

**Report of the Public Lands Subcommittee
Western Attorneys General Litigation Action Committee
Conference of Western Attorneys General**

**The Honorable Peter Michael
Attorney General
State of Wyoming
Chair
Public Lands Subcommittee
Western Attorneys General Litigation Action Committee**

**The Honorable Ellen F. Rosenblum
Attorney General
State of Oregon
Chair
Conference of Western Attorneys General**

**Christopher D. Coppin
Legal Director
Conference of Western Attorneys General
1300 I Street
Sacramento, California 95814
Ccoppin@cwagweb.org
916-322-6431**

INTRODUCTION

In August 2014, a Public Lands Subcommittee of the Western Attorneys General Litigation Action Committee of the Conference of Western Attorneys General (CWAG) was formed by CWAG Chair, Idaho Attorney General Lawrence Wasden, to examine the legal issues regarding federal land ownership in the western states. The Subcommittee was chaired by Wyoming Attorney General Peter Michael and included attorneys from the Attorney General Offices of Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington. CWAG Legal Director, Chris Coppin, served as the CWAG staff person assigned to assist the Subcommittee in its work.

The Subcommittee held ten conference calls to discuss the work of the Subcommittee and individual Subcommittee members held several conference calls with other Subcommittee members while working on sections of this Paper.

The Subcommittee did not address whether a particular state's enabling act would legally require the federal government to transfer public lands to a state, as each state's enabling act and the circumstances surrounding the admission of individual states into the Union are unique. The Subcommittee left that task of analysis to each member state.

On July 19, 2016, the membership of CWAG approved the adoption of this Paper by resolution at its annual business meeting in Sun Valley, Idaho, by vote of 11 – 1.

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EXECUTIVE SUMMARY

In August 2014, a Subcommittee of the Conference of Western Attorneys General was formed to examine the issues regarding federal land ownership in, and transfer to, the western states. Under the chairmanship of Wyoming Attorney General Peter Michael, the Subcommittee on Public Lands included attorneys from Attorney General Offices of Idaho, Montana, Nevada, Utah, New Mexico, Washington, Colorado, Oregon, Arizona and Alaska.

The express mission of the Subcommittee on Public Lands was to produce, through directed and concerted objective legal research and analysis, a document containing detailed, organized, and comprehensive commentary on legal theories for and against the continuation of substantial proprietary ownership by the United States Government of land in the western United States of America. Each member of the subcommittee reserved the right to review and comment on any and all issues identified and also to write any minority or supplemental report which such member might wish to produce.

The broad question addressed by the Subcommittee was whether the federal government was legally obligated to sell or transfer the public lands within a given state to that state. The Subcommittee jointly examined and analyzed a number of legal arguments derived from: (1) the Property Clause - Article IV, Section 3, Clause 2 of the United States Constitution; (2) the Enclave Clause - Article I, Section 8, Clause 17 of the United States Constitution and (3) the equal footing doctrine announced by the Court in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). In particular, the Subcommittee examined the following legal arguments, identified below with separate bullets, that litigants or other advocates have advanced to support the theory that the United States lacks authority to retain ownership of certain public lands:

Proposed Theories for Transfer Based on the Property Clause

- Lands that the United States received by treaty or other acquisition may only be held in trust for the creation of future states and cannot be retained for federal purposes. *Contra United States v. Gardner*, 107 F.3d 1314, 1317 (9th Cir. 1997) (theory presented by litigant in *Gardner* based on language in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845)).
- The Property Clause is a temporary ownership provision only, and Congress has power to regulate only those lands that were within the United States at

the time the Constitution was ratified. *Contra United States v. Vogler*, 859 F.2d 638, 640-41 (9th Cir. 1988) (theory argued in *Vogler* based on language from *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 436-38 (1856)).

As a result of its research, the Subcommittee observes that to date, the United States Supreme Court consistently has held that: (1) public lands fall within the purview of the Property Clause; (2) the authority of the United States under the Property Clause has no limitations; (3) the Property Clause vests the United States with exclusive authority to decide whether “to dispose of” or sell public lands; and (4) under the Property Clause, the United States may withhold public lands from sale. No Supreme Court case has directly addressed the question of whether the Property Clause empowers the federal government to retain ownership of public lands indefinitely. In *Stearns v. Minnesota*, 179 U.S. 223 (1900) and *Light v. United States*, 220 U.S. 523 (1911), the Supreme Court explicitly stated that the United States may withhold public lands from sale indefinitely, but in both cases the statement about indefinite retention arguably was *dicta*. The readers of this Paper must draw their own conclusions as to whether the Supreme Court likely would follow *Stearns* and *Light* if squarely presented with the indefinite ownership question.

Proposed Theory for Transfer Based on the Enclave Clause

- The United States may hold and regulate land only to further one of the enumerated powers granted to Congress in Article I, Section 8 of the United States Constitution. *Contra United States v. Vogler*, 859 F.2d 638, 641 (9th Cir. 1988).

As a result of its research, the Subcommittee observes that the weight of relevant decisions by the United States Supreme Court is that ownership of the public lands by the federal government is not limited to those purposes set forth in the Enclave Clause.

Proposed Theories for Transfer Based on the Equal Footing Doctrine

- The high percentage of federal land ownership in the western states violates the equal footing doctrine because the percentage of federal land ownership in the western states far exceeds the percentage of land ownership in the original thirteen states. *Contra United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997).

- Under the equal footing doctrine, title to the public lands passed to each of the western states when they were admitted to the Union. *Contra United States v. Gardner*, 903 F. Supp. 1394, 1400 (D. Nev. 1994).
- Title to all unappropriated lands was automatically transferred from the federal government to state governments when the western states were admitted to the Union because the original thirteen states obtained ownership of unappropriated dry land as an attribute of sovereignty at the time of the Revolution. *Contra United States v. Nye Cnty., Nev.*, 920 F. Supp. 1108, 1114 (D. Nev. 1996).
- Under the equal sovereignty principle, the United States cannot indefinitely retain ownership of the public lands. John Howard et. al, *Legal Analysis of the Legal Consulting Services Team for the Utah Commission for the Stewardship of Public Lands*, 54-72 (2015) (*White Paper*).¹

As a result of its research, the Subcommittee observes that, contrary to arguments that were made against the United States in the *Nye County* and *Gardner* cases, the United States Supreme Court did not suggest in its 1845 *Pollard's Lessee* decision establishing the equal footing doctrine that retention of public lands after statehood would violate a state's entitlement to admission upon equal footing with the original states. Also, the federal courts that have addressed the equal footing argument against continued federal ownership have specifically held that the equal footing doctrine established in *Pollard's Lessee* and applied in some other cases does not apply to public domain lands. The Supreme Court has had ample opportunity to apply equal sovereignty principles in addressing public lands ownership issues, but has repeatedly distinguished property issues as independent from the "limiting or qualifying of political rights and obligations" that may trigger additional scrutiny under such principles.

With the presentation of this Paper, the Subcommittee submits that it has, to the best of its ability, discharged its assignment to produce, through directed and concerted objective legal research and analysis, a document containing detailed, organized, and comprehensive commentary on legal theories for and against the continuation of substantial proprietary ownership by the United States Government of land in the western United States of America.

¹ Available online at: <http://le.utah.gov/interim/2015/pdf/00005590.pdf> (last visited June 30, 2016).