

Second Regular Session
Seventieth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 16-0863.01 Bob Lackner x4350

SENATE BILL 16-160

SENATE SPONSORSHIP

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Senate Committees

State, Veterans, & Military Affairs

House Committees

A BILL FOR AN ACT

101 CONCERNING A CLARIFICATION OF THE STATUS OF STATE POLICE
102 POWER JURISDICTION ON FEDERALLY MANAGED LANDS TO
103 ADDRESS ISSUES THAT AFFECT THE PUBLIC SAFETY OF THE
104 RESIDENTS OF THE STATE.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

In accordance with legal principles of federal law that are long understood, the bill clarifies that the state possesses, on its own behalf and on behalf of its political subdivisions, the jurisdictional right to

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

respond to and take action on land owned and managed within the state by the United States bureau of land management (BLM lands) or the United States forest service (USFS lands) for which the federal government claims only a proprietorial interest when conditions on such lands adversely affect, or pose a clear and imminent danger to, life and the public health and safety of the residents of the state; except that, in the case of any conflict between the jurisdictional right asserted in the bill and any federal activity respecting BLM or USFS lands, the federal activity controls. The bill defines "jurisdictional right" to mean the ability of the state or a political subdivision of the state, as applicable, to exercise its lawful police powers over a given land area.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1. Legislative declaration.** (1) The general assembly
3 hereby finds, determines, and declares that:

4 (a) In its "Patient Protection and Affordable Care Act" decision,
5 *Nat'l Fed'n of Indep. Bus., et al. v. Sebelius, et al.*, 132 S. Ct. 2566,
6 released in June 2012 (ACA decision), the United States Supreme Court
7 reaffirmed the status of the fifty states as "separate and independent
8 sovereigns".

9 (b) The court made it clear that the federal government "must
10 show that a constitutional grant of power authorizes each of its actions".

11 (c) In contrast, the Supreme Court further explained that "the
12 same does not apply to the States, because the Constitution is not the
13 source of their power. . . . The States thus can and do perform many of the
14 vital functions of modern government...". Indeed, the Tenth Amendment
15 to the United States Constitution explicitly states that "[t]he powers not
16 delegated to the United States by the constitution, nor prohibited by it to
17 the States, are reserved to the states respectively, or to the people."
18 Among these powers the Tenth Amendment confers upon each state is the
19 police power, or the right of a state, subject to due process and other

1 limitations, to establish and enforce laws protecting the public's health,
2 safety, and general welfare.

3 (d) In the ACA decision, the Supreme Court added, "Our cases
4 refer to this general power of governing, possessed by the States but not
5 by the Federal Government, as the 'police power'. . . . Because the police
6 power is controlled by 50 different States instead of one national
7 sovereign, the facets of governing that touch on citizens' daily lives are
8 normally administered by smaller governments closer to the governed.
9 The Framers thus ensured that powers which 'in the ordinary course of
10 affairs, concern the lives, liberties, and properties of the people' were held
11 by governments more local and more accountable than a distant federal
12 bureaucracy".

13 (e) In that case, the Supreme Court also highlighted a vital role of
14 the states' authority in relation to the federal government, stating, "The
15 independent power of the States also serves as a check on the power of
16 the Federal Government: 'By denying any one government complete
17 jurisdiction over all the concerns of public life, [a federal system in which
18 power is shared between the federal government and the states] protects
19 the liberty of the individual from arbitrary power.'" and "In the typical
20 case we look to the States to defend their prerogatives by adopting 'the
21 simple expedient of not yielding' to federal blandishments when they do
22 not want to embrace the federal policies as their own."

23 (f) The Supreme Court, concluding this line of logic, declared,
24 "The States are separate and independent sovereigns. Sometimes they
25 have to act like it."

26 (g) In *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930), the
27 United States Supreme Court stated that "[i]t is not unusual for the United

1 States to own within a State lands which are set apart and used for public
2 purposes. Such ownership and use without more do not withdraw the
3 lands from the jurisdiction of the State. On the contrary, the lands remain
4 part of her territory and within the operation of her laws, save that the
5 latter cannot affect the title of the United States or embarrass it in using
6 the lands or interfere with its right of disposal." In *Kleppe v. New Mexico*,
7 426 U.S. 529, 543 (1976), the United States Supreme Court stated that a
8 state is free to enforce its criminal and civil laws on public lands over
9 which the federal government does not assert exclusive jurisdiction.
10 Further, the "Federal Land Policy and Management Act of 1976", enacted
11 by Congress, states in Section 701 (g) (6) that "[n]othing in this Act shall
12 be construed...as a limitation upon any State criminal statute or upon the
13 police power of the respective States...or as depriving any State or
14 political subdivision thereof of any right it may have to exercise civil and
15 criminal jurisdiction on the natural resource lands...".

16 (h) Article 1, section 8, clause 17 of the United States
17 constitution, referred to herein as "Clause 17", states that the federal
18 government will "exercise exclusive legislation in all cases whatsoever
19 over such district (not exceeding ten miles square) as may by cession of
20 particular States, and the acceptance of congress, become the seat of the
21 government of the United States, and to exercise like authority over all
22 places purchased by the consent of the legislature of the state in which the
23 same shall be, for the erection of forts, magazines, arsenals, dockyards
24 and other needful buildings".

25 (i) The domain of exclusive jurisdiction by the federal government
26 is limited to the District of Columbia and other places purchased by the
27 consent of the state legislatures for the erection of forts, magazines,

1 arsenals, dockyards, and other needful buildings, which does not include
2 vast acres of undeveloped land, incidental to the powers expressly granted
3 within the constitution.

4 (j) During the Eisenhower Administration, the United States
5 government published a report titled "Report of the Interdepartmental
6 Committee for the Study of Jurisdiction Over Federal Areas Within the
7 States" in which four basic areas of federal jurisdiction were identified:

8 (I) **Exclusive Legislative Jurisdiction:** This term is applied when
9 the federal government possesses, by whichever method acquired, all of
10 the authority of the state, and in which the state concerned has not
11 reserved to itself the right to exercise any of the authority concurrently
12 with the United States except to serve civil or criminal process in the area
13 for activities that occurred outside the area;

14 (II) **Concurrent Legislative Jurisdiction:** This term is applied
15 in those instances wherein by granting to the United States authority,
16 which would otherwise amount to exclusive legislative jurisdiction over
17 an area, the state concerned has reserved to itself the right to exercise,
18 concurrently with the United States, all of the same authority;

19 (III) **Partial Legislative Jurisdiction:** This term is applied in
20 those instances wherein a state has granted authority to the federal
21 government to legislate over an area of the state but the state has reserved
22 to itself the right to exercise, by itself or concurrently with the United
23 States, other authority constituting more than merely the right to serve
24 civil or criminal process in the area, or the right to tax private property;
25 and

26 (IV) **Proprietary Interest Only:** This term is applied to those
27 instances wherein the federal government has acquired some right or title

1 to an area in a state but has not obtained any measure of the state's
2 authority over the area. In applying this definition, recognition should be
3 given to the fact that the United States, by virtue of its functions and
4 authority under various provisions of the constitution, has many powers
5 and immunities not possessed by ordinary landholders with respect to
6 areas in which it acquires an interest, and of the further fact that all its
7 properties and functions are held or performed in a governmental, rather
8 than a proprietary, capacity.

9 (k) The report also stated, "It scarcely needs to be said that unless
10 there has been a transfer of jurisdiction (1) pursuant to [Clause 17] by a
11 Federal acquisition of land with State consent, or (2) by cession from the
12 State to the Federal Government, or unless the Federal Government has
13 reserved jurisdiction upon the admission of the State, the Federal
14 Government possesses no legislative jurisdiction over any area within a
15 State, such jurisdiction being for exercise entirely by the State, subject to
16 non-interference by the State with Federal functions. . . . The Federal
17 Government cannot, by unilateral action on its part, acquire legislative
18 jurisdiction over any area within the exterior boundaries of a State. . . .
19 The consent requirement of [Clause 17] was intended by the framers of
20 the Constitution to preserve the States' jurisdictional integrity against
21 federal encroachment".

22 (l) The "Inventory Report On Jurisdictional Status of Federal
23 Areas Within the States", compiled by the United States General Services
24 Administration in 1962, categorizes virtually the entirety of United States
25 forest service (USFS) and bureau of land management (BLM) land in the
26 state as "Proprietorial Interest Only".

27 (m) Since 1962, the state has ceded concurrent jurisdiction to the

1 federal government over certain lands dedicated to national parks and
2 other purposes. However, as of the effective date of this act, at least 97%
3 of the federal lands in Colorado are held in a proprietorial interest
4 capacity only, and this includes almost the entirety of USFS and BLM
5 land in the state.

6 (n) The management of forest wildfires, wildfire mitigation
7 efforts, and the investigation and prosecution of criminal acts such as
8 arson and illegal drug production require a cooperative approach among
9 federal, state, and local governments.

10 (o) The United States department of agriculture through the USFS
11 has been remiss in working with state and local governments to
12 effectively plan, manage, and coordinate both routine and emergency
13 responses to the constant wildfire threat to the state from land that it
14 currently manages.

15 (p) The ability of counties and the state to respond to wildfires
16 that start on land managed by the United States government, and
17 specifically by the USFS and the BLM, has been restricted by the federal
18 government, resulting in clear and imminent dangers to the life, health,
19 and safety of residents of the state, both within federal lands and on land
20 within the territorial boundaries of counties and municipalities that border
21 federal land.

22 (q) The jurisdictional right of the state and its political
23 subdivisions to mitigate potential risks to life and to the public health and
24 safety should not be fettered by an intrusive and uncooperative federal
25 bureaucracy.

26 (r) By enacting this legislation, the state, on its own behalf and on
27 behalf of political subdivisions, asserts the jurisdictional right it possesses

1 under long-standing principles of federal law to respond to and to take
2 action on public lands managed within the state by the USFS within the
3 United States department of agriculture and the BLM within the United
4 States department of the interior for which the federal government claims
5 only a proprietorial interest when conditions on such land adversely
6 affect, or pose a clear and imminent danger to, life and the public health
7 and safety of the residents of the state. The assertion of such jurisdictional
8 right will, among other things, facilitate the planning, management, and
9 coordination of federal, state, and local response to wildfire threats and
10 emergencies, thereby reducing the clear and imminent dangers such
11 wildfires pose to life and to the public health and safety.

12 **SECTION 2.** In Colorado Revised Statutes, **add** 3-2-102 as
13 follows:

14 **3-2-102. State and political subdivisions - jurisdictional right**
15 **to respond to and take action on federally managed lands held in a**
16 **proprietorial interest only by the federal government - bureau of**
17 **land management - United States forest service - definitions. (1) AS**
18 **USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:**

19 (a) "BLM LANDS" MEANS LANDS WITHIN THE STATE THAT ARE
20 OWNED AND MANAGED BY THE BUREAU OF LAND MANAGEMENT WITHIN
21 THE UNITED STATES DEPARTMENT OF THE INTERIOR AS OF JULY 1, 2016,
22 AND ALL SUCH LANDS THEREAFTER ACQUIRED.

23 (b) "JURISDICTIONAL RIGHT" MEANS THE ABILITY OF THE STATE OR
24 A POLITICAL SUBDIVISION OF THE STATE, AS APPLICABLE, TO EXERCISE ITS
25 LAWFUL POLICE POWERS OVER A GIVEN LAND AREA.

26 (c) "POLITICAL SUBDIVISION" MEANS A COUNTY, CITY AND
27 COUNTY, CITY, TOWN, SERVICE AUTHORITY, SCHOOL DISTRICT, LOCAL

1 IMPROVEMENT DISTRICT, LAW ENFORCEMENT AUTHORITY, CITY OR
2 COUNTY HOUSING AUTHORITY, OR WATER, SANITATION, FIRE PROTECTION,
3 METROPOLITAN, IRRIGATION, DRAINAGE, OR OTHER SPECIAL DISTRICT, OR
4 ANY OTHER KIND OF MUNICIPAL, QUASI-MUNICIPAL, OR PUBLIC
5 CORPORATION ORGANIZED PURSUANT TO LAW.

6 (d) "PROPRIETORIAL INTEREST" REFERS TO THOSE INSTANCES IN
7 WHICH THE FEDERAL GOVERNMENT HAS ACQUIRED SOME RIGHT OR TITLE
8 TO AN AREA IN A STATE BUT HAS NOT OBTAINED ANY MEASURE OF THE
9 STATE'S AUTHORITY OVER THE AREA.

10 (e) "USFS LANDS" MEANS LANDS WITHIN THE STATE THAT ARE
11 OWNED AND MANAGED BY THE UNITED STATES FOREST SERVICE WITHIN
12 THE UNITED STATES DEPARTMENT OF AGRICULTURE AS OF JULY 1, 2016,
13 AND ALL SUCH LANDS THEREAFTER ACQUIRED.

14 (2) IN ACCORDANCE WITH LEGAL PRINCIPLES OF FEDERAL LAW
15 THAT ARE LONG UNDERSTOOD, THE STATE POSSESSES, ON ITS OWN BEHALF
16 AND ON BEHALF OF ITS POLITICAL SUBDIVISIONS, THE JURISDICTIONAL
17 RIGHT TO RESPOND TO AND TO TAKE ACTION ON BLM LANDS OR USFS
18 LANDS FOR WHICH THE FEDERAL GOVERNMENT CLAIMS ONLY A
19 PROPRIETORIAL INTEREST WHEN CONDITIONS ON SUCH LANDS ADVERSELY
20 AFFECT, OR POSE A CLEAR AND IMMINENT DANGER TO, LIFE AND THE
21 PUBLIC HEALTH AND SAFETY OF THE RESIDENTS OF THE STATE; EXCEPT
22 THAT, IN THE CASE OF ANY CONFLICT BETWEEN THE JURISDICTIONAL RIGHT
23 ASSERTED IN THIS SUBSECTION (2) AND ANY FEDERAL ACTIVITY
24 RESPECTING THE LANDS SPECIFIED IN THIS SECTION, THE FEDERAL
25 ACTIVITY CONTROLS.

26 **SECTION 3. Effective date.** This act takes effect July 1, 2016.

27 **SECTION 4. Safety clause.** The general assembly hereby finds,

- 1 determines, and declares that this act is necessary for the immediate
- 2 preservation of the public peace, health, and safety.