There's been a fair amount of national debate lately about whether federal public lands in the West should be transferred to state or private ownership. Rep. Chaffetz (R) from Utah had introduced a bill to transfer millions of acres of federal land in a range of Western states to private or state ownership – he withdrew that bill after pressure from hunting and fishing groups. Thus, the politics in DC – despite Republican control of Congress and the White House – do not seem to lend themselves to large-scale land transfers.

Nonetheless, just to be sure, last week, California lawmakers proposed legislation to try and head-off any efforts by the federal government to transfer federal public lands in the state to private ownership. (The federal government owns about 45% of the land in California.) SB 50 attempts to give the state the right of first refusal for all land sales by the federal government to private parties – the idea being that this will ensure that if land transfers do occur, the state can keep ownership of these lands, ensuring public access and preventing development.

The first question is whether the state can do this. After all, federal law is paramount under the Supremacy Clause of the U.S. Constitution, so the state wouldn't seem to have the power to control how the federal government sold its land. The state law would seem to be preempted by any federal land sale legislation.

However, the mechanism by which SB 50 works might well be constitutional. The law prohibits the recording of any deeds for lands that have been transferred out of federal ownership to private ownership without giving the state a right of first refusal. For those of you who never took Property in the first-year of law school, land recording is the process by which people give public notice of their rights in land. If you don't record your deeds, then you might lose your land to another person. Even more importantly, if you don't record your deed, then you won't get title insurance, and few banks will lend you money to develop your property, and few banks will lend a buyer money to buy the property. So an unrecorded deed is much, much less useful than a recorded deed. Thus, if the purchaser from the federal government is stuck with an unrecorded deed, they are not happy.

The key here is that the state is not trying to regulate how the federal government sells its land. It is just trying to regulate what a private purchaser can do with their land – specifically whether that private purchaser can record their deed to that land. And that might be a really important difference. Recently, the U.S. Supreme Court has made a big deal about whether a particular area of law has traditionally been within the purview of state or local regulation – for instance, it has narrowly construed federal wetlands regulatory authority on the grounds that land-use regulation is traditionally a state function.

Sometimes, the Court has even made this the basis of striking down federal laws on constitutional grounds, arguing that areas such as family law are traditionally state areas, not federal areas. You don't get more state and local than land recording. Land records are kept at the county level in the United States, and the land recording system is structured by state, not federal law. Even the IRS is required to file its tax liens through the land records system established by state law. So for the courts to conclude that SB 50 is preempted, they would have some hard work to do to argue why the federal government can interfere with state land recording and property law powers.

In addition, because the state is asking for a right of first refusal, the state isn't lowering any sales price that the federal government receives for the land – it just matches whatever price the market would bear. So to the extent that the primary purpose of any federal land sale legislation would be to raise money, SB 50 would not conflict with that purpose. (Whether a state law conflicts with the goals or purpose of a federal law is an important component of preemption analysis.) Likewise, if the purpose of any federal land sale legislation is simply to transfer ownership to state or local governments or private parties, a right of first refusal doesn't conflict with that purpose as well. The only plausible purpose of any federal land sale legislation that might lead to a finding of preemption with SB 50 is if the purpose of that legislation is to transfer ownership only to private parties, regardless of the price. However, I think the politics of enacting legislation along those lines would be very difficult, even for a Republican Congress and White House.

There is still some uncertainty here – in particular, whether there is relevant caselaw on federal preemption of state laws that affect federal land sales and transfers. But it is a much more plausible approach than might seem at first glance.

If the state wants, I also think it has some additional approaches it could pursue. For instance, it might "pre-zone" federal lands to restrict or prevent development and mandate public access. That regulation is likely preempted as applied to federal lands under Supreme Court caselaw. However, once the land is transferred to private ownership, the regulation could apply with full force and effect. Moreover, even the most restrictive regulatory rules likely would not trigger a takings claim that the private landowner was owed compensation for the loss of value, since that landowner bought the land from the federal government knowing it could not be developed. And again, once the land is in private ownership, it is subject to state land-use regulation, which as the Supreme Court has noted, is an area of traditional state power.

The state might also pass legislation giving state agencies authority to take, through eminent domain, lands that had been transferred to private ownership from the federal

government in a specific period of time (say, five years). The compensation owed to the land owner could be presumptively set at the price the landowner paid the federal government for the land. This would operate more or less the same as the right of first refusal, allowing the state to acquire lands that the feds were selling off, but at the sales price. The main difference with the right of first refusal is that it might allow the state time to decide whether to acquire the lands, or to find the funds to pay the landowner. And again, eminent domain power by the state is a fairly core feature of state sovereignty, so when it is used vis-à-vis private landowners, it is hard to see how this would be preempted.

Overall, the state has a range of approaches it could take if it wants. Most importantly from the state's perspective, however, is that any legislation (no matter what approach) would send a clear message to Washington DC that California likes its federal public lands very much, and doesn't want to see them go away.