COLORADO LAW

Professor Mark Squillace
University of Colorado Law School
Wolf Law Building :: 401 UCB
Boulder, Colorado 80309-0401
303.492.1287 :: mark.squillace@colorado.edu

UNIVERSITY OF COLORADO LAW SCHOOL



Dagny Stapleton
Deputy Director, Nevada Association of Counties
304 South Minnesota Street
Carson City, NV 89703

***Testimony of Mark Squillace before the Nevada Land Management Task Force***
***6 December 2013***

Dear Ms. Stapleton:

Set forth below is my statement to the Nevada Land Management Task Force presented by videoconference on December 6, 2013. Please advise me if you have any questions about my testimony.

Thank you for the opportunity to speak about the prospects for transferring federal lands in Nevada to state control. My name is Mark Squillace. I am a professor law at the University of Colorado Law School and until recently served as the Director of the Natural Resources Law Center there. I have been teaching and writing about public lands issues for more than 25 years and I am the co-author of a book with Professors James Rasband and James Salzman on Natural Resources Law and Policy.

I had only a few days to prepare for this appearance but I hope that I am able nonetheless to shed some light on the possible legal arguments for and against this proposed transfer.

Let me begin by acknowledging the frustration that many people in Nevada feel regarding the fact that the federal government owns nearly 83% of all the land in your State. It is perfectly understandable to me that some State officials want more control over the use and disposition of these public lands. But feelings of frustration are not enough to support a legal claim, and for the reasons that I will describe for you today, I do not believe that Nevada can make a credible legal argument to support a transfer of title of federal lands to the State.

Let me begin by discussing the Nevada Enabling Act. Section 4 of that Act states quite clearly and unequivocally "That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States…" It is hard to imagine language that could be more clear. How can a State that has expressly disclaimed all right and title to its unappropriated public lands now lay claim to those same lands?

Proponents of the proposed transfer, however, point to Section 10 of the Enabling Act, which provides "That five percentum of the proceeds of the sales of all public lands lying within said state, ***which shall be sold by the United States*** subsequent to the admission of said state into the Union, … shall be paid to the said state…." If you just focus on the words "***shall be sold***" then perhaps this sounds like a duty on the part of the federal government to divest itself of all public lands within the State. But that phrase must be read in context. The relevant language is "***which shall be sold***" and quite clearly this phrase is simply intended to delimit the transactions for which the 5% payments to the State must be made.

Moreover, even if you can somehow read this language as a duty to sell the public lands it establishes no time limit on that duty, and as the cases I will discuss soon suggest, the federal government enjoys virtually unfettered discretion under the Constitution to decide on whether, when, and how to dispose of public lands.

Before turning to the relevant cases, I would like to note one additional legal problem with the proposed legislation. Even assuming that you can overcome the substantial arguments under the Enabling Act against the transfer of federal public lands in Nevada, on what possible basis does the state claim title to lands that have not been sold? At most, the State might ask a court to order that the lands be sold at some point in the future so that the State can enjoy its 5% proceeds. I want to emphasize that I think it is extremely unlikely that the State could secure such an order; I raise it here only to point out another serious flaw with the proposal to secure a transfer of public lands to the State.

Let me turn now to the Property Clause and a few of the key cases decided under the Property Clause. As most of you no doubt know, the clause gives to the Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

There has been much litigation about the scope of the Property Clause and it pretty much all points in one direction. And that is for a very broad reading of the power. I want to highlight three cases that help illustrate this point.

The first is *United States v. Gratiot*, 39 U.S. 526 (1840). This case involved a decision by the federal government to lease certain public lands in Illinois for lead mining. The lawyers for the defendants in this case claimed that the Property Clause gave the Congress

the power only to dispose of lands and not to hold them by way of a lease of mineral rights. They protested specifically against the government's claim that the United States could lease these public lands for mineral development purposes in perpetuity. Here's what the attorneys for defendants argued, and I quote, "No authority in the cession of the public lands [from the States] to the United States is given, but to dispose of them."

And here is how the Supreme Court responded. "If such are the powers of Congress over the lands belonging to the United States – [i.e., the powers under the Property Clause] the words 'dispose of,' cannot receive the construction contended for…; that they vest in Congress the power only to sell, and not to lease such lands. The disposal must be left to the discretion of Congress. And there can be no apprehensions of any encroachments upon state rights, by the creation of a [permanent tenancy]." Thus the notion that the federal government was under a general obligation to dispose of the public lands within a reasonable period of time was put to rest as far back as 1840.

Let me turn to a second case decided exactly 100 years after the decision in *Gratiot*. *United States v. San Francisco*, 301 U.S. 657 (1940) involved the controversial grant to the City and County of certain public lands for the purpose of building the Hetch Hetchy Dam in Yosemite National Park. A condition of the grant was that the City could not transfer the right to sell water or electricity to any private person or corporation. When the City tried to transfer certain rights to Pacific Gas & Electric – a private company – the federal government sued and won. As Justice Black explained for 8 members of the Court (and I quote): "The power over the public land … entrusted to Congress [under the Property Clause] is without limitations. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy."

Let me suggest to you that when Congress enacted FLPMA and established a policy of retaining the public lands in federal ownership it was exercising a power that was expressly countenanced by the Court in its *San Francisco* decision.

Finally, let me turn to the most recent relevant case from the Supreme Court – *Kleppe v. New Mexico*, 426 U.S. 529 (1976). *Kleppe* involved an effort by the State of New Mexico to round up and remove certain burros on federal public lands in the State. The State claimed the authority to take such action pursuant to its general authority to regulate wildlife. The BLM claimed, however, that the round up on public lands violated the Wild Free Roaming Horses and Burros Act. In response the State filed a lawsuit claiming that this law was unconstitutional. The Supreme Court disagreed and in so doing rejected the State's argument for a narrow reading of the Property Clause. Rather, the Court held that the Congress has "complete power" over public lands, and this power necessarily includes the power to regulate and protect the wildlife thereon. It is simply not possible to reconcile this complete power – recognized by the Court in New Mexico – with any State claim of ownership to the federal public lands.

Before closing this discussion of case law let me briefly touch on the case that supporters of this proposed legislation frequently cite – *Pollard v. Hagan*, 44 U.S. 212 (1845). *Pollard* – a case decided by the Court in 1845 – involved the power of the United States to sell certain tidelands under Mobile Bay in the State of Alabama. The Court ruled against the United States because title to the tidelands, along with title to the bed of all navigable waters, passed to the State upon statehood under the equal footing doctrine. In reaching this conclusion, the Court suggested that the United States held public lands only for the purpose of carrying out their final sale, and that such sales were necessary to provide the States with complete sovereignty. Had this view prevailed, of course, the federal government would have lacked the power after statehood to set aside public lands as national parks, wildlife refuges, military reserves, and wilderness areas, to name just a few of the types of protected federal lands. But as the other cases I have mentioned make clear, this language from *Pollard* has been thoroughly rejected by the Court in many later cases. Moreover, it is important to note that this language was not part of the Court's holding in *Pollard*. As I noted, *Pollard* did not even involve federal public lands but rather state-owned tidelands. Thus the Court's statements about public lands were mere dictum that later court decisions have quite conclusively rejected.

Let me close by suggesting that even if the State has no legal claim to federal public lands, it surely does have the power to work with the Congress and the federal government to put itself in a position of greater control over certain public lands that it believes would benefit from closer State management. Exchanging state trust lands for consolidated tracts of land that might generate more revenues or provide other benefits to the citizens of the State is one plausible idea for securing control over lands that the State sees as important to its future growth. The State could also work with Congress to change the General Mining Law to secure market-based royalties for hard-rock mineral development on public lands. Because the States have historically shared those royalties equally with the federal government, this sensible reform could generate tens of millions of dollars for State coffers.

Thank you again for the opportunity to appear before your task force today. I will be very happy to provide you with a written copy of my testimony and I look forward to answering any questions that you might want to raise.

Sincerely yours,

Professor Mark Squillace