

Reasserting State Sovereignty in Public Lands Management

The Eminent Domain Authority for Federal Lands Act

BY REP. CHRIS HERROD (UT)

Our Founding Fathers recognized that states possessed the power to rein in an overreaching federal government. The principles of federalism and limited government have been emphasized for years by ALEC and are currently being rediscovered by the nation as a whole. Unfortunately, fundamental principles such as the original meaning of the Supremacy Clause found in Article VI of the U.S. Constitution have been distorted. All laws passed by Congress are not supreme, only those laws “made in Pursuance thereof,” referring to the U.S. Constitution, especially the Enumerated Powers granted in Article I Section 8 and the 10th Amendment.

Toward that end, Utah passed legislation designed to challenge the federal government’s seemingly unlimited authority during the 2010 legislative session. HB 143—Eminent Domain Authority—makes “public land” subject to eminent domain by the state. Since eminent domain authority is not an enumerated power, this authority remains with the state. “Public land” was retained by the federal government when Utah became a state and not acquired under Article I Section 8 (17), known as the “Enclave Clause,” so such land is subject to state jurisdiction.

The goal is to force the question: “Who is the sovereign—the state or the federal government?” Sovereignty actually rests with the people, so the question becomes: “To whom did the people give their sovereignty?” A subsequent bill, HB 324, identifies specific

land subject to eminent domain, authorizes action based on a breach of Utah’s *Enabling Act*, and provides funding to fight the court battles.

of Utah will exercise its sovereign right and eminent domain public land so that Utah’s children can receive the full benefit to which they are entitled.

“No free government, or the blessing of liberty can be preserved to any people without a frequent recurrence of fundamental principles.” — Patrick Henry

Public Education and Utah’s Enabling Act

State *Enabling Acts* are contracts between those in the territory at the time of statehood and the United States government. The contracts cannot be broken by one party. In Utah’s case, the federal government has reneged on its promise to dispose of the “public land” within Utah—the results have been costly to the state especially to Utah’s school children.

According to Utah’s *Enabling Act*, in addition to school trust land given at statehood, Utah schools are entitled to 5 percent of all gross proceeds of public lands “which shall be sold.” “Shall” is used consistently throughout the act as meaning “must happen,” not “may happen.” The value of the energy resources locked up in just the Kaiparowits Plateau in the Grand Staircase National Monument is estimated at over \$1 trillion. Five percent of this would be \$50 billion. The interest alone could fund Utah’s K-12 education, which currently has the lowest funding per pupil in the nation. If the federal government will not honor its contract, then the state

Critics argued that since Utah forfeited its claim to “right and title” of public land in the *Enabling Act*, Utah therefore gave up authority over the land. Such language actually proves just the opposite. Utah did not give up its claim of jurisdiction or sovereignty. By forfeiting “right and title,” Utah simply forfeited claim of ownership, which was needed to give clean title to the land. This is often referred to as “proprietary” title and is the same type of ownership that any property owner holds. In contrast, Utah gave up “right, title, and jurisdiction” over sovereign Indian lands within its boundaries.

Equal Footing Doctrine

Under the “Equal Footing” doctrine, all states are to be admitted as equal sovereign states, with no state having more political rights than another. After the Revolutionary War, some of the original states maintained claims on property outside of their states’ boundaries but within the territory of the United States. Eventually these states agreed that they would give up such claims through

“state land cessions” for the best interest of the United States on the condition that these lands, as well as future public lands, would be sold for the benefit of the Union and/or the creation of new states. When they did so, they gave up not just “right and title” but “all right, title, and claim, as well as of soil as of jurisdiction.”

According to records from the Constitutional Convention, our Founding Fathers were aware of the possibility of the federal government exerting “undue influence” on such states if allowed to own or control large tracts of land. In the past, federal land issues were primarily a Western issue, but recent events show that jurisdictional and constitutional issues affect every state. For example, Louisiana never should have had to seek federal permission to build berms

to protect its coastline in waters within state boundaries. When the original 13 American colonies received independence from Great Britain, sovereignty of the coastal waters was not reserved to the federal government, but was given to the individual states. The Equal Footing Doctrine dictates that if the original colonies had sovereignty over coastal waters, Louisiana should as well.

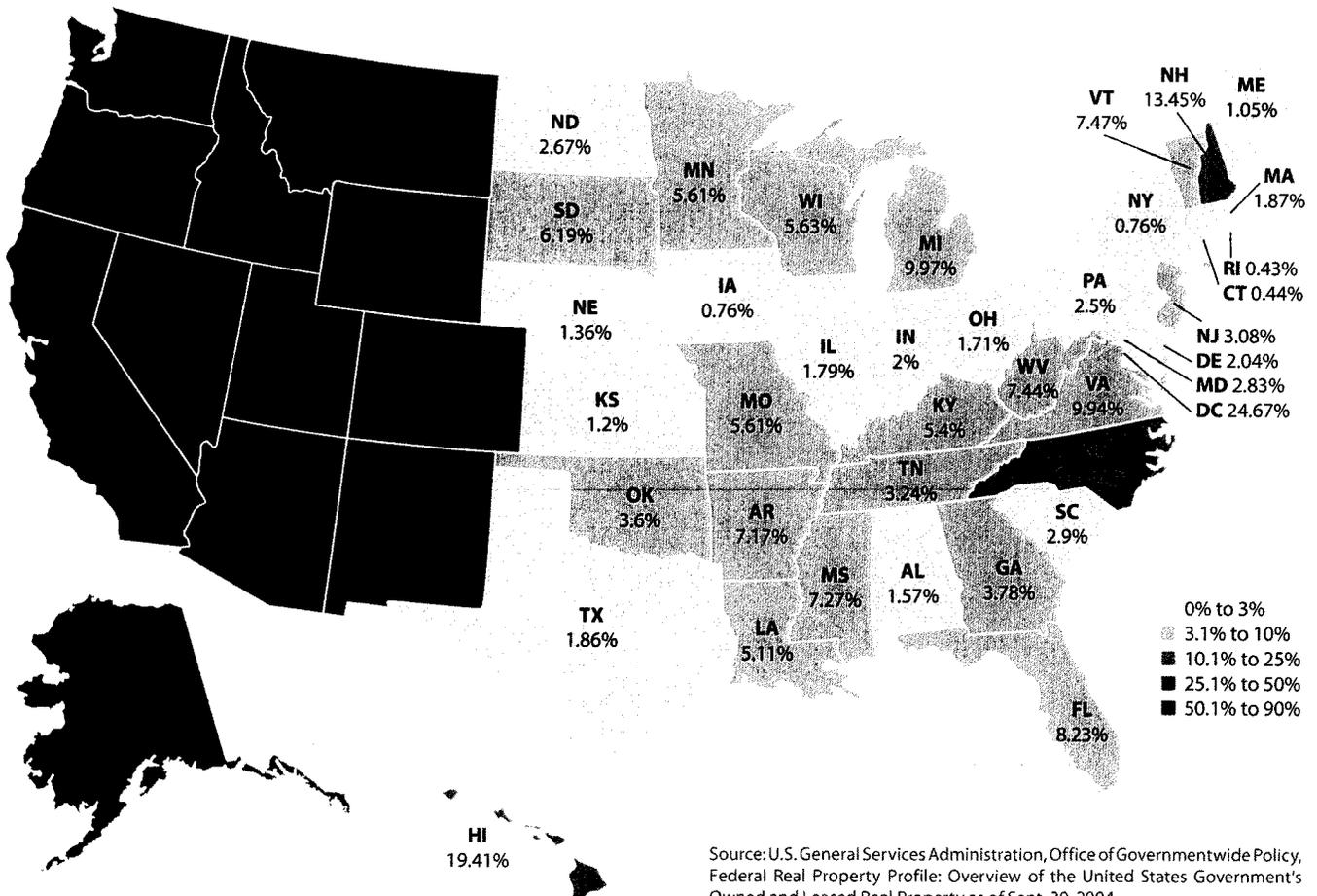
Various 10th Amendment groups and Members of Congress, such as Rep. Rob Bishop of Utah, have organized efforts to refocus on the 10th Amendment in an attempt to rein in the federal government. The question becomes what issue represents the best case to force this issue. In Utah, we believe that eminent domain, the Equal Footing doctrine and a breach of enabling acts are the best way to do this. We invite

all states to pass legislation similar to the model legislation that ALEC adopted at the 2010 Annual Meeting as the *Eminent Domain for Federal Lands Act*.

If ever there was time for state legislatures to jealously guard against encroachments from healthcare, to land use, to cap and trade—it is now. Please join Utah as we reassert our rights—for Utah cannot accomplish this alone. Join us as we reclaim our sovereignty and fight to limit the federal government to the enumerated powers given in Article 1, Section 8. States alone possess the ability to rein in the federal government and therefore save our republic. United we can succeed. ■

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Percentage of Federally Owned Acreage, by State



Source: U.S. General Services Administration, Office of Governmentwide Policy, Federal Real Property Profile: Overview of the United States Government's Owned and Leased Real Property as of Sept. 30, 2004.

