Public Lands

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April 29, 1994

Dale White
Harney County Court
Courthouse
450 N. Buena Vista
Burns, Oregon 97220

RE: Nye County Nevada Claim to Ownership of Public Lands

Dear Judge White:

Recently you inquired of this office as to the constitutional basis under which the federal government is afforded the power to retain the public lands. Your question was in part related to the claims recently raised by Nye County, Nevada that the federal government had no constitutional right to retain these lands after statehood.

Based upon our research of the various constitutional provisions and accompanying case law, we find that the federal government clearly had the authority to retain the public lands upon statehood. Furthermore, we find that the federal government has the power to manage and dispose of these lands, a power that is without limitation.

DISCUSSION

Under the Constitution of the United States, Congress has been granted the " . . . power to dispose of and make all needful rules and regulations respecting the territory or other property, belonging to the United States." (U.S. Constitution, Article Four, Section Three).

In United States v. Gratiot 39 U.S. 526, 10 L.Ed. 573, (1843) the Supreme Court clarified that the term "territory" as used in this provision of the Constitution is merely descriptive of one kind of property, and is equivalent to the word "lands." (id. p.535)

The Court noted that Congress has the same power over the territory as it has over any other property belonging to the United States. This power is vested in Congress without limitation. (id. p.535)

In Gratiot the defendant was challenging the federal government's authority to lease lead mines within the State of Illinois. While Mr. Gratiot claimed that the federal government had no right to these lands after statehood, the Supreme Court ruled that the State of Illinois ". . . cannot claim a right to the public lands within her limits." (id. p.538)

The defendants had argued that there was " . . . no authority in the cession of the public lands to the United States is given, but to dispose of them, and to make rules and regulations respecting the preparation of them for sale." Furthermore the defendants argued that the lands were to be disposed of and not retained by the United States. (id. p.532)

The Supreme Court ruled that the power of Congress over the lands belonging to the United States is not limited in the manner the defendant alleged. The Court noted there was no encroachment upon state rights by the reserving and leasing of the lead mines subsequent to Illinois becoming a part of the Union. (id. p.538)

In Gratiot the Supreme Court clearly recognized that the Federal Government could retain and dispose of the federal lands. This was a power that survived after statehood.

The Supreme Court reaffirmed this position in Pollard v. Hagan 44 U.S. 21, 11 L.Ed. 565 (1845). In Pollard the Court was called upon to address the issue of whether the federal government retained any interest in the navigable waters after statehood.[1]

The question presented to the Supreme Court was whether property that had been below the usual high water mark at the time of statehood belonged to the federal government or the State of Alabama. In deciding the issue the Supreme Court distinguished between the sovereignty and jurisdiction of the federal government as opposed to that possessed by the state governments.

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[1]. While Nye County relies upon Pollard for the proposition that the federal government retained no interest in the public lands after statehood, in fact, the case held that the federal government retained no interest in the navigable waters. In deciding this issue the Court also clarified that the federal government did, however, retain the public lands.

The Supreme Court clarified that the federal government holds " . . . the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose." (id. 571)

While the federal government holds the forts, magazines, arsenals, dock yards and needful places ("enclaves") with full rights of sovereign power, all other lands are under the sovereign power of the states. It was this state sovereignty that the Court recognized in determining that the navigable waters were part of the state sovereignty.

The Court, however, distinguished the enclaves and navigable waters from the public lands and ruled that the federal government holds the public lands not by any municipal sovereignty but by the force of the deeds of cession. (id. p. 571-2)

The terms of the compacts (deeds of cession) were propositions submitted to the various states for their acceptance or rejection. (id. p. 571) They represented voluntary surrenders by the states.

The authority of the federal government to set apart the public lands and to reserve these lands from sale was recognized in Grisar v. McDowell 6 Wall 363, 73 U.S. 495, 18 S.Ct. 863, 868 (1867). In Grisar the federal government reserved from sale a tract of land the City of San Francisco claimed as a pueblo. In resolving the issue the Court clarified that the President had the requisite authority to reserve the public lands from sale. (id. p. 868)

Reserving the public lands from entry and sale was within the Constitutional power afforded Congress to dispose of the public domain and the authority to make all needful rules and regulations. Butte City Water Co. v. Baker 196 U.S. 119, 49 L.Ed. 409, 25 S.Ct. 211, 213 (1904).

Congress has the absolute right to prescribe the times, the conditions and the mode of transferring the public domain, or any part of it. To prevent the possibility of any state legislature interfering with this right, a provision was inserted in the compacts by which new states were admitted into the Union, that such interference with the disposal of the public domain lands shall never be made. Van Brocklin v. Anderson 117 U.S. 151, 29 L.Ed. 845, 6 S.Ct. 670, 679 (1886)

Under the reservation in the Act of Admission and the acceptance thereof by the various states, the right of Congress to determine the disposition of public lands within that state was reserved. Stearns v. Minnesota ex rel Marr 179 U.S. 223, 45 L.Ed 162, 21 S.Ct. 73, 80 (1900) If Congress determines that a great body of lands within a state should be reserved for an indefinite period, it may do so for Congress clearly had the power to withdraw all of the public lands from private entry or public grant. (id. p. 80)

The ability of the federal government and state to enter into a compact that allows the federal government to retain the public lands does not violate the equal footing doctrine.[2] The compacts were made under the full authority of the state to deal with the nation. The Supreme Court in reviewing this issue noted that the state and nation are competent to enter into an agreement of such nature with one another, a position that has been repeatedly affirmed by the Supreme Court. (id. p. 81)

The authority of the federal government to control and manage the public lands was recognized by the Supreme Court in Camfield v. United States 167 U.S. 518, 17 S.Ct. 864 (1897). In Camfield the Court addressed the problem of private landowners fencing public lands in a manner that excluded others from grazing or accessing them.

In resolving the enclosures issue the Court noted that even after statehood the federal

> " . . . government has with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to persecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withold (sic) them from sale." (id. p. 866)

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[2]. The Equal Footing clause " . . . has long been held to refer to political rights and to sovereignty. It does not . . . include economic stature or standing. There has never been equality among the states in that sense. Some states when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. . . . The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty." United States v. State of Texas 339 U.S. 707, 70 S.Ct. 918, 922 (1950); State of Alabama v. State of Texas 347 U.S. 272, 74 S.Ct. 48 (1954).

The Court further noted that "we do not think the admission of territory as a state deprives it of the power of legislating for the protection of the public lands, . . . A different rule would place the public domain of the United States completely at the mercy of state legislatures." (id. p. 867)

In Light v. United States 220 U.S. 523, 31 S.Ct. 485, 487-8 (1910) questions were raised whether Congress could withdraw large bodies of land from settlement without the consent of the state wherein these lands were located.

In resolving the issue, the Supreme Court noted that the "nation is an owner, and has made Congress the principal agent to dispose of its property. . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of." It can prohibit absolutely or fix the terms on which its property may be used and it can withhold or reserve the land indefinitely. (id. p. 487-488)

Likewise in United States v. Grimaud 220 U.S. 506, 31 S.Ct. 480, 480 (1910) the Supreme Court recognized the authority of the federal government to set apart and reserve in any state or territory, public lands as public forest preserves.

Merely because the lands are included within a state does not take from Congress the power to control their occupancy and use or the power to prescribe the conditions under which others may obtain rights in these lands. Utah Power & Light Co. v. United States 243 U.S. 389, 37 S.Ct. 387, 389-390 (1916).

CONCLUSION

Contrary to the position of Nye County, the retention by the federal government of public lands within a newly created state does not violate the sovereignty of the state. The Supreme Court has repeatedly addressed this issue and ruled that the retention of the public lands is an issue governed by the terms of the cession grants within the various statehood compacts.

With respect to the lands ceded by the states as part of the statehood compacts, the federal government has the unlimited discretion as to how it disposes of these lands[3] and may set them aside for uses such as forest preserves.

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[3]. While this power is without limitation, as a result of a variety of Legislative acts, the various states and counties have been afforded a role in the management of these lands.

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With respect to the lands ceded by Oregon as part of the statehood compacts, the federal government has the unlimited discretion[3] as to how it disposes of these lands and may set them aside for uses such as forest preserves.

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Finally, it must be observed that this authority of the federal government to dispose, retain, and manage the public lands has been recognized for over two hundred years. It is the foundation upon which the homestead laws and other disposal acts were based. To now strike it down would unsettle countless titles and work manifold injury to landowners throughout the West.

If you have any further questions on this matter please don't hesitate to contact me.

Sincerely,

Ronald S. Yockim

RSY/dbc