Glade Hall Testimony

Federal Land Action Group Forum

July 28, 2015

The federal government, claims to be the owner of large portions of the land area within the boundaries of the wester states. This claim is variably based on the these states having been acquired by the federal government through treaty or purchase. By reason of such claimed ownership, the federal government claims legislative jurisdiction "without limitation" over such lands pursuant to Art. IV Sec. 3, clause 2 of the U.S. Constitution.

None of the enumerated powers of Congress contained in Article I of the U.S. Constitution are invoked to support this claim

The historical background shows that Great Britain established sovereignty and dominion over the region of North America by discovery and conquest. This sovereignty and dominion includes, as a principal component, the concept of paramount title, also referred to as the ultimate fee, and eminent domain, that is, that there is an underlying ownership by the government in the real property within its boundaries. This ownership is the basis for the right of the government to take private property for public use upon payment of just compensation. It also

includes the right to escheat on failure of heirs.

After the American Revolution, this underlying ownership “passed definitively to the States” The original states acquired by the revolution the entire rights of soil, and of sovereignty.

Seven of the states obtained title to vast tracts of land west of the Appalachian Mountains. The remaining six states feared that the seven "landed” states could exercise undue influence. Accordingly, they insisted on an agreement that the landed states divest themselves of their western lands.

The landed states agreed to surrender their lands,to the Confederation for the purpose of forming new and independent states.

In its deed of cession Virginia required that the territory so ceded shall be laid out and formed into States . .and admitted members of the Federal Union; having the same rights of sovereignty, freedom, and independence, as the other States

Congress adopted the *Northwest Ordinance of 1787* to establish territorial governments, to admit new states, and to apply the proceeds of sale of the public lands to the Revolutionary War debt. For this reason, the legislatures of those new States, were never to interfere with the primary disposal of the soil by the

United States, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.

The *Northwest Ordinance* also provided that states were to be formed in the Territory and that those future states would be admitted "on an equal footing with the original states in all respects whatever." This language, referred to as the Equal Footing Doctrine, is repeated in the statutes forming the western states.

The Framers made it crystal clear that it was the duty of Congress to dispose of the ceded land.

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;. . . *U.S. Const.*, art. IV, sec. 3, cl. 2.

Of course, the thirteen original states continued to own all unappropriated public lands within their borders following ratification of the *Constitution* in 1789. There is no provision in the constitution providing power to own and/or manage land within states, other than the Enclave Clause. Article IV Sec. 3 Cl. 2 was specifically for the northwest territories.

Congress was in the position of being a mere trustee of the ceded lands.

The western land was "to be held by the United States until it is in a suitable condition to become a state upon an equal footing with other states." *Dred Scott v. Sanford*, U.S. 60 (19 How.) 393, 432 (1857). All land held by the United

States in the West, then, was held in trust for the establishment of future states which were expected to enjoy the same rights of sovereignty and independence as the original thirteen. The trust was to terminate upon admission of the states to the Union:

The residual sovereignty and independence were held intrinsically by each of the separate and individual states that formed the union as a matter of the structure established by the *Constitution*. There was simply no provision in the *Constitution* that provided the federal government any further or additional powers, sovereignty, or jurisdiction over the newly formed states. It necessarily follows, then, that upon the creation of a new state, all the powers, sovereignty, and jurisdiction of governance that may exist, lodged in that state, except for the enumerated powers delegated to the Federal Government. Accordingly, those states as "states" held all the rights of sovereignty and power held by the original thirteen states, including the unappropriated land within their boundaries. The powers, sovereignty, and jurisdiction of a state are not, and cannot, be diminished by a compact with the federal government.

As a condition of ratifying the Articles of Confederation the six states without western lands insisted on an agreement that the landed states divest themselves of their western lands. The landed states agreed to surrender their

lands (the Northwest Territory) to the Confederation for the purpose of forming new and independent states.

Congress adopted the Northwest Ordinance to establish territorial governments, to admit new states and to apply the proceeds of sale of the lands to the Revolutionary War debt. The Ordinance also provided that states were to be formed in the Territory and that those future states would be admitted "on an equal footing with the original states in all respects whatever."

Article IV,Sec. 3, Cl.2 of the Constitution gave the federal government power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. Subsequent case law holds that this clause was intended to be applied to the Northwest Territory only.

The general but limited power of the federal government to hold title to property was created through the adoption of the Enclave Clause, which allows the Federal Government to hold land in "places purchased by the consent of the Legislature of the State" for "the erection of forts, magazines, arsenals, dockyards and other needful buildings.".

The thirteen original states continued to own all unappropriated public lands within their borders following ratification of the Constitution in 1789

By 1796, Vermont, Kentucky and Tennessee also had been admitted to the

Union, each owning all the unappropriated land within their boundaries. Id. at 287. Opinions of the Supreme Court confirmed that new states took all unappropriated land upon statehood to the utter destruction of all claim to the lands belonging to the United States.

Supreme Court case law holds that the United States never held any municipal sovereignty, jurisdiction, or right of soil in the territory, of which any of the new states were formed except for a temporary purpose to execute the trusts by disposing of the land. The new states were entitled to the sovereignty and jurisdiction over all the territory within their limits, subject to the common law, to the same extent as the original states. To maintain any other doctrine is to deny that these later states have been admitted into the union on an equal footing with the original states.

By various acts, Congress authorized the formation of each of the constitutions and states in which the federal government now claims title to the unappropriated lands. These acts defined the boundaries of each state and provided that the state consists of all territory included within the defined boundaries. By deeds of cession, all the lands within the legal description, were ceded to the state. There was no reservation of ownership, municipal sovereignty, or jurisdiction over such lands by the federal government.

The specific issue of who owns the unappropriated lands within a state has not been presented before the Supreme Court. Courts have occasionally assumed federal ownership in cases involving the public lands where such ownership was asserted and not contested, but the Supreme Court has never decided the issue. The 1976 case of *Kleppe v. New Mexico* makes a finding that held that "Congress exercises the powers both of a proprietor and of a legislature over the public domain. However, the Kleppe opinion has been severely criticized in the scholarly writings.

Professor David E. Engdahl, in his treatise Constitutional Federalism In A Nutshell, writes of the opinion as follows:

> In 1976, with an opinion that displays darkest ignorance of what had been established for two centuries before, the Supreme Court unanimously (albeit unawares) revolutionized its doctrine under that clause. (Article IV, Sec. 3, Cl. 2) Kleppe v. New Mexico, 426 U.S. 529 (1976) The briefing on behalf of New Mexico was inept; and for its part, the Court conspicuously failed to deal with many of the relevant cases and demonstrably misunderstood others. (Pg. 228) . . . Kleppe held that "Congress exercises the powers both of a proprietor and of a legislature over the public domain." . . . On this view, Congress can make rules for federal property which have no relation whatever to any matter otherwise of legitimate federal concern, and any such rule, being legislative in character, "necessarily overrides conflicting state laws under the Supremacy Clause." (Pg. 229) . . . as to property located within the boundaries of states, that is a profoundly novel proposition which makes a mockery of the basic purpose of enumerated powers doctrine. . . . What Kleppe really means is that over all the vast federal public domain within states, the United States has plenary, general governmental jurisdiction, and is not confined to those enumerated

> powers which it may exercise elsewhere in the country. It means that as to the east and the middle west, enumerated powers doctrine remains the foundation of constitutional power analysis, but as to the roughly half of the country from the Rocky Mountain states westward it as absolutely no significance at all. (Pg. 231) Kleppe's misallocation of governing authority over Article IV federal property is irreconcilable with the "equal footing" doctrine revitalized in Corvallis just seven months later. (Pg. 231) One who has learned from the study of two centuries of organic constitutional doctrine that sound principles most often ultimately return can assert confidently that Kleppe must eventually be overruled. (Pg. 232)

The decision of the Ninth Circuit in the Gardner and Bradshaw cases further erodes the equal footing doctrine by purporting to establish a hierarchy of classifications of sovereignty of the States of the Union based on the ownership of the lands that comprise each state prior to statehood. The Ninth Circuit held, "Because the State of Nevada had no independent claim to sovereignty and the United States owned the lands previously, Nevada cannot claim the same rights of sovereignty as Alabama." The Court further holds that the equal footing only acts to establish equality with regard to political standing and sovereignty. This holding ignores the fact that the most fundamental element of sovereignty is paramount title or eminent domain.

> This Union was and is a Union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. The definition of 'a State' is found in the powers possessed by the original states which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States

into the Union.*Coyle v. Smith*, 221 U.S. 559, 566-j (1911)

> Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states will be upon an equal footing, in all respects whatever. . . and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease. *Pollard* 44 U.S. (3 How.)

Clearly, congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign, independent State, or indispensable to her equality with her sister states, necessarily implied and guaranteed by the very nature of the Federal compact. Id at 560.

In *Coyle v. Smith*, 221 U.S. 559 (1911), the Court held:

> The plain deduction from this case is that when a new State is admitted into the Union. it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union which would not be valid and effectual if the subject of congressional legislation after admission. Id. at 573 (emphasis added).

The characteristics of a "state" are:

Independence: This characteristic is defined as "The state or condition of being free from dependence, subjection, or control of any exterior power. (Can a state be 13% independent?)

Sovereignty: The Ninth Circuit acknowledges that the equal footing

doctrine requires that the State of Nevada enjoy full sovereignty. Nevertheless, it does not recognize that the

term "sovereignty" means sovereignty and dominion over all its lands.

When the western states were admitted to the United States on an equal footing with the original states in all respects whatever, this meant with full sovereignty and included the paramount title and eminent domain of all lands within its boundaries.

Freedom: "The state of being free; liberty; self-determination; absence of restraint; . . . The citizens of the western states do not enjoy the opportunity for self determination that citizens of non-public land states enjoy. A large portion of the most basic of all resources is denied to them. Their governmental control and action is restrained in a large portion of their land surface.

Equal in Authority: "Legal power; a right to command or to act;.

Having been admitted without condition, compromise, diminution, impairment, or otherwise unshorn of the attributes of statehood. The western states were admitted with the federal government conducting the function of disposition of the unappropriated lands as they had been entrusted to do throughout the development of the United States. However, when the federal government breached that trust by usurping ownership and control of those lands,

the western states were clearly denied the attributes of statehood.

In the Gardener case, the holding of the District Court was that the State of Nevada was admitted with the condition that the federal government possessed the power to convert its trusteeship over the unappropriated lands into permanent title. Such a holding means that the western states, unlike non-public land states, has been admitted in a diminished and impaired status.

Finally, the Ninth Circuit held that "Congress' power under the property Clause to administer its own property is virtually unlimited, citing *Kleppe* 426 U.S. at 539". This expression is accurate when applied to territory outside the boundaries of a state, but its application to the area of an admitted state has the effect of holding that land to be in territorial status.

Article IV provides legislative jurisdiction over such lands while they are in territorial status. *United States v. Gratiot,* 39 U.S. 526 (1840) The *Gratiot* case is the judicial bedrock for the Kleppe opinion. The language from the *Gratiot* case relied on in *Kleppe* when quoted completely is as follows:

> The term "territory" as here used, is merely descriptive of one kind of property, and is equivalent to the words "lands". And Congress has the same power over it as any other property belonging to the United States; and this power is vested in Congress without limitations, and has been considered the foundation upon which the territorial governments rest. (Emphasis supplied)

The clear implication of this holding is that the powers authorized to Congress

pursuant to Article IV, Section 3, Clause 2, exist only outside the boundaries of states admitted into the union. The underlined language, however, is dropped from the later quotes of this holding.

It is a patent absurdity to assert that such full powers of governance cover 87% of the land surface of a state of the Union and at the same time assert that such state has been admitted to the Union on an equal footing with the original states in every respect whatever. The very argument that such power can exist within a state is itself sufficient refutation of the claim by the Federal Government that the public lands within the State of Nevada are property belonging to the United States.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the Staes. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' *Coleman v. Thompson*, 501 U.S. 1277, 1281, 111 S. Ct. 2546, 2570, (1991).

The citizens of the western states are people who need the protection of politically responsive local officials who will protect their liberties. It is a fundamental violation of their rights to claim that they are citizens of a state and of the United States of America, yet are located in an area wherein agencies of the Federal Government can exercise despotic powers under the claim that the power delegated to them by Congress are "without limitation."

My recommendation to the Committee is that the federal government should execute quitclaim deeds conveying to the western states the unappropriated lands within each of those states' boundaries and disclaiming any power over such lands based on Article IV, Section 3, Clause 2. I respectfully submit that these deeds should be accompanied by an apology to those states for the breach of trust set forth hereinabove.

Respectfully submitted the 28th day of July, 2015.

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Glade L Hall