

SENATE COMMITTEE OF REFERENCE REPORT

Chairman of Committee

Date

April 14, 2015

Committee on State, Veterans, & Military Affairs.

After consideration on the merits, the Committee recommends the following:

SB15-039 be amended as follows, and as so amended, be referred to the Committee of the Whole with favorable recommendation:

1 Amend printed bill, strike everything below the enacting clause and
2 substitute:

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

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

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

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

23 (d) In the ACA decision, the Supreme Court added, "Our cases
24 refer to this general power of governing, possessed by the States but not
25 by the Federal Government, as the 'police power.' . . . Because the police

1 power is controlled by 50 different States instead of one national
2 sovereign, the facets of governing that touch on citizens' daily lives are
3 normally administered by smaller governments closer to the governed.
4 The Framers thus ensured that powers which 'in the ordinary course of
5 affairs, concern the lives, liberties, and properties of the people' were held
6 by governments more local and more accountable than a distant federal
7 bureaucracy";

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

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

21 (g) In *Utah Power and Light v. United States*, 243 U.S. 389
22 (1917), the U.S. Supreme Court held that "The power of the United States
23 to protect its property by its own legislation from private trespass and
24 waste does not, and cannot, imply a general police power over the vacant
25 public lands within a State. The section in the Constitution relating to the
26 admission of new States, and the concomitant disposition of the public
27 lands, excludes, by its express terms, any construction by which the
28 United States may claim any additional governmental or police powers
29 within the States in which such public land is situated.";

30 (h) Article 1, section 8, clause 17 of the United States
31 Constitution, referred to herein as "Clause 17," states that the federal
32 government will "exercise exclusive legislation in all cases whatsoever
33 over such district (not exceeding ten miles square) as may by cession of
34 particular states, and the acceptance of congress, become the seat of the
35 government of the United States, and to exercise like authority over all
36 places purchased by the consent of the legislature of the state in which the
37 same shall be, for the erection of forts, magazines, arsenals, dockyards
38 and other needful buildings";

39 (i) The domain of exclusive jurisdiction by the federal government
40 is limited to the District of Columbia and other places purchased by the
41 consent of the state legislatures for the erection of forts, magazines,
42 arsenals, dockyards, and other needful buildings, which does not include

1 vast acres of undeveloped land, incidental to the powers expressly granted
2 within the constitution;

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

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

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

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

25 (IV) **Proprietorial Interest Only:** This term is applied to those
26 instances wherein the federal government has acquired some right or title
27 to an area in a state but has not obtained any measure of the state's
28 authority over the area. In applying this definition, recognition should be
29 given to the fact that the United States, by virtue of its functions and
30 authority under various provisions of the constitution, has many powers
31 and immunities not possessed by ordinary landholders with respect to
32 areas in which it acquires an interest, and of the further fact that all its
33 properties and functions are held or performed in a governmental, rather
34 than a proprietary, capacity;

35 (k) The report also stated, "It scarcely needs to be said that unless
36 there has been a transfer of jurisdiction (1) pursuant to [Clause 17] by a
37 Federal acquisition of land with State consent, or (2) by cession from the
38 State to the Federal Government, or unless the Federal Government has
39 reserved jurisdiction upon the admission of the State, the Federal
40 Government possesses no legislative jurisdiction over any area within a
41 State, such jurisdiction being for exercise entirely by the State, subject to
42 non-interference by the State with Federal functions. . . . The Federal

1 Government cannot, by unilateral action on its part, acquire legislative
2 jurisdiction over any area within the exterior boundaries of a State. . . .
3 The consent requirement of [Clause 17] was intended by the framers of
4 the Constitution to preserve the States' jurisdictional integrity against
5 federal encroachment";

6 (l) In *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930), the
7 United States Supreme Court stated that "[i]t is not unusual for the United
8 States to own within a State lands which are set apart and used for public
9 purposes. Such ownership and use without more do not withdraw the
10 lands from the jurisdiction of the State. On the contrary, the lands remain
11 part of her territory and within the operation of her laws, save that the
12 latter cannot affect the title of the United States or embarrass it in using
13 the lands or interfere with its right of disposal.";

14 (m) The "Inventory Report On Jurisdictional Status of Federal
15 Areas Within the States", compiled by the United States General Services
16 Administration in 1962, categorizes virtually the entirety of United States
17 Forest Service (USFS) and Bureau of Land Management (BLM) land in
18 the state of Colorado as Proprietary Interest Only;

19 (n) Since 1962, the state of Colorado has ceded concurrent
20 jurisdiction to the federal government over certain lands dedicated to
21 national park and other purposes. However, as of the effective date of this
22 act, at least 97% of the federal lands in Colorado are held in a
23 proprietary interest capacity only, and this includes almost the entirety
24 of USFS and BLM land in the state.

25 (o) The management of forest wildfires, wildfire mitigation
26 efforts, and the investigation and prosecution of criminal acts such as
27 arson and illegal drug production require a cooperative approach among
28 federal, state, and local governments;

29 (p) The United States department of agriculture through the USFS
30 has been remiss in working with state and local governments to
31 effectively plan, manage, and coordinate both routine and emergency
32 responses to the constant wildfire threat to Colorado from land that it
33 currently manages;

34 (q) The ability of Colorado counties and the state to respond to
35 wildfires that start on land managed by the United States government, and
36 specifically by the USFS and the BLM, has been restricted by the federal
37 government, resulting in clear and imminent dangers to the life, health,
38 and safety of residents of the state, both within federal lands and on land
39 within the territorial boundaries of counties and municipalities that border
40 federal land.

41 (r) The jurisdictional right of the state of Colorado and its political
42 subdivisions to mitigate potential risks to life and to the public health or

1 safety should not be fettered by an intrusive and uncooperative federal
2 bureaucracy; and

3 (s) By enacting this legislation, the state of Colorado, on its own
4 behalf and on behalf of political subdivisions, asserts the jurisdictional
5 right it possesses under long-standing principles of federal law to respond
6 to and to take action on public lands managed within the state by the
7 USFS within the United States department of agriculture and the BLM
8 within the United States department of the interior for which the federal
9 government claims only a proprietorial interest when conditions on such
10 land adversely affect, or pose a clear and imminent danger to, life and the
11 public health and safety of the residents of the state. The assertion of such
12 jurisdictional right will, among other things, facilitate the planning,
13 management, and coordination of federal, state, and local response to
14 wildfire threats and emergencies, thereby reducing the clear and imminent
15 dangers such wildfires pose to life and to the public health and safety.

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

18 **3-2-102. State and political subdivisions - jurisdictional right**
19 **to respond to and take action on federally managed lands - U.S.**
20 **department of agriculture - bureau of land management - definitions.**

21 (1) AS USED IN THIS SECTION:

22 (a) "BLM LANDS" MEANS LANDS WITHIN THE STATE THAT ARE
23 OWNED AND MANAGED BY THE BUREAU OF LAND MANAGEMENT WITHIN
24 THE UNITED STATES DEPARTMENT OF THE INTERIOR AS OF JULY 1, 2015,
25 AND ALL SUCH LANDS THEREAFTER ACQUIRED.

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

29 (c) "POLITICAL SUBDIVISION" MEANS A COUNTY, CITY AND
30 COUNTY, CITY, TOWN, SERVICE AUTHORITY, SCHOOL DISTRICT, LOCAL
31 IMPROVEMENT DISTRICT, LAW ENFORCEMENT AUTHORITY, CITY OR
32 COUNTY HOUSING AUTHORITY, OR WATER, SANITATION, FIRE PROTECTION,
33 METROPOLITAN, IRRIGATION, DRAINAGE, OR OTHER SPECIAL DISTRICT, OR
34 ANY OTHER KIND OF MUNICIPAL, QUASI-MUNICIPAL, OR PUBLIC
35 CORPORATION ORGANIZED PURSUANT TO LAW.

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

40 (e) "USFS LANDS" MEANS LANDS WITHIN THE STATE THAT ARE
41 OWNED AND MANAGED BY THE UNITED STATES FOREST SERVICE AS OF
42 JULY 1, 2015, AND ALL SUCH LANDS THEREAFTER ACQUIRED.

1 (2) IN ACCORDANCE WITH LEGAL PRINCIPLES OF FEDERAL LAW
2 THAT ARE LONG UNDERSTOOD, THE STATE OF COLORADO POSSESSES, ON
3 ITS OWN BEHALF AND ON BEHALF OF ITS POLITICAL SUBDIVISIONS, THE
4 JURISDICTIONAL RIGHT TO RESPOND TO AND TO TAKE ACTION ON BLM
5 LANDS OR USFS LANDS FOR WHICH THE FEDERAL GOVERNMENT CLAIMS
6 ONLY A PROPRIETORIAL INTEREST WHEN CONDITIONS ON SUCH LANDS
7 ADVERSELY AFFECT, OR POSE A CLEAR AND IMMINENT DANGER TO, LIFE
8 AND THE PUBLIC HEALTH AND SAFETY OF THE RESIDENTS OF THE STATE;
9 EXCEPT THAT, IN THE CASE OF ANY CONFLICT BETWEEN THE
10 JURISDICTIONAL RIGHT ASSERTED IN THIS SUBSECTION (2) AND ANY
11 FEDERAL ACTIVITY RESPECTING THE LANDS SPECIFIED IN THIS SECTION,
12 THE FEDERAL ACTIVITY CONTROLS.

13 **SECTION 3. Effective date.** This act takes effect July 1, 2015.

14 **SECTION 4. Safety clause.** The general assembly hereby finds,
15 determines, and declares that this act is necessary for the immediate
16 preservation of the public peace, health, and safety."

17 Page 1, line 101, strike "**RETENTION**" and substitute "**POSSESSION**".

18 Page 1, line 102, strike "**CONCURRENT**" and substitute "**POLICE POWER**"
19 and strike "**LANDS,**" and substitute "**LANDS FOR WHICH THE FEDERAL**
20 **GOVERNMENT HAS ASSERTED ONLY A PROPRIETORIAL INTEREST,**".

21 Page 1, strike lines 103 through 107 and substitute "**AND, IN CONNECTION**
22 **THEREWITH, THE POSSESSION BY THE STATE AND ITS POLITICAL**
23 **SUBDIVISIONS OF THEIR JURISDICTIONAL RIGHTS OVER LAND MANAGED**
24 **WITHIN THE STATE BY THE UNITED STATES FOREST SERVICE AND THE**
25 **BUREAU OF LAND MANAGEMENT.**".

** *** ** *** **