Written by **Joe Wolverton, II, J.D.** on January 26, 2013

Utah City Councilman Joins Fight to Defend State Sovereignty

Local elected leaders are catching the nullification fever and are joining with state lawmakers to force the federal beast back into its constitutional cage. One of these sovereignty-minded local leaders is Highland, Utah, city councilman Tim Irwin (right).

Irwin, a first-time councilman, has introduced two resolutions in support of two sovereignty-restoring laws signed over the last two years by Utah Governor Gary Herbert.

"The point is to give support to the governor to bring back sovereignty to Utah," Irwin said. "I'm getting active and concerned with the overreach of the federal government, and I'm doing my part in Highland to protect our freedoms for our grandkids."

One of the state laws supported by the measures offered by Irwin is the Transfer of Public Lands Act (TPLA).

On March 23, 2012, Governor Herbert signed the TPLA into law. In the act (HB 148), the state of Utah claims that the federal government has reneged on promises made to Utah at the time of its entry into the Union. Specifically, Utah claims that the federal government has retained over 25 million acres (almost half of the state's total area) of land within the sovereign borders of Utah, despite commitments to return that land to the control of the state government in a timely manner. That agreement was made in 1896.

"Private land ownership has been the cornerstone for freedom in this country and economic opportunity," Herbert said at the signing ceremony. "Federal control of our land has put us at a distinct disadvantage compared to other states."

Not surprisingly, the Obama administration disagrees. An article in the *Salt Lake Tribune* from April 2012 quotes Interior Secretary Ken Salazar saying the signing of the law is "nothing more than a political stunt" and "political rhetoric you see in an election year."

Despite Salazar's assessment, Herbert and the state legislature carry on in the quest to reclaim their state's sovereignty and plan to enforce the terms of the TPLA requiring Congress to restore title to the land in question to the Beehive State by December 31, 2014.

Besides, if this is an election-year stunt, it is a slow-building one. It's been nearly 100 years since the Utah state legislature first expressed its disapproval of Congress's delay in complying with the statehood stipulations. In 1915, the legislature sent Joint Memorial 4 to Congress and the president. It reads in part:

> In harmony with the spirit and letter of the land grants to the national government, in perpetuation of a policy that has done more to promote the general welfare than any other policy in our national

> life, and in conformity with the terms of our enabling act, we, the members of the legislature of the state of Utah, memorialize the President and the congress of the United states for the speedy return to the former liberal national attitude toward the public domain, and we call attention to the fact that the burden of state and local government in Utah is borne by the taxation of less than one-third the lands of the state, which alone is vested in private or corporate ownership, and we hereby earnestly urge a policy that will afford an opportunity to settle our lands and make use of our resources on terms of equality with the older states, to the benefit and upbuilding of the state and to the strength of the nation.

That was the first, but not the last "political stunt" pulled by the Utah state legislature regarding federal ownership of state lands. The Utah Constitutional Defense Council submitted a report to the state legislature pointing to several similar petitions by the state over the years:

> When the federal government began to move more toward policies of reservation and conservation in the early 1900's, Utah registered its objections by urging the return to active disposal. At various points throughout the 20th century, Utah restated these objections, particularly upon the passage of FLPMA [Federal Land Policy and Management Act], wherein the policy shift to one of land retention and preservation became express federal law. For various reasons, mostly political, these prior Utah efforts to restore the benefits contemplated by the enabling act have been unsuccessful.

The primary sponsor of the act, State Representative Ken Ivory, claims that federal failure to relinquish title to this real estate as promised has deprived Utah of its cut of the money made from the sale of the land and the property tax that would be collected after the property was purchased by individuals or corporations. Federally owned property is not subject to state taxation.

Whether Utah has a constitutional leg to stand on depends on the interpretation of Article IV, Section 3 of the U.S. Constitution. This provision, known as the Property Clause, governs Congress's power to dispose of land belonging the United States. The relevant part reads:

> 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.

The legal foundation for Utah's claim is laid out chiefly in House Joint Resolution 3, enacted concurrently with the TPLA.

While there are several sound legal arguments, the defense based on the Utah Enabling Act seems the strongest.

As described by a Federalist Society White Paper on the Utah law, the Enabling Act argument is "a contract-based theory — including a compact-based duty to dispose" and "includes claims that the TPLA simply enforces a promise made when Utah became a state that the federal government has heretofore seemed unwilling to completely honor and fulfill."

House Joint Resolution 3 explains it this way:

> The enabling acts of the new states west of the original colonies established the terms upon which all such states were admitted into the union, and contained the same promise to all new states that the federal government would extinguish title to all public lands lying within their respective borders; the U.S. Supreme Court looks upon the enabling acts which create new states as "solemn compacts" and "bilateral (two-way) agreements" to be performed "in a timely fashion"….

It would be difficult even for the notoriously slow-moving federal government to sustain an argument that 118 years after the enactment of the Utah Enabling Act is "timely."

As of now, there has been very little public debate over Utah's demand that the federal government comply with the terms of the contract under which the state was admitted into the Union. That is likely to change, however, as the effective date of the Transfer of Public Lands Act draws nearer.

To their credit, state and local lawmakers such as Representative Ivory and Councilman Irwin have buttressed their argument with well reasoned references to and interpretations of relevant statutes and case law.

That said, there is little doubt that a federal government consumed with and committed to a consolidation of all power will fight the law, as it has done with other recent legislative expressions of state sovereignty.

Challenges filed by the Obama administration against state laws in the areas of immigration and health care, reveal that Washington considers the states nothing more than administrative subordinates whose continued existence is tolerated only so long as they faithfully facilitate the execution of the millions of mandates of the multitude of federal programs.

Photo: Tim Irwin

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