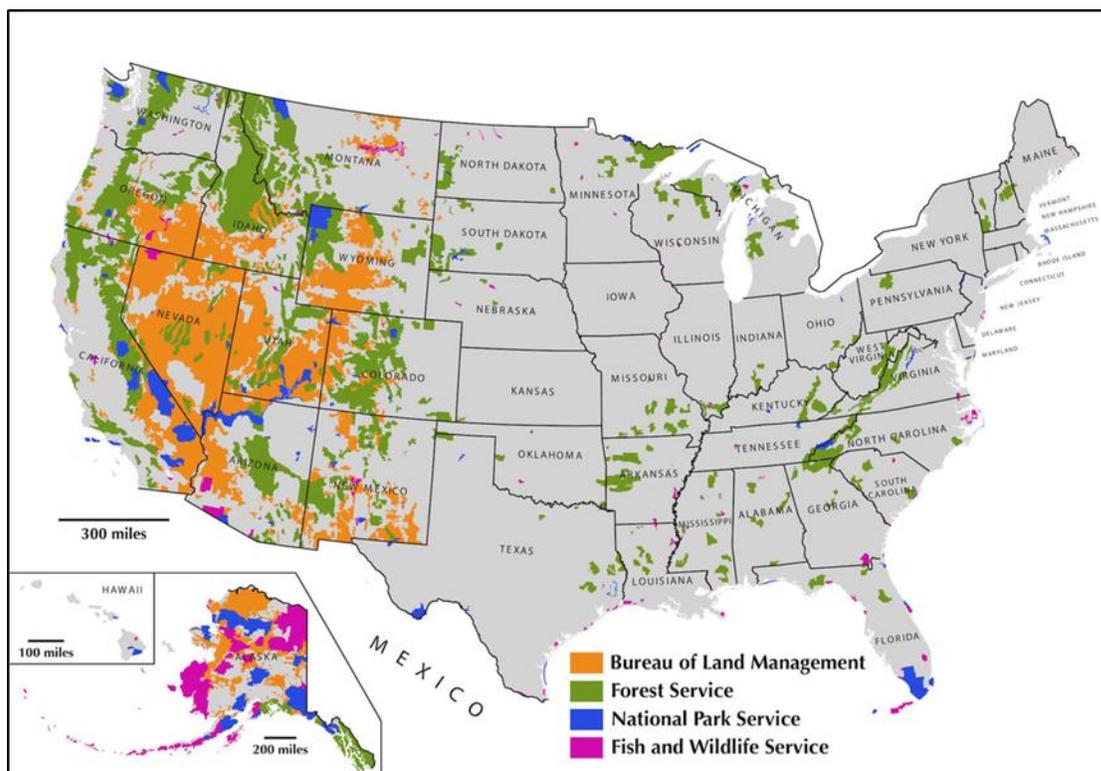


Fig. 1

Currently, approximately 640 million acres of surface land are managed by the federal government, accounting for nearly 28% of the 2.3 billion acres of land in

the 50 states and District of Columbia. Four federal land management agencies (FLMAs) administer 608 million acres (95%) of these federal lands:

- Forest Service, in the Department of Agriculture, manages the 193 million acre National Forest System.
- Bureau of Land Management (BLM), in the Department of the Interior (DOI), manages 246 million acres of public lands.
- Fish and Wildlife Service (FWS), in DOI, manages 89 million acres as part of the National Wildlife Refuge System.
- National Park Service (NPS), in DOI, manages 80 million acres in the National Park System.

Most of these lands are in the West, where the percentage of [U.S. ownership] is significantly higher than elsewhere in the nation. The remaining federal acreage is managed by several other agencies, including the Department of Defense.<sup>5</sup>

## Original Inhabitants



Fig. 2

What became the United States of America was inhabited by indigenous populations with land use practices that were already thousands of years old when Europeans arrived.

European settlers obtained land title via conquest over American Indians. In the Eastern United States, the thirteen colonies then obtained title from Great Britain following the Revolutionary War, conveying the frontier to the federal government.<sup>6</sup>

Throughout the history of this country, the United States government has developed policies for Acquisition, Disposition, and Retention of its public lands.

## UNITED STATES PUBLIC LANDS POLICY: ACQUISITION

The formation of the U.S. federal government was particularly influenced by the struggle for control over what were then known as the “western” lands—the lands between the Appalachian Mountains and the Mississippi River that were claimed by the original colonies.

The original states reluctantly ceded the lands to the developing new government. This cession, together with granting constitutional powers to the new federal government, including the authority to regulate federal property and to create new states, played a crucial role in transforming the weak central government under the Articles of Confederation into a stronger, centralized federal government under the U.S. Constitution.<sup>7</sup>

### Colonial Land Grants

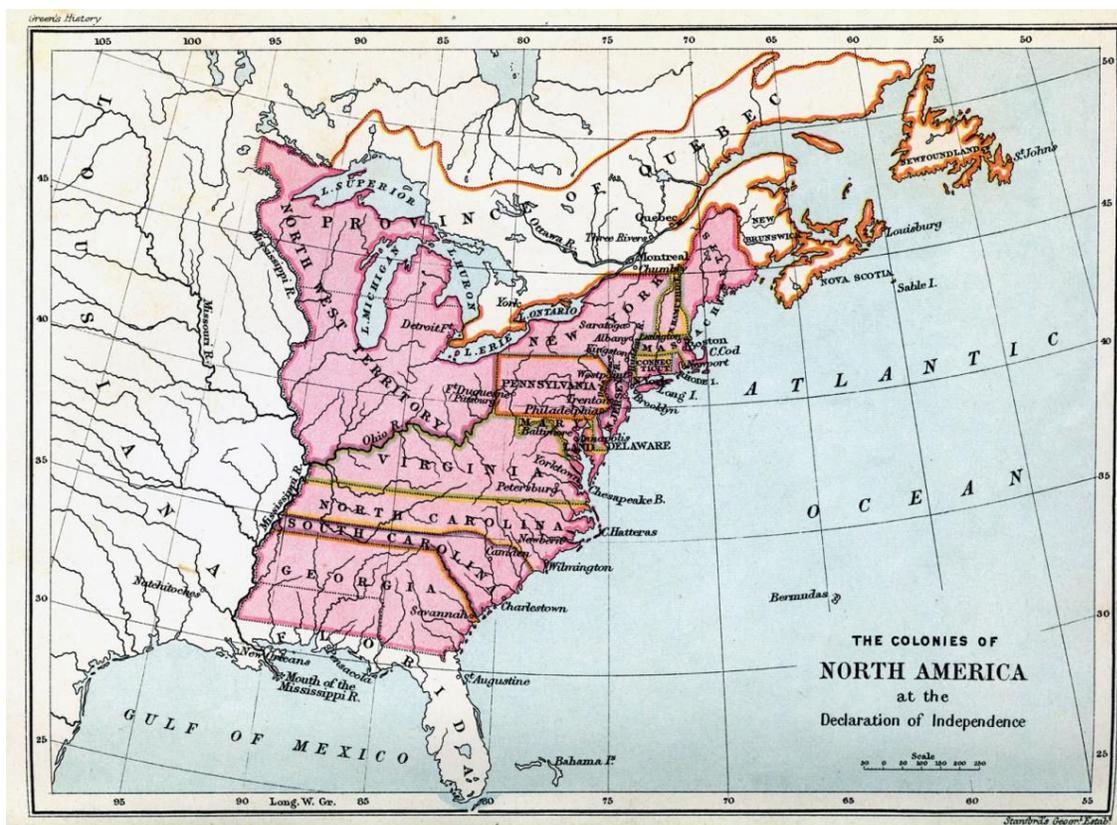


Fig. 3

Understanding the constitutional basis of the nation’s public lands requires going back to the founding of the nation. Even before the Declaration of Independence, representatives of the thirteen original states had started work crafting Articles of Confederation that they intended to be the governing charter of the new national government. The Articles would not, by their own terms, take effect until they were ratified by all thirteen states.

A dispute prevented the Articles from being formally ratified for several years. Because their colonial charters had very imprecise boundaries, seven of the original states had claims to western lands beyond the Appalachian Mountains. Six did not. The latter, led by Maryland, balked at ratifying the Articles until the claims to western lands were relinquished. The stalemate left the nation without a formally constituted government at the very time it was fighting to gain its independence.

Eventually, the nation's founders came to accept Maryland's argument that those western lands should "be considered as common property" of the nation, because they were being "wrested from the common enemy by blood and treasure of the thirteen states." The seven states with claims to western lands agreed to cede them to the national government, and upon that assurance, the Articles of Confederation were ratified.<sup>8</sup>

### State Land Claims and Cessions to the Federal Government

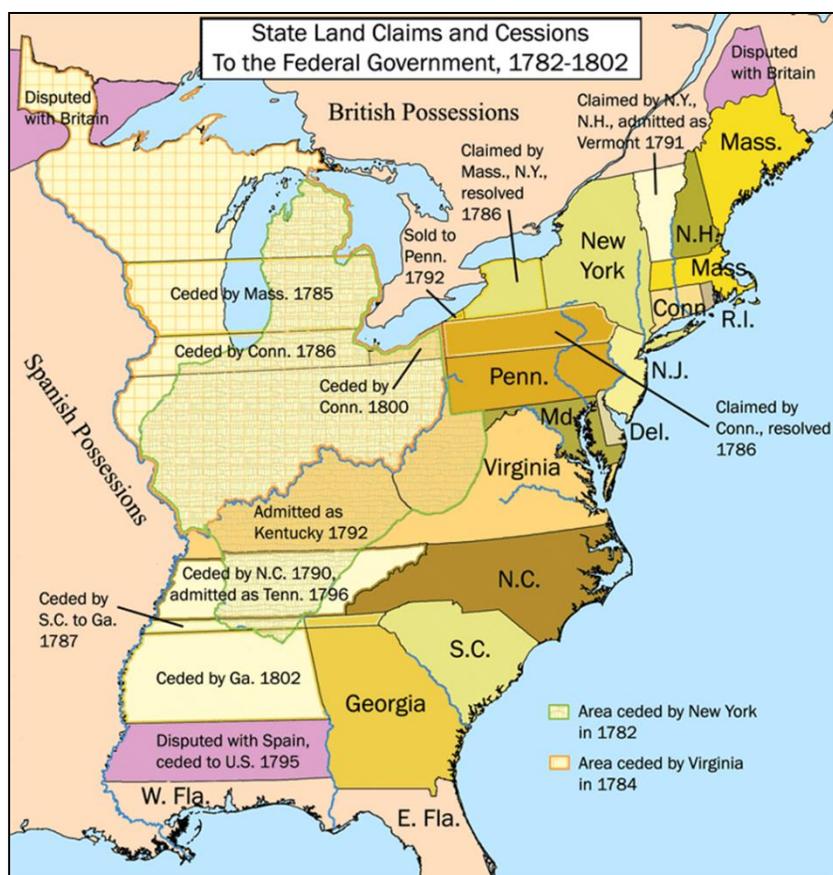


Fig. 4

The first public lands were created in 1781 when New York agreed to surrender to the federal government its claim to unsettled territory extending westward to the Mississippi River. The other colonies followed New York's lead and by 1802 all territory west of the colonies, from the Appalachian Mountains to the Mississippi River, became public domain lands owned by the federal government.<sup>9</sup>

Four pieces of legislation paved the way for this to happen:

The first is the October 10, 1780, Resolution of [the] Second Continental Congress that urged the states with western land claims to cede them to the United States. It called for these lands to be “disposed of for the common benefit of all the United States,” and further specified that the land grant and settlement process shall proceed “at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled.”

The second, Virginia’s 1784 cession to the United States of the western lands it claimed, called for these ceded lands to be “considered as a common fund for the use and benefit of the United States” and that the lands “shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever.

The third is the famous Northwest Ordinance adopted by the Congress of the Confederation in 1787. Among other things, it established a framework for admitting new states out of the Northwest Territory [the land between the Appalachian Mountains and the Mississippi River that became the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and parts of Minnesota], and specified that those new states “shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.”<sup>10</sup>

### **The Articles of Confederation and the U.S. Constitution**

The Continental Congress adopted the Articles of Confederation, the first constitution of the United States, on November 15, 1777. The Articles created a loose confederation of sovereign states and a weak central government, leaving most of the power with the state governments. The need for a stronger federal government soon became apparent and eventually led to the Constitutional Convention in 1787. The present United States Constitution replaced the Articles of Confederation on March 4, 1789.<sup>11</sup>

### **U.S. Constitution Property Clause**

The last and most important [fourth piece of legislation] is the United States Constitution, which replaced the Articles of Confederation in 1788. It gives Congress nearly unfettered discretion regarding whether, when, and on what terms new states may be admitted to the Union. Further, its so-called Property Clause gives Congress “power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>12</sup>

## U.S. Westward Expansion



Fig. 5

“West of the Mississippi River (except Texas), lands were primarily acquired by the U.S. federal government from foreign governments, as was Florida (which was acquired from Spain). Federal land acquisition from foreign countries began with the Louisiana Purchase (530 million acres) in 1803, and continued through treaties with Great Britain and Spain (76 million acres) in 1817 and 1819, respectively. Other substantial acquisitions (620 million acres), through purchases and treaties, occurred between 1846 and 1853.”<sup>13</sup>

Texas was acquired from the Republic of Texas in 1845.

The Treaty of Guadalupe Hidalgo, signed on February 2, 1848, ended the Mexican-American War in favor of the United States. The war had begun almost two years earlier, in May 1846, over a territorial dispute involving Texas. The treaty added an additional 525,000 square miles to United States territory, including the land that makes up all or parts of present-day Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming.<sup>14</sup>

The last major North American land acquisition by the U.S. federal government was the purchase of Alaska (378 million acres) in 1867.<sup>15</sup>

This land was acquired pursuant to the federal government’s treaty-making power, and is managed pursuant to the Property Clause of the U.S. Constitution.<sup>16</sup>

## UNITED STATES PUBLIC LANDS POLICY: DISPOSITION

### Land Acts



Fig. 6

In 1812, Congress established the General Land Office (GLO) to administer the public lands, with the primary purpose of passing public lands into private ownership. [By the middle of the 19th century,] most of the accessible land east of the Mississippi River had been settled and developed.<sup>17</sup>

Two-thirds of the original 1.8 billion acres of public domain acquired by the United States were transferred to individuals, corporations and states. Most of the public lands were transferred out of the public domain by:

- Military Bounties – Over 61 million acres of public domain lands west of the Appalachian Mountains were granted to veterans of the Revolutionary War and the War of 1812 as compensation for their service.
- Land Grants to States - Each new state that joined the Union gave up claim to federal public domain lands within its borders, but received large acreages of public domain in land grants. These were to be leased or sold by the state to help raise funds for public schools, colleges, universities and other public institutions in the state.
- Land Grants to Railroads & Wagon Roads – Over 40 million acres were transferred out of the public domain in railroad and wagon road land grants. In the 1860-1880 era, Congress gave over 60 land grants to railroad companies as incentives to build transportation systems for the developing nation.
- Land Transfers to Individuals – In 1860, Congress began passing a series of laws to facilitate the settlement and development of vast areas of public domain west of the Mississippi River by citizens and masses of immigrants moving to America for a better life. Among these laws [was] the Homestead Act (1862).
- The Mining Law of 1872- This law facilitated mineral exploration and development and created mining camps that grew into many of the present-day communities of the West.<sup>18</sup>

The persistence of federal land ownership across the West was not for lack of effort. Between 1822 and 1884 the federal government made almost 408 million acres of public land available for sale, of which just over 179 million acres were sold.<sup>19</sup>

### Rain Chart of the United States 1872



There is a marked difference between the amount of public lands found in the eastern and central states, and those found in the western states.

In 1877, John Wesley Powell, Director of the United States Geologic Survey (USGS), observed that:

Except for some land offering timber or pasturage, the far greater part of the land west of the [100th Meridian] was essentially not farmable, [because it could not support conventional agriculture requiring at least 20 inches of annual rain, or irrigation].<sup>20</sup>

As of 1905, there were still almost 450 million acres of the United States that remained unreserved and open to settlement. Of these acres, over 418 million acres were in the eleven contiguous western states. The lands that remained were the most difficult from which to earn a living, as settlers selected the best and most valuable lands first.<sup>21</sup>

### “An End Should Be Put To Federal Landlordism”

The federal government tried to give additional public land to the states, but many states refused. In 1929, President Hoover addressed western governors, declaring that “an end should be put to federal landlordism and bureaucracy, and that save for certain mineral rights, the remaining public lands should be ceded to the states in which they lay.”

President Hoover then convened a committee to investigate turning over the public domain to the states. The committee “gave overwhelming support” to ceding the public domain to the states. Although Congress drafted legislation giving public lands to the states, those bills died for lack of state support. States were reluctant

to acquire the public domain because the proposed grants excluded sub-surface minerals, and states feared that if they accepted the land they would lose federal reclamation funds, mineral revenue, and highway funds while incurring increasing administrative costs.

Even in fertile river valleys, rapid snowmelt could cause devastating floods, and rugged topography combined with the cost of reservoir and irrigation system development slowed development. Until the 1920s and the birth of large federal irrigation projects, much of the Intermountain West was simply too dry for productive homesteading and agriculture.

Disposal laws applied equally across the country, but the western landscape was simply less hospitable to settlers. To this day, land ownership reflects these realities: on average, western counties with more arable land have a higher percentage of land in private ownership than counties where arable land is in short supply.<sup>22</sup>

## UTAH TERRITORY AND STATEHOOD

### Mormon Pioneer Settlement



Fig. 8

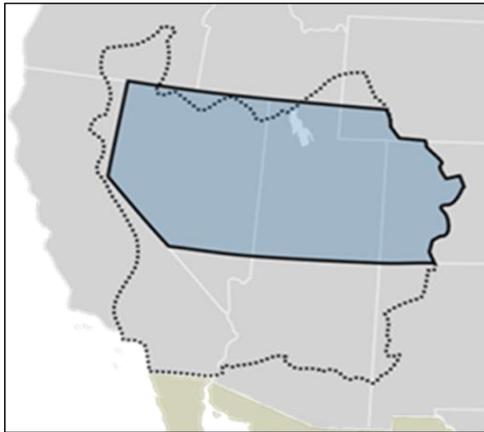
While most of the accessible land east of the Mississippi River had been settled and developed by mid-nineteenth century, the land to the west was largely unaltered by modern human influence until the first Mormon pioneers entered the Salt Lake Valley in 1847.

At the time, the area was claimed by Mexico until the Mexican War of 1848. Unlike prior land transfers, from public domain to private interests, Utah was unusual due to conflicts between the Mormon Church and the United States over issues such as polygamy and separation of church and state. Early Utahans were not permitted to enjoy the benefits of the Preemption Act of 1830 [which granted settlers the right to purchase at \$1.25 per acre 160 acres of public land which they have cultivated

for at least 12 months, thereby offering "squatters" some protection against speculators who purchase lands they have already improved]. Nor could they take up land under the Homestead Act of 1862 [because] near the end of 1856, most surveyors and the Surveyor General were asked to leave the Territory of Utah, and the General Land Office was moved to Denver, Colorado.

In 1868, the General Land Office returned to Utah, and in 1869 U.S. law became applicable in Utah Territory. As a result, Utah was the last area in the continental United States where the public domain was open to private ownership.<sup>23</sup>

## Utah Territory



**Fig. 9**

The Utah Territory is shown in blue, while the proposed State of Deseret is outlined by the dotted line. Modern state boundaries are shown for reference.

In 1849 those living in the Utah Territory petitioned to become part of the Union as the state of Deseret. Congress denied their request, primarily because the population was too small and the boundaries were too large (it covered not only present-day Utah but most of Nevada and Arizona and parts of several other western states). In 1850, Congress created the Utah Territory, which was smaller than the proposed Deseret.

Statehood petitions were also submitted in 1856, 1862, 1867, 1872, and 1882. But the Mormons, the majority residents of the territory, faced several challenges, [chief among them the question of polygamy]. ... In 1890 church president Wilford Woodruff issued a statement officially disavowing the practice of plural marriage by church members ... which cleared the way for Utah's statehood.<sup>24</sup>

## Utah Enabling Act and Statehood 1896

Eighteen months after the [Utah] Enabling Act was enacted, President Cleveland proclaimed the admission of Utah "into the Union on an equal footing with the original States." But he did so only after declaring that the "terms and conditions prescribed by the Congress" for the state to qualify for admission "have been duly complied with," including that the State had adopted an "ordinance irrevocable without the consent of the United States," that made the "various stipulations" recited in the [Utah] Enabling Act.<sup>25</sup>

Statehood enabling acts granted land to states for multiple purposes, and required states to disclaim all other claims to land. In Utah's case, the federal government

gave the newly minted state [7.4 million acres of] land to support public schools, a university, an agricultural college, a school for miners, a normal school, a reform school, an "institution for the blind," an "insane asylum," a "deaf and dumb asylum," a miners' hospital, to support construction of the state capital, and to fund construction of irrigation reservoirs. ... In return for statehood and land grants, Utah agreed to disclaim right and title to additional federal public lands. The statutory disclaimer of title to all other federal lands was included in section three of the Utah Enabling Act and incorporated into the Utah Constitution.<sup>26</sup>

Section 3 of the Utah Enabling Act reads,

**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 the lands belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands belonging to residents thereof; 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;** [emphasis added].<sup>27</sup>

### **Original Land Titles in Utah Territory**

According to information at the Utah Division of Archives and Records Service,

All land in Utah became part of the public domain when the United States signed the Treaty of Guadalupe Hidalgo in February 1848. This land came into the possession of the United States government with a clear and undisputed title. No state contested title, and no private rights had been established previously. Therefore every original land title in Utah can be traced to a patent or other document transferring that land from the federal government.<sup>28</sup>

In spite of this information, in 2015 Utah representatives in Washington, D.C. launched a congressional team to develop a legislative framework for transferring public lands to local ownership and control with the stated purpose to "explore legal and historical background in order to determine the best congressional action needed to **return these lands to the rightful owners** [emphasis added]."<sup>29</sup>

And Utah transfer advocates in 2020 continue to mislead their constituencies by telling them that the Utah Enabling Act states that ... "Federal ownership (of land in Utah) would be of limited duration and that the bulk of those lands would be timely disposed of by the federal government into private ownership or otherwise returned to the State."<sup>30</sup>

It does not say that.

## **UNITED STATES PUBLIC LANDS POLICY: RETENTION**

In addition to acquiring public lands and disposing of public lands, federal policy includes retaining public lands and reserving them for the use of the American people. Public lands, whether under the General Land Office (GLO) created in 1812, or since 1946 under the Bureau of Land Management, are the lands from which most national parks, monuments, forests, wildlife refuges, wilderness areas, recreation areas, historic trails, and other areas for the public to access and use, are carved.

Without U.S. Public Lands and the policies that reserve some of those lands in federal ownership, none of these areas would exist.

### **National Parks: The Yellowstone Act 1872**

Yellowstone is considered to be the world's first national park, set aside, not for royalty, but for the common people.

The Yellowstone Act of 1872 designated the region as a public "pleasuring-ground," which would be preserved "from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders within.

For a nation bent on settling and exploiting the West, the creation of Yellowstone was surprising. Many congressmen gave it their support simply because they believed the rugged and isolated region was of little economic value. Yet the Yellowstone Act of 1872 set a precedent and popularized the idea of preserving sections of the public domain for use as public parks.<sup>31</sup>

Local politicians and businessmen did not share in those sentiments. In 1872, the Helena Gazette wrote,

We regard the passage of the act as a great blow struck at the prosperity of the towns of Bozeman and Virginia City.<sup>32</sup>

And the Legislative Delegation worked diligently to keep the park unfunded and tried to have it de-authorized.

For the decade after Yellowstone National Park was established in 1872, the park was under serious threat from those who would exploit, rather than protect, its resources. Poachers killed animals. Souvenir hunters broke large pieces off the geysers and hot springs. Developers set up camps for tourists near hot springs, along with bath and laundry facilities in the hot springs. In response, civilian superintendents were hired to preserve and protect this land. Their experience and intentions varied, and they were all under-funded and under-staffed. Word got back to Congress that the park was in trouble, but legislators refused to appropriate any funds for the park's administration in 1886.

Yellowstone National Park turned to the U.S. Army for help. In 1886, men from Company M, First United States Cavalry, Fort Custer, Montana Territory came to Yellowstone under the command of Captain Moses Harris. They began what would be 32 years of military presence in the park.<sup>33</sup>

In the years following the establishment of Yellowstone, the United States authorized additional national parks and monuments, many of them carved from the federal lands of the West. These, also, were administered by the Department of the Interior, while other monuments and natural and historical areas were administered by the War Department and the Forest Service of the Department of Agriculture. No single agency provided unified management of the varied federal parklands.<sup>34</sup>

### **National Park Service**

On August 25, 1916, President Woodrow Wilson signed the act creating the National Park Service, a new federal bureau in the Department of the Interior responsible for protecting the 35 national parks and monuments then managed by the department and those yet to be established. This "Organic Act" states that "the Service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments and reservations...by such means and measures as conform to the fundamental purpose of the said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>35</sup>

### **Utah**

In Utah, the only one of the five national parks that did not begin as a presidentially decreed national monument is Canyonlands National Park. Local resistance at the time included the following statement by Senator Wallace Bennett in 1962 regarding the future of southern Utah if Canyonlands National Park was established. He thought that,

All commercial use and business activity would be forever banned and nearly all of southern Utah's growth would be forever stunted."<sup>36</sup>

### **National Forests: Forest Reserve Act 1891**

One hundred years after the founding of the Nation, unrestricted, large-scale exploitation of timber resources and overgrazing threatened to destroy the very natural resources relied upon by the United States. Uncontrolled wildfires and denuded and overgrazed mountains destroyed watersheds, and led to devastating floods and polluted drinking water impacting towns and communities.

Lumbermen, [who] had exhausted the forests of the East, were fast clearing the great pine forests of the Lake States, and would soon move on to the South and West. ...

Acquisitiveness was the spirit of the times, with little heed to the rules of fair play or the needs of the future. Reaction to abuse of the Nation's natural values during this period gave rise to the forestry and conservation movement in America.<sup>37</sup>

[In] 1879, Congress created a Public Lands Commission, to codify public land laws, classify public lands, and recommend wise disposal and management of these lands. The Commission proposed a law to correct abuses in public lands disposal and management. It advised withdrawal from disposal of public lands chiefly valuable for timber or setting aside portions of these lands as forest reserves. The Commission's report to Congress in 1880 contributed greatly to the Forest Reserve Act finally passed in 1891.<sup>38</sup>

## **Utah**

The act included a provision that permitted the President of the United States to set aside forest reserves from the land in the public domain. President Harrison designated 15 forest reserves on over 13 million acres of forested land in seven western states and Alaska. None of these first forest reserves were located in Utah; however, it was not long before Utah citizens began to petition the General Land Office to protect several Utah watersheds that had been over-utilized from excessive sheep grazing and timber harvesting.

On February 22, 1897, President Grover Cleveland unexpectedly added 13 new forest reserves encompassing more than 21 million acres of land. The Uinta Forest Reserve was one of the new additions. This unforeseen addition to the forest reserve system generated protest that denounced the entire reservation system. Consequently, the forest reserves created by Cleveland were suspended for one year, and Congress, under the new administration of President William McKinley, authorized legislation for the practical administration of forest reserves.

The Organic Act of 1897 was passed and it designated the purpose of the reserves to be for watershed protection and timber production. The Organic Act, considered to be one of the most important pieces of federal forest legislation, provided the main statutory basis for the management and protection of forest reserves in the United States.<sup>39</sup>

## **Agriculture Appropriations Act 1907**

Due to complaints from many special interest groups, ranging from cattlemen to loggers to sheepmen and homesteaders, over the myriad regulations required for operations in forest reserve lands, they, together with their political allies, managed to get enough support in Congress by 1907 to change the 1891 law [Forest Reserve Act].

Senator Charles W. Fulton, Republican of Oregon, attached an amendment to the Agriculture Appropriations Act of 1907, which stated, "Hereafter no forest reserve shall be created, nor shall any addition be made to one heretofore created, within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado or Wyoming."<sup>40</sup>

Utah was not on the list.

### **U.S. Forest Service 1905**

Responsibility for forest reserves fell under the Department of the Interior until 1905, when President Theodore Roosevelt transferred their care to the Department of Agriculture's new U.S. Forest Service.<sup>41</sup>

The mission of the U.S. Forest Service is: To sustain the health, diversity, and productivity of the Nation's forests and grasslands to meet the needs of present and future generations.<sup>42</sup>

### **National Monuments: Antiquities Act 1906**

The Antiquities Act was enacted in 1906 [under President Teddy Roosevelt] in response to the destruction of prehistoric ruins and other archaeological sites in the western United States, often by amateur archaeologists and treasure hunters. The act authorizes the President to declare, by public proclamation, historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest located on federal land as national monuments. It also authorizes the President to reserve parcels of land surrounding these objects, but limits the size of such reservations to "the smallest area compatible with the proper care and management of the objects to be protected." Though the Antiquities Act was enacted with the primary goal of preserving archaeological sites, it has also been frequently used to protect naturally occurring objects, such as the geological features within the Grand Canyon National Monument [established in 1908 by presidential proclamation].<sup>43</sup>

### **Utah**

Like Grand Canyon National Park [1919 Act of Congress], all of the land within [Utah's] Zion [National Park] was set aside under authority of the Antiquities Act. The first step was taken by William Howard Taft, when he proclaimed Mukuntuweap National Monument in 1909. At that time the sculpted valley was as obscure as the name, isolated and unknown. The second step occurred in 1918 when Woodrow Wilson enlarged the monument acreage five-fold (15,840 to 76,800 acres) and changed the name to Zion.

Assistant Director of the National Park Service Horace Albright, Utah Senator Reed Smoot, local people, and representatives of the Union Pacific Railroad all wanted a national park. The reasons most often cited were protection and development for tourism. ... Zion became a national park in 1919, but additions to the park would

again involve the Antiquities Act. ... In 1937 President Franklin Roosevelt proclaimed Kolob Canyon as the second Zion National Monument. This one had a longer life span than the first, existing until 1956, when it was made part of the park through an act of Congress.<sup>44</sup>

The other three national parks in Utah that began as national monuments are:

- Bryce Canyon National Park, established “as a national monument in 1924 after the governor of Utah and the Utah legislature lobbied for national protection of the area.”
- Arches National Park, established as a national monument in 1929.
- Capitol Reef National Park, established as a national monument in 1937.

There are seven [now eight] national monuments in Utah. Six are managed by the National Park Service and one, the Grand Staircase-Escalante National Monument, is managed by the Bureau of Land Management. The six national monuments managed by the National Park Service are Cedar Breaks National Monument, established in 1933; Dinosaur National Monument, established in 1915; Hovenweep National Monument, established in 1923; Natural Bridges National Monument, established in 1908; Rainbow Bridge National Monument, established in 1910; and Timpanogos Cave National Monument, established in 1922.<sup>45</sup>

The eighth and most recent national monument is Bears Ears, established in 2016 and under the management of the BLM.

In 2015, the Utah state legislature passed S.C.R. 4: Concurrent Resolution Regarding the Creation of National Monuments. This concurrent resolution of the Legislature and the Governor urges:

- Congress to create a process for establishing a national monument that includes public participation and local and state involvement;
- expresses opposition to the presidential creation of any large area national monument as a violation of the Antiquities Act's smallest-area-compatible mandate;
- declares that unchecked exercise of power concentrated in the President has serious consequences for Utah, as nearly 60% of the state is federally owned; and
- urges Congress to check the President's ability to exercise this power by amending the Antiquities Act to clarify its actual intent, which is to establish small discrete monuments or memorials.<sup>46</sup>

The state’s newest national monuments, Grand Staircase-Escalante and Bears Ears, were created under the Antiquities Act and are currently the focus of litigation under the Antiquities Act.

In 2017, Utah legislators passed two concurrent resolutions. HCR 11: Concurrent Resolution Urging the President to Rescind the Bears Ears National Monument Designation, and HCR 12: Concurrent Resolution Urging

## Federal Legislation to Reduce or Modify the Boundaries of the Grand Staircase-Escalante National Monument.<sup>47</sup>

In response to those requests, the president issued two proclamations [reducing]:

“ ... the Grand Staircase-Escalante monument from 1.7 million acres to 1 million acres and the Bears Ears monument from 1.35 million acres to 228,784 million acres, [explaining that] ... each of the monuments contained objects that were ‘not ... of any unique or distinctive scientific or historic significance’ and were not in danger of being damaged or destroyed’.”<sup>48</sup>

Various groups have sued to block these proclamations, arguing that the President exceeded his authority under the Antiquities Act. [Past Presidents have reduced the size of existing monuments, but] because none of the prior proclamations diminishing monuments was challenged in court, these lawsuits offer the first opportunity for a court to decide whether the act empowers the President to diminish a national monument. ... While the President’s authority to diminish a national monument has been questioned, there appears to be no dispute that Congress has authority to do so, a power it has exercised before.<sup>49</sup>

### **Fish and Wildlife Service: National Wildlife Refuge System 1966**

The first national wildlife refuge was established by executive order in 1903, although it was not until 1966 that the refuges were aggregated into the National Wildlife Refuge System (NWRS) administered by the Fish and Wildlife Service (FWS). The NWRS includes wildlife refuges, national monument areas, waterfowl production areas, and wildlife coordination units.<sup>50</sup>

The U.S. Fish and Wildlife Service's mission is, working with others, to conserve, protect and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people.<sup>51</sup>

The NWRS’s mission is to administer a network of lands and waters for the conservation, management, and restoration of fish, wildlife, and plants and their habitats. Other uses (recreation, hunting, timber cutting, oil or gas drilling, etc.) may be permitted, to the extent that they are compatible with the NWRS mission and an individual unit’s purpose.<sup>52</sup>

### **Utah**

The U.S. Fish & Wildlife Service manages three wildlife refuges in Utah: Bear River Migratory Bird Refuge, Fish Springs National Wildlife Refuge, and Ouray National Wildlife Refuge. ... The three Utah refuges provide opportunities for wildlife observation, photography, environmental education, interpretation, fishing and hunting. Millions of birds flying along both the Pacific and Central flyways use Utah refuges as important resting, feeding and nesting sites.<sup>53</sup>

In addition to the three refuges, the U.S. Fish & Wildlife Service manages the “Jones Hole National Fish Hatchery, the Ouray National Fish Hatchery, the Bear River Watershed Conservation Area, the Colorado River Wildlife Management Area, and the Rocky Basin Fire Management Zone.”<sup>54</sup>

### **Bureau of Land Management 1946**

The BLM was formed in 1946 by combining two existing agencies. One was the Grazing Service (first known as the DOI Grazing Division), established in 1934 to administer grazing on public rangelands. The other was the General Land Office, which had been created in 1812 to oversee disposal of the federal lands.<sup>55</sup>

With historical roots dating back to the earliest days of the nation, the BLM administers the lands that remain from America's original "public domain."<sup>56</sup>

The agency’s multiple-use mission includes everything from recreation, wildlife conservation, and preservation of natural and cultural resources to livestock grazing, logging, and energy and mineral development.

More than 99% of BLM-administered lands are available for recreational use with no fees, and since 2000, the BLM has become the lead agency in land conservation in the country. The BLM manages more wildlife habitat than any other federal agency, including 25 national monuments, 12 national conservation areas, and 8.8 million wilderness acres. BLM also oversees the National Landscape Conservation System, about 36 million acres managed to conserve special features for the benefit of current and future generations.<sup>57</sup>

The Bureau of Land Management's mission is to sustain the health, diversity, and productivity of public lands for the use and enjoyment of present and future generations.<sup>58</sup>

### **Utah**

Located mostly in western and southeastern Utah, these [BLM] lands are varied, ranging from rolling uplands to sprawling desert lowlands. Utah’s public lands feature some of the most spectacular scenery in the world, from the snow-capped peaks of remote mountain ranges to colorful red-rock canyons.<sup>59</sup>

The public lands and resources administered by the BLM are among Utah’s greatest assets, benefitting local communities and our nation. Every year, BLM-managed public lands in Utah support thousands of jobs and draw millions of visitors. ... In addition, the BLM in Utah manages two National Conservation Areas, three National Historic and Scenic Trails, 18 Wilderness areas, 11 Wild and Scenic River segments, and 86 Wilderness Study Areas.<sup>60</sup>

## **FEDERAL LAND AND STATE LAND IN UTAH**

In 1896, as required by the Federal Government, Utah entered the Union as a state with “over 70% of its public land owned by the federal or state government.”<sup>61</sup>

According to a 2014 report on the *Analysis of a Transfer of Federal Lands to the State of Utah*, published in the Utah Economic and Business Review:

The largest federal land manager in the state is the BLM, which manages 22.8 million acres of primarily rangelands, employs 774 FTEs, and spends on average about \$120 million annually to manage its lands.

The U.S. Forest Service is the second key land management agency, overseeing 8.15 million acres of national forests in the state. The Forest Service employs more than 1,000 people and spends an estimated \$107 million to manage the forests.

With 112,696 acres under its jurisdiction in Utah, the U.S. Fish and Wildlife Service (FWS) has a much smaller land presence than either the BLM or Forest Service. Most of the FWS lands are tied to fish hatcheries and wildlife refuges. Those operations employ 35 people and cost almost \$4.6 million; this represents a fraction of the agency’s activities in the state. The FWS is primarily a regulatory agency, not a land management agency.

Finally, the National Park Service (NPS) manages the Glen Canyon National Recreation Area, which covers 1.2 million acres in Utah and Arizona—most of this in Utah. Allocating spending on a per acre basis, the NPS spends about \$16 million annually to operate the Utah portion of Glen Canyon.<sup>62</sup>

“Utah government agencies, including the State of Utah School and Institutional Trust Lands Administration, the Utah Division of Forestry, Fire, and State Lands, the Utah Division of Wildlife Resources, and the Utah Division of State Parks and Recreation, correspondingly manage state trust lands, state sovereign lands, state wildlife reserves, and state parks. ... State lands comprise 10 percent of Utah.”<sup>63</sup>

## **DIFFERENT MANDATES**

The mix of federal and state public lands in Utah and the other western states and how they are managed can be confusing. Both the federal government and state governments manage their public lands under different mandates, and different agencies have different missions.

While the statutory regimes differ -- the National Forests are administered under the National Forest Management Act, and the BLM lands under the Federal Land Policy and Management Act -- both statutes borrow from the Multiple Use Sustained Yield Act in their emphasis on striking a balance in

land use planning among the competing values of recreation, grazing, timber, watershed protection, wildlife and fish, and wilderness.<sup>64</sup>

And,

While the federal land managers [BLM and USFS] are working under the multiple-use and sustained yield mandates, most western state land managers work under a mandate of revenue maximization.<sup>65</sup>

### **Multiple-Use Sustained Yield Act of 1960**

[In 1960, Congress passed an Act] “to authorize and direct that the national forests be managed under principles of multiple use and to produce a sustained yield of products and services, and for other purposes ... the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”<sup>66</sup>

### **National Forest Management Act of 1976**

“The National Forest Management Act (NFMA) is an amendment of the Forest and Rangeland Renewable Resources Planning Act of 1974 (RPA). This Act establishes standards for how the Forest Service manages the national forests, requires the development of land management plans for national forests and grasslands, and directs the Forest Service to develop regular reports on the status and trends of the Nation’s renewable resources on all forest and rangelands.”<sup>67</sup>

### **Federal Land Policy and Management Act 1976**

[In] 1976 ... “Congress passed the Federal Land Policy and Management Act (FLPMA), an organic act for the BLM that established the agency’s multiple use mandate to serve present and future generations. The Act declared that the public lands be retained in federal ownership, unless as a result of the land use planning procedure provided for in the Act, it is determined that disposal of a particular parcel will serve the national interest.”<sup>68</sup>

“Sec.103.[43 U.S.C. 1702](c) Defines the term “multiple use” to mean “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.”<sup>69</sup>

### **Utah School and Institutional Trust Lands Administration**

Created in 1994, the Utah School and Institutional Trust Lands Administration (SITLA), manages the state’s 3.4 million acres of trust lands. Unlike public lands, trust lands are not held in the public trust rather, they are held in trust for 12 [public] beneficiaries, defined and designated by Congress at statehood. ...

SITLA works with private business to generate revenue from energy and mineral royalties, and real estate and surface development. ...

Trust lands are generally open to the public for responsible recreational activities including hunting, fishing, hiking, camping, and off-highway vehicle (OHV) use.

However, public access to trust lands can be withdrawn at any time to allow SITLA to meet its constitutional mandate to generate revenue to support trust land beneficiaries.<sup>70</sup>

### **State Sovereign Lands**

The Utah Division of Forestry, Fire, and State Lands is an agency within the Utah Department of Natural Resources that is responsible for managing state sovereign lands, as well as directing programs that maintain healthy forests and provide wildfire assistance.

The framework for sovereign land management is found in the Utah Constitution, state statute, and administrative rule. The Utah Constitution accepts sovereign lands to be held in trust for the people, under the public trust doctrine, and managed for the purposes for which the lands were acquired. Presently, the Division of Forestry, Fire, and State Lands manages state sovereign land using multiple-use and sustained-yield principles.<sup>71</sup>

State sovereign lands include Utah Lake, Great Salt Lake, Bear Lake, the Jordan River, and portions of the Green River, Colorado River, and Bear River, along with the Moab Exchange Lands.

Both SITLA and the Division of Forestry, Fire & State Lands have used the land exchange process outlined by FLPMA to successfully trade parcels of land between federal and state ownership for the benefit of all parties. An example of this is the Moab Exchange Lands parcel north of Moab off the Willow Springs Road, acquired by the State of Utah in 1965 in an exchange for sovereign lands within the newly-designated Canyonlands National Park.<sup>72</sup>

### **Utah Division of State Parks and Recreation**

The Utah Division of Parks and Recreation is committed to enhancing the quality of life of all Utah residents by preserving and providing natural, cultural and recreational resources for the enjoyment, education and inspiration of this and future generations. The Division manages Utah's 43 state parks, heritage sites and museums, which are explored by nearly 4 million visitors annually.

Through the Utah State Parks system, visitors can explore 23 lakes and reservoirs, including 1,346 square miles of freshwater; ride over 80,000 miles of ATV trails on some of the nation's largest, and most spectacular trail systems; hike and bike 277 miles of trails or stay the night at one of the system's 3,406 campgrounds.<sup>73</sup>

## **VISITATION AND ECONOMICS U.S. PUBLIC LANDS**

### **Outdoor Recreation**

Despite the skyrocketing popularity of national public lands, funding for the federal agencies that manage them has failed to keep pace with rising visitation. All federal land management agencies are facing budget cuts in Fiscal Year 2019, but none more so than the Bureau of Land Management and U.S. Forest Service. Together,

these agencies manage 316 million acres of public lands where the public is invited to hike, camp, hunt, and fish for little to no cost.

Unlike their dwindling budgets, visits to Bureau of Land Management and Forest Service lands are rising. The Center for Western Priorities' analysis shows that non-national park lands receive nearly 60 million more visitors on an annual basis than their more well-known brethren. National monuments, wilderness and wilderness study areas, national wildlife refuges, and national conservation areas all offer world-class outdoor experiences without the big-name recognition of national parks.

When policymakers invest in infrastructure to support outdoor recreation on these public lands, local communities see the benefits. ... What's more, the outdoor recreation economy is an increasingly important sector for states across the West. In the 11 Western states considered [in this report, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming] outdoor recreation is responsible for \$239 billion in consumer spending and nearly two million jobs yielding over \$75 billion in wages and salaries.

The data show that Americans and international travelers visit public lands in Western states more than 290 million times annually, making Western public lands one of the most popular destinations for recreation in the country. The West's U.S. public lands saw four times as many visits as people who live in all of the eleven Western states combined. In total, that equals almost one visit for every person living in the United States.

The number of annual visits to public lands in the United States continues to grow. In 2006 the National Park Service saw approximately 81 million visits to national parks in the 11 Western states. Eleven years later, in 2017, the number of visits to national parks had ballooned to over 108 million. Similarly, visitation to the Bureau of Land Management's national monuments has nearly tripled since 2000.<sup>74</sup>

### **Utah: Outdoor Recreation**

The data shows that in Utah, more than 28 million people visit public lands every year.<sup>75</sup>

Outdoor recreation contributes more than \$12.3 billion to the economy, employs more than 110,000 people and is the primary driver behind the tourism industry. Not only does Utah outdoor recreation create \$737 million in state and local tax revenues, it is the reason for \$3.9 billion in wages and salaries. Governor Herbert created Utah's Office of Outdoor Recreation in January 2013 as a result of the large contribution the industry plays in Utah's economy.<sup>76</sup>

### **Natural Resources**

The US Department of the Interior's Office of Natural Resources Revenue (ONRR) disbursed \$11.69 billion in Fiscal Year (FY) 2019 from energy production on federal and American Indian-owned lands and offshore areas. States received \$2.44 billion

in disbursements, and more than \$1 billion was disbursed to American Indian Tribes and individual Indian mineral owners. In addition, \$1.76 billion went to the Reclamation Fund; \$1.0 billion to the Land and Water Conservation Fund (LWCF); \$150 million to the Historic Preservation Fund; and the remaining \$5.35 billion to the US Treasury.<sup>77</sup>

### **Utah: Natural Resources**

The following figures are for the lands being targeted by the TPLM legislation, and do not include federal money expended on the National Park Service or the Fish and Wildlife Service lands in Utah, except for Payment in Lieu of Taxes (PILT).

The PILT program eligibility is reserved for local governments that contain nontaxable Federal lands within their boundaries. These jurisdictions provide significant support for national parks, wildlife refuges, and recreation areas throughout the year. PILT seeks to compensate local governments for the inability to collect property taxes on federally owned land.<sup>78</sup>

#### 2018 Federal Funds Expended on, or Distributed to, Utah

1. BLM Operations and Management Budget	\$125,400,000
2. USFS Operations and Management Budget	\$69,521,000
3. Glen Canyon NRA Operations and Management Budget	\$11, 948,000
4. BLM Fire Costs	\$47,900,000
5. USFS Fire Costs	\$36,422,000
6. Payment in Lieu of Taxes (PILT)	\$40,715,865
7. Fed. Revenue Share	\$74,500,000
<b>Total</b>	<b>\$406,406,865</b>

(Amounts for 2018 Federal Funds Expended on and Distributed to Utah derived from communication with: Utah BLM State Office; USFS Region 4 Office in Ogden, Utah; Glen Canyon NRA Superintendent, GLCANRA; Federal Payment in Lieu of Taxes (PILT) and Revenue Sharing Funds for Utah, Office of the Secretary, Department of Interior, Washington, DC.)

Of all the costs to manage US public lands in Utah covered by the federal government, fire is perhaps the least predictable and potentially the most expensive, along with the cost associated with deferred maintenance on public lands.

2018 State Funds for, ...fire suppression costs and post-fire rehabilitation: \$42 million. ... When other agency firefighting costs, including the federal government are added in, the costs of the Utah wildfire season in 2018 topped \$150 million.<sup>79</sup>

If the federal government were no longer to own public lands, the rationale for the U.S. spending money to fight these fires would largely evaporate. That would almost certainly mean that the responsibility for fighting wildfires would likely fall

on state and local governments and the private sector, just as it does in other parts of the country where there are few public lands.<sup>80</sup>

In 2018, in excess of \$400 million dollars of federal funding was expended in the state of Utah in support of public lands. If the state acquires these lands, they will lose those federal funds and have to make up the difference with state funding, or will have to sell those lands into private hands.

If sold, it is highly unlikely the public would ever get them back.

## **PART TWO: UNDERSTANDING THE PRO-TRANSFER NARRATIVE**

### **UTAH ANTI-PUBLIC LAND RHETORIC**

Utah's anti-public land rhetoric has already cost the state economically. After 20 years in Salt Lake City, the twice-annual Outdoor Retailer trade show left Utah for Denver, Colorado. The move came after Utah Governor Gary Herbert refused to halt the state's efforts to transfer U.S. public lands to Utah, nullify the Antiquities Act, and undo Bears Ears National Monument. The trade show injected \$45 million into Utah's economy each year.<sup>81</sup>

### **UTAH TRANSFER OF PUBLIC LANDS ACT (TPLA)**

On March 23, 2012, Utah's Governor [Gary Herbert] signed into law [House Bill 148] the Transfer of Public Lands Act (TPLA). The TPLA demands that the United States transfer title to federal public lands to Utah by December 31, 2014, turning approximately 30 million acres of federal public land and the resources they contain into state property.<sup>82</sup>

It also calls for the transfer of such acreage to the State and established procedures for the development of a management regime for the increased state portfolio of land holdings resulting from the transfer.<sup>83</sup>

### **National Reaction**

Following on the TPLA's footsteps, the American Legislative Exchange Council [ALEC] enacted a model resolution demanding the conveyance of federal public lands to the states, and both the Republican National Committee and National Association of Counties passed resolutions supporting public land transfers.<sup>84</sup>

#### American Legislative Exchange Council

The American Legislative Exchange Council is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism.<sup>85</sup>

This [ALEC model] resolution urges the U.S. federal government to extinguish title and government jurisdiction over public lands that are held in trust by the U.S. federal government and convey title and jurisdiction to willing states in which the federal public lands are located as was promised in congressional resolutions in 1780, the Land Ordinance of 1784 and the Northwest Ordinance of 1787, among others.<sup>86</sup>

The State Factor, a publication of the American Legislative Exchange Council, in support of the ALEC model resolution says that:

The states joining the Union subsequent to the original 13 were [likewise] *compelled to cede excess lands to the federal government* [emphasis added] for the general welfare.<sup>87</sup>

However, unlike the 13 original states that held claims to their lands from Great Britain, subsequent states were created from U.S. territories. According to an article in the University of Chicago Law Review 2003 titled, The Constitution in Congress: The Public Lands, 1829-1861:

Statehood put an end to federal sovereignty over the territories, but not to federal ownership of the lands. Statutes providing for the admission of new states not only reserved federal title to the public domain within their borders; they contained explicit provisions designed to insulate federal lands from state taxation.<sup>88</sup>

#### 2016 Republican National Committee Platform

"Utah's efforts became a model for legislation that sprang up across the West, and transfer theories were adopted as part of the Republican National Committee Platform."<sup>89</sup>

The platform language is found on pages 20 and 21 under the heading, *America's Natural Resources: Agriculture, Energy, and the Environment* and states:

The federal government owns or controls over 640 million acres of land in the United States, most of which is in the West. These are public lands, and the public should have access to them for appropriate activities like hunting, fishing, and recreational shooting.

Federal ownership or management of land also places an economic burden on counties and local communities in terms of lost revenue to pay for things such as schools, police, and emergency services. It is absurd to think that all that acreage must remain under the absentee ownership or management of official Washington.

Congress shall immediately pass universal legislation providing for a timely and orderly mechanism requiring the federal government to convey certain

federally controlled public lands to states. We call upon all national and state leaders and representatives to exert their utmost power and influence to urge the transfer of those lands, identified in the review process, to all willing states for the benefit of the states and the nation as a whole. The residents of state and local communities know best how to protect the land where they work and live. They practice boots-on-the-ground conservation in their states every day.

We support amending the Antiquities Act of 1906 to establish Congress' right to approve the designation of national monuments and to further require the approval of the state where a national monument is designated or a national park is proposed.<sup>90</sup>

### National Association of Counties

The American County Platform and Resolutions for 2012-2013 include,

"Criteria for the transfer, sale or acquisition of public lands shall include consideration of fair market value, consultation with appropriate counties and jurisdictions, and public values."<sup>91</sup>

### **State Reaction**

Inspired by the prospect of local control, increased commodity production, and the revenue windfall that many assume a state takeover would bring, ten of the eleven contiguous western states had, by late 2015, entertained some form of transfer legislation. Idaho joined Utah in calling for a takeover of federal public lands. Montana, Nevada, and Wyoming enacted legislation calling for transfer option studies. Nevada then enacted a joint resolution urging Congress to transfer public lands to the state.

The Arizona legislature demanded that the United States extinguish title to all public lands in Arizona and transfer them to the state, only to see the bill vetoed by the Governor. Unable to override the Governor's veto, transfer movement supporters then tried to amend the Arizona Constitution to assert Arizona's claim of title to federal public lands. While the ballot measure was defeated soundly, the Arizona legislature refused to give in, eventually enacting a bill "to examine processes to transfer, manage and dispose of federal lands within this state."

The Colorado Legislature defeated at least one joint resolution and three transfer bills. The New Mexico Legislature fought off at least nine similar efforts. Oregon thwarted four transfer bills, and Washington [state] blocked three transfer bills.

Even distant states are joining the act. Georgia "encourages the federal government to imminently extinguish both its title and government jurisdiction on the public lands that are held in trust by the United States and convey title and jurisdiction to willing States in which the federal public lands are located." Similarly,

South Carolina encourages the U.S. Congress to “coordinate the transfer of title to the Western states.”<sup>92</sup>

### **Conflicting Statements**

In 2019, Senator Mike Lee at a US Senate Subcommittee on Public Lands, Forests, and Mining roundtable held in Moab, Utah stated,

Not a single member of the Utah Legislature or the US Congress wants Utah to be “anything but a public lands state.” ... Nobody in the state or federal legislature was looking to ‘privatize’ Utah’s public lands. ... In many circumstances, what we’re talking about here is not whether or not to have public land-in fact, that’s not what we’re discussing at all. We’re talking about who owns it, who manages it, and what the circumstances are for its ownership and management.”<sup>93</sup>

However, in The Federalist Society January 2013 issue the author states,

Thus, if after the State gets the lands back it decides to sell that property to private owners, the division of the proceeds will replicate the same division and school trust commitment that would exist according to the terms of the Utah Enabling Act had (and as if) the United States sold the property itself.<sup>94</sup>

Yet, an undated American Lands Council Foundation publication contains the following statement,

AFTER THE TRANSFER ... The goal is to ensure that everything you could do before, you will be able to do after the transfer, only better. Federal public lands will become State public lands.<sup>95</sup>

To understand the basis for these remarks, it is important to look at the history of transfer legislation in Utah.

### **UTAH PUBLIC LANDS TRANSFER HISTORY 2010-2020**

In the past decade, the Utah Legislature has sponsored over 46 bills and at least 28 resolutions,

...to help facilitate the transfer of public lands from federal to state government.<sup>96</sup>

To support Transfer legislation, a number of reports, resolutions and articles have been published looking at the economics, legal bases, regulatory requirements, and logistics of taking over ownership and management of the federal lands.

An equal number of reports have been written to address the legal and economic obstacles involved in state takeover of federal lands.

The following information highlights some of those actions.

### HB143 Eminent Domain Authority

Passed by the Utah State Legislature in 2010 it,

Authorizes the state to exercise eminent domain authority on 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.<sup>97</sup>

Clause 17 is also known as the Enclave Clause. According to an Article in the Montana Law Review (2015) titled *To Transfer or Not to Transfer, That is the Question: An Analysis of Public Lands Title in the West*,

The purpose of the Enclave Clause has always been for the federal government to acquire property from a state for specific essential government uses, such as for the construction of military bases, post offices, or sometimes even for national parks. The notable aspect of the Enclave Clause is that the state must affirmatively own title to the land and then, for whatever specific reason articulated, cede some measure of control back to the federal government. However, only a small fraction of federal land is held pursuant to the Enclave Clause.

If state and federal laws on public lands conflict, the Supremacy Clause specifies which law reigns supreme:

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.<sup>98</sup>

### HB 148 Utah Transfer of Public Lands Act (TPLA)

Passed into law in 2012, HB 148:

- requires the United States to extinguish title to public lands and transfer title to those public lands to the state on or before December 31, 2014;
- provides that if the state transfers title to public lands with respect to which the state receives title to the public lands under the Transfer of Public Lands Act, the state shall retain 5% of the net proceeds the state receives, and pay 95% of the net proceeds the state receives to the United States;
- provides that the 5% of the net proceeds of those sales of public lands shall be deposited into the permanent State School Fund;
- provides a severability clause;

- requires the Constitutional Defense Council to study or draft legislation on certain issues related to the transfer, management, and taxation of public lands, including:
  - drafting proposed legislation creating a public lands commission; and;
  - establishing actions that shall be taken to secure, preserve, and protect the state's rights and benefits related to the United States' duty to have extinguished title to public lands and transferred title to those public lands to the state;<sup>99</sup>

Under the Compendium of Budget Information for the 2014 General Session of the Utah State Legislature, one finds a line item for a Constitutional Defense Council.

This line item was created during the 2012 General Session to track a \$1.8 million appropriation to the Constitutional Defense Fund (CDC) from the Constitutional Defense Restricted Account. This appropriation was made to ensure funding is available for public land litigation cases currently in process. Some of these cases include RS2477 roads, title transfer of public lands from the United States to the State of Utah, state water rights, etc.<sup>100</sup>

The Constitutional Defense Council (CDC) was created to assist the Governor and the Legislature with constitutional issues affecting State's rights. ... The CDC's key duties include: Formulating legal strategies to further the State's public lands policy. ... [and] Directing the Utah Attorney General to initiate and prosecute any action that the council determines will further its statutory purposes.<sup>101</sup>

A 2018 article in the Salt Lake Tribune titled, *Utah Attorney General Sean Reyes Hints at Suing Feds over Control of Public Lands* provides the following information,

It's been more than two years since Utah political leaders set aside \$4 million for a yet-to-be-filed lawsuit aimed at "taking back" 31 million acres of public land in the state controlled by the U.S. government. ... Meeting with rural lawmakers last week, Utah Attorney General Sean Reyes said his office is preparing a lawsuit targeting aspects of the 1976 Federal Land Policy and Management Act (FLPMA) that diminish local and state influence over public lands. ... Reyes told members of the Utah Legislature's Rural Caucus on Friday his office intends to challenge the law that ensures the federal government keeps ownership of public land — although, he said, the lawsuit could be handled by outside lawyers.<sup>102</sup>

### HJR 3 Joint Resolution on Federal Transfer of Public Lands

Also passed in 2012, HJR 3:

This joint resolution of the Legislature demands that the federal government extinguish title to Utah's public lands and transfer title to those lands to the state of Utah.

- urges the United States Congress to engage in good faith communication, cooperation, coordination, and consultation with the state of Utah regarding the transfer of title of public lands directly to the state of Utah;
- declares that the Legislature, upon transfer of title of the public lands directly to the state of Utah, intends to affirmatively cede the national park lands to the federal government, under Article I, Section 8, Clause 17 of the United States Constitution, on condition that the lands permanently remain national park lands and that they not be sold, transferred, or conveyed to any party other than the state of Utah;
- declares that, upon transfer of the public lands directly to the state of Utah, the Legislature intends to affirmatively cede to the federal government all lands currently designated as part of the National Wilderness Preservation System pursuant to the Wilderness Act of 1964;
- calls for the creation of a Utah Public Lands Commission to review and manage multiple use of the public lands, including access, open space, and sustainable yield of the abundant resources, and to determine, through a public process, the extent to which public land may be sold, if any; and
- urges, to the extent that the Public Lands Commission determines through a public process that any such land should be sold to private owners, that 5% of the net proceeds should be paid to the permanent fund for public education and 95% of the net proceeds should be paid to the federal government to pay down the national debt.<sup>103</sup>

#### HB 142 Public Lands Policy Coordinating Office Amendments

[Passed in 2013] this bill requires the Public Lands Policy Coordinating Office to conduct a study and economic analysis of the transfer of certain federal lands to state ownership; and establishes reporting requirements.<sup>104</sup>

That study, *An Analysis of a Transfer of Federal Lands to the State of Utah* prepared by the University of Utah, Bureau of Economic and Business Research in 2014 states in its summary conclusion:

The full study provides a wealth of information about current activities and operations that are tied to public lands in Utah. Using that information, the cost of managing the transferred lands can be estimated and the potential revenue streams identified, but forecasting the full economic effects of a land transfer from the federal government to the state of Utah is simply not possible.<sup>105</sup>

## HB 151 Commission for Stewardship of Public Lands

This bill passed in 2014: creates the Commission for the Stewardship of Public Lands;

- designates the duties of the commission; and
- requires the Public Lands Policy Coordinating Office to periodically report to the commission.

This bill appropriates:

- to the Senate, as an ongoing appropriation:
  - from the General Fund \$9,000 to pay for the commission; and
- to the House of Representatives, as an ongoing appropriation:
  - from the General Fund \$16,000 to pay for the commission.

(2) (a) The coordinator and the office shall: 51 (i) conduct a study and economic analysis of the ramifications and economic impacts of the transfer of public lands;”<sup>106</sup>

In 2015, the Commission for the Stewardship of Public Lands hired outside legal counsel and public relations firms. Outside legal counsel presented its legal analysis on public lands that summarized Utah's legal case against the federal government and steps to facilitate the transfer of federal lands to the state. Prepared by the Davillier Law Group, LLC, its task was to “... evaluate alternative legal theories that Utah may use in court to attempt to gain ownership or control of the public lands with[in] its borders.”<sup>107</sup>

- Cost to taxpayers to fund this report: \$500,000.<sup>108</sup>

“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. ... 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
  - Total estimated legal expenses to take court action based on the report: \$13,819,000.00.”<sup>109</sup>

To learn more about the “alternative” legal theories and the legal challenges they face, please refer to the *Legal Analysis of the Legal Consulting Team* report cited above and the legal rebuttal to it, *Are U.S. Public Lands Unconstitutional?*<sup>110</sup>

#### HCR 13 Concurrent Resolution on Transfer of Public Lands Act

This [2014] resolution calls upon the federal government to honor the promises that it honored with all states east of Colorado and transfer title of public lands to all willing western states;

- calls upon national and state government leaders to exert their utmost power and influence to urge the imminent transfer of public lands to all willing western states for the benefit of these western states and for the nation as a whole;
- strongly urges the members of Utah's congressional delegation to immediately sponsor legislation in the United States House of Representatives and the United States Senate that transfers ownership and title of the public lands within the state of Utah and any other western state that wishes to be included in the legislation; and
- urges the members of Utah's congressional delegation to use the proposed introduction of legislation to transfer title and ownership of public lands as an opportunity to educate their colleagues regarding the importance of the legislation and to begin the process of obtaining cosponsors for the bill and support from the numerous individuals that will be positively affected by the transfer of these public lands to state ownership and control.<sup>111</sup>

However, an article in the Colorado Natural Resources, Energy & Environmental Law Review (2018) titled *The Transfer of Public Lands Movement: The Battle to Take “Back” Lands That Were Never Theirs* informs that:

In Utah, the Office of Legislative Research and General Counsel appended a review note to the initial draft of the TPLA, explaining that demanding transfer of title to the public lands to Utah “would interfere with Congress’ power to dispose of public lands. Thus, that requirement and any attempt by Utah in the future to enforce the requirement, have a high probability of being declared unconstitutional. The Office of the Wyoming Attorney General reached a similar conclusion, opining that “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.”<sup>112</sup>

#### HB 164 Interstate Compact on Transfer of Public Lands

This 2014 legislation,

- Enacted an interstate compact establishing a compact commission to consider mechanisms for securing the transfer of federal land to member states;
- provided for membership and withdrawal, established an administrator, designated funding sources, and
- defined the goals of securing sovereignty and jurisdiction over western states' public lands.<sup>113</sup>

### HB 287 Commission for the Stewardship of Public Lands and Private Donations for Public Lands Litigation

In 2016, HB 287,

“Codified provisions related to the Commission and created the Public Lands Litigation Restricted Account and the Public Lands Litigation Expendable Special Reserve *Fund* for asserting, defending, or litigating state and local government rights to the disposition and use of federal lands within the state.”<sup>114</sup>

According to a KUER article dated March 4, 2020 titled *State Lawmakers are Urging Utah to Bring Public Land Transfer Case to the Supreme Court:*

The American Lands Council, started by former State Rep. Ken Ivory in 2012, is asking state leaders to bring the question of whether the state can take control of federal public land to the U.S. Supreme Court. And it’s asking for \$50,000 to generate public support for the effort. Rep. Phil Lyman, R-Blanding, is sponsoring the appropriations request in the Utah Legislature. He said the money will help the American Lands Council educate residents of western states about the need to bring a land transfer case to the U.S. Supreme Court.

“It’s to frame the case,” he said. “To make people aware of it, so when it comes up it’s not out of the blue.”<sup>115</sup>

On June 23, 2020, the Salt Lake Tribune published an article by Brian Maffly, *Utah Gave Group \$400,000 to Sue the Feds on Public Lands Issues. It Never Did. What Happened?*

In 2016, the Utah Legislature opened up its wallet to a nonprofit called the Foundation for Integrated Resource Management (FIRM), one of several groups that have received millions in taxpayers dollars in recent years to push greater local and state control over Utah’s large expanses of federal land and imperiled wildlife.

But FIRM’s taxpayer-supported charge was specific: File lawsuits against the federal government on behalf of Utah counties. The goal was to reverse

restrictive land-use policies as a way to promote “integrated” use of natural resources.

Four years and \$400,000 later, FIRM has yet to pursue a single legal action, according to ethics complaints filed Tuesday with the IRS, the Utah Division of Consumer Protection and Utah’s state auditor.<sup>116</sup>

At the national level, Utah’s Rob Bishop and Jason Chaffetz have been busy altering House rules and introducing legislation to facilitate the transfer of U.S. public lands to the states.

... the new language for the [2017] House budget, authored by Utah Republican representative Rob Bishop, who has a history of fighting to transfer public land to the states, says that federal land is effectively worthless. Transferring public land to: “state, local government or tribal entity shall not be considered as providing new budget authority, decreasing revenues, increasing mandatory spending or increasing outlays.”

Essentially, the revised budget rules deny that federal land has any value at all, allowing the new Congress to sidestep requirements that a bill giving away a piece of federal land does not decrease federal revenue or contribute to the federal debt.<sup>117</sup>

In the House of Representatives January 24, 2017 Mr. Chaffetz introduced the following bill;

...H.R.621 “Disposal of Excess Federal Lands Act of 2017” To direct the Secretary of the Interior to sell certain Federal lands in Arizona, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, and Wyoming, previously identified as suitable for disposal, and for other purposes.<sup>118</sup>

## **NEXT STEPS**

### **LWVUS CONCURRENCE**

In 2017, the League of Women Voters of New Mexico (LWVNM) initiated a study of the transfer of federal public lands in response to legislation discussed in several western states, including New Mexico. Although no [public land] transfers occurred as a result, the LWVNM believed it was necessary to have a position that could be used for advocacy if and when such legislation was proposed in New Mexico.

Because the LWVNM also believes “there is significant risk that this issue may arise with little advance notice in any state with federal public lands ... [and that their] position can be generalized to any/all state and local Leagues,” they asked for LWVUS Concurrence at the National LWV Convention in June 2020. By an overwhelming majority, their position was approved and adopted as a LWVUS

Position which allows all Leagues across the country to speak with one voice in opposing the transfer of US public lands into state ownership.

### **LWV Position on Transfer of Federal Public Lands**

The League believes that federal public lands should benefit all Americans. The lands should remain under the jurisdiction of the federal government with Forest Service and Bureau of Land Management lands managed according to the Multiple-Use Sustained-Yield policy. We support improvements in management and regulation.

Federal law allows for the sale or exchange of federal lands if it is in the public interest. Prior to any transfer, a comprehensive assessment that covers the following issues should be performed:

1. environmental analysis, including air and water quality, biodiversity, endangered and threatened species
2. health impacts
3. environmental justice
4. suitability of proposed land use
5. subsurface resources
6. financial/economic impacts
7. cultural resources
8. public access
9. management for fire and other natural disasters
10. tribal consultation.

The League is opposed to the sale of federal lands to private entities except for small tracts surrounded by nonfederal lands.

The League is opposed to the transfer of subsurface rights to the state or other entities. Any development of subsurface rights on federal land should benefit all Americans.<sup>119</sup>

### **STUDY QUESTIONS**

1. Are Utah voters fully aware of the taxpayer dollars spent on this issue?
2. What arguments can local Leagues use to lobby their senators and representatives on this issue?
3. What federal lands affect your community the most?
4. Which organizations can the League partner with on this issue? In what ways can we support them?
5. The Antiquities Act of 1906, used to create National Monuments by presidential proclamation is also under assault by transfer proponents. Since four out of the five National Parks in Utah began as National Monuments, should the LWVUT do a study to examine the impact of the Antiquities Act of 1906 on U.S. public lands?

## TAKE ACTION

Make retention of U.S. public lands under federal ownership a priority for your league.

- Learn more about your public lands at <https://www.doi.gov/blog/americas-public-lands-explained>
- Find out what public lands are in your state.
- Become an advocate for them.
- Partner with like-minded entities to get the word out to the public about the transfer movement.
- Contact your elected officials and discuss this issue.
- Find out where they stand on transferring U.S. public lands into state ownership.

And vote accordingly.

## APPENDIX

### FIGURES

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