

\$14 million price tag for public lands lawsuit gives governor pause

By Lisa Riley Roche, Deseret News

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Summary

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SALT LAKE CITY — Gov. Gary Herbert said Thursday he's still reviewing whether he supports going forward with a proposed lawsuit against the federal government over its control of public lands, given the high price tag.

"I think the thing that gives us all pause is the cost," the governor told reporters during his first media availability of the 2016 Legislature. "You kind of have to handicap (it). We're going to spend \$14 million and our chances of success are what?"

At the same time, members of the House GOP caucus were listening to legal arguments for Utah asserting control over public lands made by attorneys brought together by the Legislature's Commission for Stewardship of Public Lands.

House Speaker Greg Hughes, R-Draper, told the caucus it's time for the state to make a decision.

"I think we're coming together, finally, in a way we can accelerate the pace in terms of this argument," he said. "Frankly, if we're not going to do it, if we're not going to move the needle on this, we've got to quit talking. We've got to do something."

No position was taken by the caucus, but no one spoke against legal action. Members of the Republican-controlled commission voted in December to pursue a lawsuit after hearing that recommendation from the team of lawyers they'd hired.

The commission's House chairman, Rep. Keven Stratton, R-Orem, said the issue is "politically charged" and should be decided based on factual information. "This is an all-hands-on-deck issue."

Another member of the commission, Rep. Mel Brown, R-Coalville, said the price tag isn't a consideration.

"The cost in my mind shouldn't even be a discussion. It's trivial," Brown said. "How can you put price on self-determination and freedom?"

But the governor noted there's no guarantee the state would win in court. He said he'd prefer to see Congress resolve the long-standing issue of having more than 66 percent of the state's lands under federal control.

The public lands initiative recently unveiled by Utah GOP Reps. Rob Bishop and Jason Chaffetz is a "better, more sure way of getting it done," Herbert said. Still, he said the initiative doesn't exclude a lawsuit.

What would boost his enthusiasm for a court case, Herbert said, is for other Western states to join Utah in a lawsuit. Less than 5 percent of the land in states east of Colorado is under federal control compared with more than 50 percent in the West.

"I think there is discussion along that very line," the governor said. "Having other states of like mind joining together gives us a stronger voice and helps share the costs. If that was to be the case, I would certainly welcome that."

It will be up to Attorney General Sean Reyes' office whether the state files suit, but lawmakers would have to approve the funds. Hughes said later that the \$14 million price tag is an estimate that initially gave lawmakers pause.

"I think it did before, but when you put it in its context, I don't think it's as big an issue," the speaker said. "What we're talking about, we really need to get to a point where we need to move forward and make a strong case for this ... or not."

The speaker said a decision might not be made by the end of the session.

"I think if there's a legislative will and we can have these conversations with our federal delegations as well as the governor, I would hope that by the end of 45 days we know more than we know right now," Hughes said.

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Utah Legislators Vote To Pursue Lawsuit To Seize Federal Lands



ByBRADY McCOMBSPublishedDecember 10, 2015, 12:11 PM EST

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SALT LAKE CITY (AP) — The federal government controls two-thirds of the land in Utah and the state says it's prepared fight to get it back.

A Republican-dominated commission of Utah legislators voted Wednesday to move forward with a lawsuit challenging the U.S. government's control of federal lands — the latest salvo in a long-running feud.

The commission made the decision after a consulting team it hired said its research concluded the Constitution does not give the U.S. government power to control federal lands within state borders.

The team of hired lawyers recommended the commission urge the governor and attorney general to take on the lawsuit, even while warning it could cost up to \$14 million, take years to play out in the courts and saying it would be far from a sure victory.

"It's a solid argument but the court has never thought about it before," said Ronald Rotunda, a constitutional law expert part of the team of lawyers. "That's what makes it a very dramatic case."

The only votes against moving forward came from two Democrats, who objected to the costs and

questioned the objectivity of the consulting team.

The decision marks the latest indication that Utah's conservative leadership remains committed to moving forward with what many consider a longshot attempt to assert state powers.

Utah passed a law in 2012 demanding the federal government hand over the lands by the end of 2014. When that deadline quietly passed, Utah legislators began weighing a possible lawsuit. Supporters of the plan argue that the state would be a better managers of the land and that local control would allow Utah to make money from taxes and development rights on those acres.

Lawmakers backing the proposal hit on those topics Wednesday in explaining their votes.

Rep. Keven Stratton, R-Orem, chair of a commission for the stewardship of public lands, said the decision was made after years of careful consideration and countless stories from residents in rural counties about how federal management makes living and doing business on federal lands cumbersome and unpleasant.

"We want things that we treasure cared for not only for our day, but for the generations to come," Stratton said. "We have a record in this state that shows that we can manage and care for the treasures we all value."

The office of Utah Attorney General Sean Reyes will make a final decision on the lawsuit. His chief of staff, Parker Douglas, said they will review the consultant's voluminous report and do their own analysis before making any decision.

"There's arguably a case," Douglas said, adding the attorney general's office "is not a rubber stamp. . . . We will look at it and we will consider it."

The state has paid the consultants \$502,000 so far, and is authorized to pay up \$2 million to prepare a legal strategy and sway public opinion in the state's favor.

Department of Interior Secretary Sally Jewell considers Utah's push a misguided effort that doesn't take into account benefits or costs of managing public lands, agency spokeswoman Jessica Kershaw in a statement. "The Secretary has been clear on this issue -- she's happy to have thoughtful discussion about achieving balanced managements - but she's not open to selling off public lands to the highest bidder," the statement reads.

Sen. Jim Dabakis, D-Salt Lake City, voiced his lingering skepticism about the objectivity of the firm's research and questioned why the state is spending money for what he said most legal scholars consider a legal Hail Mary at best. He said the hired lawyers have the same ideological bent as Utah's GOP-dominated legislature.

"It's a little bit like asking a barber, 'Do I need a haircut?'" Dabakis said.

Rep. Joel Briscoe, D-Salt Lake City, said he opposed the plan because he needs more time to assess whether the lawsuit is worth \$14 million of taxpayer money, a cost estimate he called stunning.

The two Democrats are joined by a long list of environmental groups in opposing the plan. The Center for Western Priorities said in a statement that Utah is wasting money to have hired guns give them the answers they want to hear.

The consulting team and the commission defended the work, saying they researched and analyzed counter points.

"I asked: If there are warts, we want to see them," Stratton said. "If there's a pile of horsepucky, if we're barking up the wrong tree, we want to see that."

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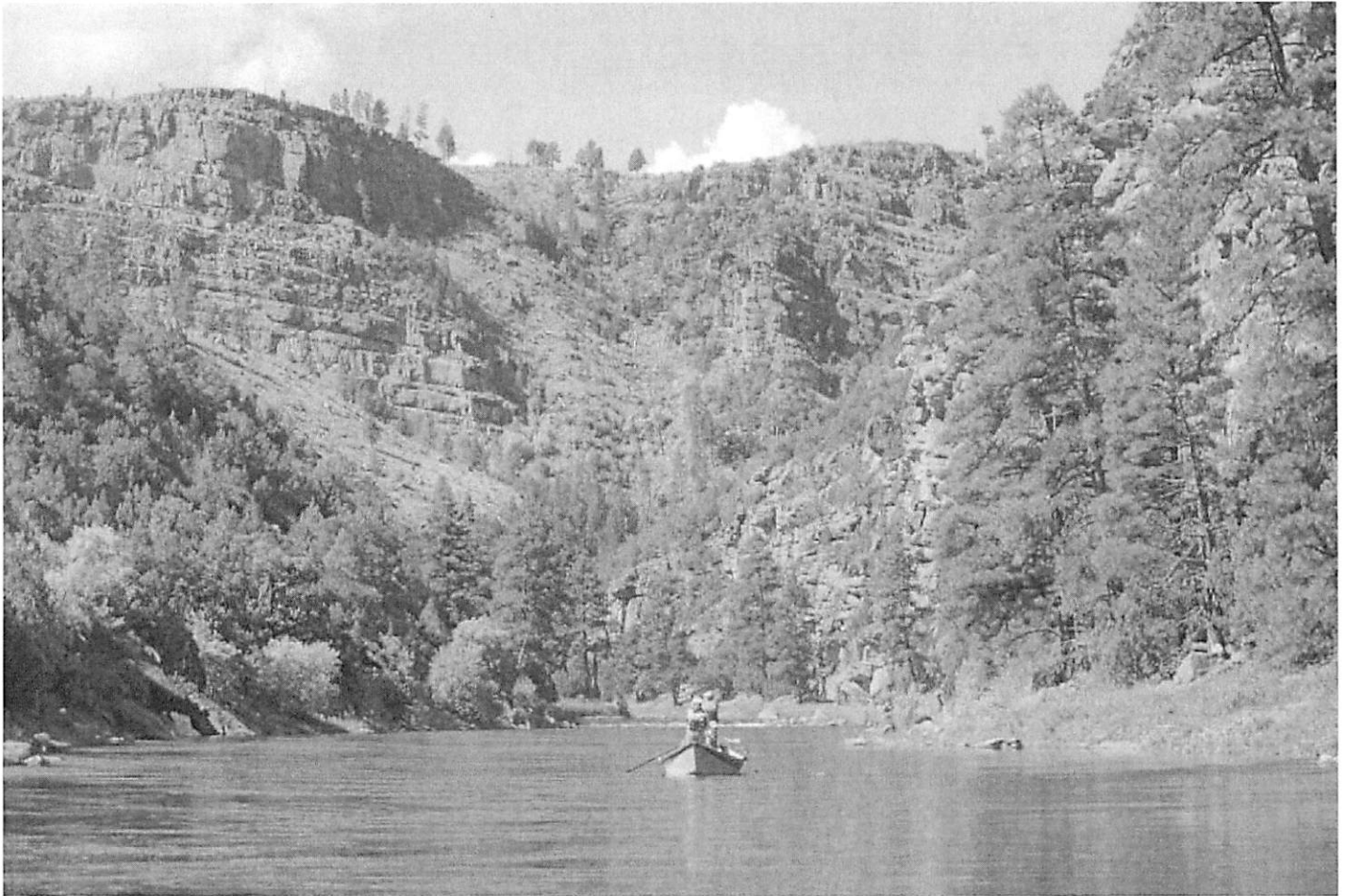
The history and law behind Utah's bid to gain federal public lands

The history and law behind Utah's bid to gain federal public lands

By BRIAN MAFFLY | The Salt Lake Tribune

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(Brett Prettyman | Tribune file photo) A drift boat floats the upper section of Utah's Green River below Flaming Gorge Reservoir in Daggett County. Utah is contemplating a lawsuit, expected to cost \$14 million, to force the federal government to hand over title to this landscape and 31 million acres of other public lands. Critics say such a move would undue the region's conservation legacy and lead to the privatization of the land, while backers say the state can do a better job managing these lands.

Legal case » Consultants hired by the state say the feds can't retain the lands indefinitely, but other experts disagree.





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In the 1780s, Maryland was worried about its neighbors as America's newly independent states pondered how to bind 13 former British colonies into a single nation.

Virginia and Pennsylvania envisioned their borders extending far into "unoccupied" land to the west, and Maryland feared that its influence would wane should those states gain large empires. It insisted these lands be reserved for future states and sold to pay down a massive war debt and fund ongoing government operations.

The historic compromise to resolve this impasse led to the principles Utah is now invoking as it builds a legal case to demand that the federal government hand over title to 31 million acres of public lands.

To persuade Maryland's leaders to sign the Articles of Confederation, other states agreed that all future states would join the union on "equal footing" with the original 13, making the young nation a federal republic of sovereigns, according to the [legal analysis recently unveiled by consultants](#) hired by the Utah Commission for the Stewardship of Public Lands.

However, by retaining much of the land in Utah and other Western states, the consultants argue, the federal government has denied these newcomers to the union full benefits of true statehood.

"On the questions of whether the federal government has the constitutional power to near permanently retain over 66 percent of land within the borders of the state of Utah, it is our conclusion that power does not exist," George Wentz, a partner with the New Orleans law firm Davillier Group, told the commission last month.

Wentz and his team of constitutional scholars recommended Utah file suit with the U.S. Supreme Court aimed at fulfilling the goals of HB148, the 2012 law ordering the federal government to hand over most of the Utah land administered by the Bureau of Land Management and U.S. Forest Service.

But according to other legal minds, Wentz's case, outlined in a 146-page report, is full of holes that will likely cause hemorrhages in the estimated \$14 million cost of bringing such a case.

Acquiring the arid West • University of Utah law professors John Ruple and Bob Keiter conclude the state's legal consultants ignore the historical context of western expansion and decades of legal precedents.

"The Supreme Court has made clear that the Property Clause [of the U.S. Constitution] grants Congress an 'absolute right' to decide upon the disposition of federal land and no 'State legislation can interfere with this right or embarrass its exercise,'" Keiter and Ruple wrote in an October 2014 white paper. In upholding the National Forest System, the court concluded "the federal government could retain public lands for broad national benefits, and that it could do so indefinitely."

The territory won following the 1848 war with Mexico — much of New Mexico, Arizona, California, Utah, Nevada and Colorado — was not amenable to agriculture, unlike the rolling self-watered plains east of the 104th Meridian.

Land "didn't belong to the states first, because there were no states," Ruple said. "This notion that Utah is the same as Maryland and Connecticut is historically suspect."

Settlement out West required massive federal subsidies in the form of land giveaways, roads and rail, irrigation and, later, fire suppression. In 1905, four decades after passage of the Homestead Act, 418 million acres remained open for homesteading in 11 western states because it was too difficult to settle and develop.

"Outside of valleys with reliable snowmelt fed rivers, consistent year-around water sources were often unavailable, and even where rivers and streams existed, rugged topography and the cost of developing reservoirs and irrigation systems limited agricultural opportunities," the scholars wrote.

"The Homestead Act didn't work in Utah and Nevada, because you couldn't homestead without water. We didn't have good groundwater pumping until the 1930s," Ruple said.

Congress drafted legislation in 1932 to convey public lands to the states, but the bill died in the absence of Western support. These states feared losing mineral revenue and other funds shared by the federal government, while getting saddled with huge administrative costs should they acquire this public domain, according to Keiter and Ruple.

Given this history, they say, no Western state can credibly argue it has been denied equal footing simply because federal ownership of its public land has persisted.

In the 19th century, the federal government was already setting aside big tracts for national parks and

forest reserves, so a policy retaining land was in motion before Utah joined the union in 1895.

And while Wentz's report challenges the legality of provisions in the 1976 Federal Lands Policy and Management Act, which codified land retention policies, Ruple noted that the federal government has continued to dispose of land since its passage. Between 1990 and 2010, 24 million federal acres have been transferred to state and private hands, according to Ruple.

Debating the benefits of victory • Wentz's team, after convincing the public lands commission last month to hire it for additional services, is drafting a complaint and a confidential memo to Utah Attorney General Sean Reyes. The decision to pursue the case would be left to Reyes, although Republican lawmakers have made it clear they want to litigate and HB148 authorizes such a lawsuit.

No other Western state has enacted a land transfer demand, although Utah is urging others to join its legal crusade and established an "interstate compact" for them to join.

Wentz pegged Utah's legal tab at \$13.8 million and has been careful to emphasize the outcome is anything but certain. He notes many groups will seek intervenor status and the government will devote extensive resources fighting back.

The sum includes a seven-member legal team working full time for six months at \$1,750 an hour, plus retaining an attorney specializing in Supreme Court practice. Expert witnesses paid \$300 an hour for testimony would cost \$720,000, plus another \$480,000 for consulting experts.

Transfer critics in the Legislature regard such spending an utter waste, noting Utah has an unhappy history of spending heavily on outside lawyers to wage dubious legal battles.

And Keiter and Ruple contend a legal victory for Utah could be a disaster for its citizens since it is unlikely the state would also get the rights to oil, gas and valuable minerals on the transferred lands. Without mineral revenues to cover the cost of administering the land, Utah would be forced to sell much of it, they argue.

The government did convey vast tracts to latecoming states in the 19th century. Utah was given 7.5 million acres — 13.8 percent of the land within its borders — in checkerboard-like sections to be managed to support schools. But leaders spent most of this endowment before reforms created the School and Institutional Trust Lands Administration in 1994 and stopped the bleeding.

For transfer critics, this history raises doubts about the state's ability to manage the public domain in the public interest.

But others see the \$14 million legal bill as a worthwhile investment considering the stakes and potential rewards should Utah prevail. Wentz's team says federal land retention has prevented Utah from growing

its population and developing economically to its full potential.

Two of the nation's fast growing states, Utah and Nevada, happen to be those with the highest percentages of their land under federal ownership. This growth, however, is largely occurring in established urban areas; many rural areas are contracting and local leaders allege federal land management thwarts economic development.

The U. scholars have so far released three white papers contesting the wisdom and legal reasoning behind land transfer. Their next paper will explore solutions to rural Westerners' unhappiness with federal oversight of so much of the land surrounding their communities.