Written by **Joe Wolverton, II, J.D.** on October 7, 2015

Federal Judge Strikes Down New Mexico Law Permitting Removal of Trees

A federal court has overturned a New Mexico state law that protected the power of counties to cut down trees and clear brush on federally controlled forest land without getting the permission of the U.S. Forest Service.

Not surprisingly, in her ruling invalidating the state law, U.S. District Judge Christina Armijo cited the Supremacy Clause, claiming that that constitutional provision prevents states from infringing on federal prerogatives.

"It is well settled that, when state law conflicts with federal law, federal law pre-empts state law," she wrote in a 66-page ruling published September 30.

The lawsuit was filed as a result of an Otero County resolution passed in 2011 that proposed a plan to remove trees from tens of thousands of acres in the Lincoln National Forest in order to decrease the propensity for wildfires.

"Our forest has been overcrowded for too long," County Commissioner Ronny Rardin said after the adoption of the resolution. "We are going to show the world what an acre of forest land should look like."

The U.S. Forest Service then sued the county, claiming that an existing federal statute preempted county officials from implementing the planned thinning.

Judge Armijo's ruling represents an incorrect interpretation of two key constitutional provisions: the Supremacy Clause of Article VI, and Article I Section 8's description of the process by which the federal government can acquire land.

First, with regard to the so-called Supremacy Clause, the fact is that this often-misunderstood mandate does not declare that all laws passed by the federal government are the supreme law of the land, period. A closer reading reveals that it declares the "laws of the United States made in pursuance of" the Constitution are the supreme law of the land.

In pursuance thereof, not in violation thereof.

Alexander Hamilton clearly explained this part of Article VI when he wrote in *The Federalist*, No. 33:

> If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted [sic] to it by its constitution, must necessarily be supreme over those societies and the individuals of whom they are composed.… But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.

> [Emphasis in original.]

In other words, in order for the federal statute cited by the U.S. Forest Service to have supremacy over a competing state, county, or municipal legislation, the federal government would have to point to the particular provision in the Constitution wherein it is granted the authority to act in the designated arena.

This brings us to an analysis of the power of the federal government to acquire and administer land within the sovereign states.

Before reviewing the relevant case law, let's begin the analysis where all such endeavors should begin: with the constitutional text.

After laying out the legislative authority over the federal district (Washington, D.C.), Article I, Section 8 reads in relevant part: "…and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

Let's break that down. First, in order for Congress (the subject of Article I) to exercise authority over land, it has to go through several steps: First, the land has to be purchased; and second, Congress must obtain the consent of the state legislature in the state where the land is located.

Next, this particular clause establishes the exclusive purposes for which this land may be used by the federal government, all which can be summed under the national defense umbrella.

Now, is the U.S. Forest Service (which, by the way, is a department of the executive branch, a branch of the federal government given no authority whatsoever to own or administer land) averring that it has purchased this land after receiving the permission of the New Mexico state legislature and that the use to which this forest is being put has something to do with national defense?

I've read the complaint and none of this is asserted by the federal agency.

For the next part of the analysis, we turn to case law.

In the decision handed down by the Supreme Court in the case of *Escanaba Co. v. City of Chicago*, 107 U.S. 678, 689 (1883), the concept of constitutional interpretation known as the "equal footing doctrine" was established. It declares that the "equality of constitutional right and power is the condition of all the States of the Union, old and new."

Basically, this principle requires that any state joining the union do so on equal footing with the 13 original states. As reported by the legal website Justia, "Since the admission of Tennessee in 1796, Congress has included in each State's act of admission a clause providing that the State enters the Union 'on an equal footing with the original States in all respects whatever.'"

The question of whether the federal government could legally and constitutionally assert ownership over lands located within the boundaries of a state was the central issue in the Supreme Court case of *Pollard's Lessee v. Hagan*, decided in 1845. Justia provides a short, helpful summary of the events:

> *Pollard's Lessee* involved conflicting claims by the United States and Alabama of ownership of certain partially inundated lands on the shore of the Gulf of Mexico in Alabama. The enabling act for Alabama had contained both a declaration of equal footing and a reservation to the United States of these lands.
>
> Rather than an issue of mere land ownership, the Court saw the question as one concerning

> sovereignty and jurisdiction of the States. Inasmuch as the original States retained sovereignty and jurisdiction over the navigable waters and the soil beneath them within their boundaries, retention by the United States of either title to or jurisdiction over common lands in the new States would bring those States into the Union on less than an equal footing with the original States.

This, the court would not permit:

> Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it, before she ceded it to the United States.
>
> To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding….
>
> To Alabama belong the navigable waters and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and *no compact that might be made between her and the United States could diminish or enlarge these rights*. [Emphasis added.]

In other words, regardless of how often the federal government claims authority over land located within the sovereign states and no matter how many federal judges misinterpret the applicable clauses, the Constitution, common law, and relevant Supreme Court rulings prove that no such authority exists.

The remedy? States must reassert their sovereignty and nullify every act of the federal government that exceeds the very narrow and specifically enumerated limits on its power.