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A.B. 158

Data Transmittal Sheet

Honorable Members,
Assembly Committee on Elections, Procedures, and Ethics

As promised, attached is support for my testimony regarding the lack of any Federal municipal authority (police powers) within admitted states.

In ***Pollard v. Hagan*** **44 U.S. 212 (1845)** the United States Supreme Court states several times that, once a state is admitted to the union, the Federal Government has NO municipal authority within the State.

Also attached are copies of U.S. Code Article 43 Sect 1701. and Sect. 1733 which are part of the Federal Land Practices and Management Act (**FLPMA**) and Code of Federal Regulations Title 43 Sect. 4150 et seq. which was written by the Departments of Interior and Agriculture to administer **FLPMA.** You will find that there is a contradiction between what Congress wrote and what the BLM and USFS consider their regulations.

Just to show that State and Local authorities can legally fight the Feds, I have attached the "Unacceptable Species Ordinance" which Custer County Idaho enacted when the U.S. government tried to introduce Grizzly bears to the County.

Thank you for your consideration,

David K. Schumann

David K. Schumann, Vice Chairman,
Nevada Committee for Full Statehood
(450-6359)

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ASSEMBLY ELECTIONS, PROCEDURES, & ETHICS
DATE: 4/29/03 ROOM: 3138 EXHIBIT F
SUBMITTED BY: David Schumann

Subject: Pollard v. Hagan
Date: Wed, 22 May 2002 21:23:29 -0700
From: David Schumann <David.Schuman@verizon.net>
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http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=44&invol=212

U.S. Supreme Court

POLLARD v. HAGAN, 44 U.S. 212 (1845)

44 U.S. 212 (How.)

JOHN POLLARD ET AL., LESSEE, PLAINTIFF IN ERROR,
v.
JOHN HAGAN ET AL., DEFENDANTS IN ERROR.

January Term, 1845

[44 U.S. 212, 213] THIS case was brought up by writ of error from the Supreme Court of Alabama.

It was an ejectment brought by the plaintiff in error in the Circuit Court (State Court) of Alabama, to recover a lot in the city of Mobile, described as follows, viz.: Bounded on the north by the south boundary of what was originally designated as John Forbes & Co.'s canal, on the west by a lot now or lately in the occupancy of, or claimed by, _____ Ezel, on the east by the channel of the river, and on the south by Government street.

The case was similar in its character to the two cases of City of Mobile v. Emanuel et al., reported in 1 How., 95, and Pollard's lessee v. Files, 2 Id., 592. In the report of the first of these cases the locality of the

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ground and nature of the case are explained.

In 1 How., 97, it is stated that the court charged the jury, that 'if the place in controversy was, subsequent to the admission of this state into the union, below both high and low water-mark, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them by virtue of the act of Congress.' And at page 98 it is remarked, that 'the Supreme Court of Alabama did not decide the first point raised in the bill of exceptions, viz.: that Congress had no right to grant the land to the city of Mobile.'

In the case of Pollard's lessee v. Files, it is remarked (2 How., 601) that 'the arguments of both counsel as to the right of the state of Alabama over navigable water in virtue of her sovereignty, are omitted, because the opinion of the court does not touch upon that point.'

In the present case, there were objections made upon the trial below to the admission of certain evidence which was offered by the defendant; but these objections were not pressed, and the whole argument turned upon the correctness of the charge of the court, which was as follows: 'That if they believed that the premises sued for were below usual high water-mark, at the time the state of Alabama was admitted into the union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiff no title, whether the waters had receded by the labor of man only, or by alluvion; to which plaintiff excepted, and the court signs and seals this bill of exceptions.'

Under these instructions the jury found for the defendant, and the Supreme Court of Alabama affirmed the judgment. From this last court the case was brought up, under the 25th section of the Judiciary Act, and the only question was upon the correctness of the above instructions.

Coxe, for the plaintiff in error.

Sergeant, for the defendant in error. [44 U.S. 212, 214] Coxe, for plaintiff in error, said, that the only point presented upon the record grew out of the charge of the court. The plaintiff gave in evidence a patent from the United States for the premises in question; an act of Congress, July 2d, 1836, and an act of 26th May, 1824. Proof was given that the waters of Mobile bay, at high tide, overflowed the premises during all the time up to 1822. This same title has been before the court already and confirmed. 1 How., 95; 2 Id., 591. The act of Congress admitting Alabama into the union is in 6 Laws U. S., chap. 458, p. 380. The 6th section contains a proviso, that all navigable waters shall remain public highways, &c. Unless this section prevents the land described in the patent from belonging to the United States, the plaintiff must recover under it. In 14 Pet., 361, the land in question was situated just like this, and the title was confirmed. So in 16 Pet., 234, 245. In these two cases there is an implied opinion of the court upon the point now under consideration, and the expressed opinion of one judge. 16 Pet., 262, 266. In 2 How., 599, the point was expressly raised by the counsel on the other side. If the land did not belong to the United States, it belonged to nobody. Neither the state of Alabama nor the city of Mobile had any title to it. Many lands are in the same situation, subject to be overflowed, and if they belong to nobody, there is an end to all improvement of them, and they must remain public nuisances. Sergeant, for defendant in error, stated the following points: 1. The plaintiff rested his case entirely upon the act of Congress of the 2d July, 1836, and the patent issued under it, showing no previous or other right. The act and the patent gave him no title to the premises, because, 1st. The United States had nothing to grant or to release; the right, if any, between high and low water-mark being in the state of Alabama, and not in the United States; and if ever in the United States, after Alabama became a state, was passed away and parted with by the act of 1824. 2d. The right and title in and to the premises in question were vested in those under whom defendant claims, by a valid grant from Spain before the treaty of 1803, namely, by the grant of June 9th, 1802. 3d. The grant from Spain, calling for the river as a boundary, maintained the same boundary and followed the

river. 4th. The length of the line referred to in the grant does not limit defendant's right, because it is not stated for the purpose of limiting the right, but only as the then distance to the river; because it actually went into the river, and also because the call for the river controls both course and distance. [44 U.S. 212, 215] 2. The act of Congress could not operate as a release or confirmation, because there was no right or color of right for a release or confirmation to operate upon. 3. The right of the defendant was saved and confirmed by the act of 1824, so as to place it thenceforward beyond doubt or question. (All of Mr. Sergeant's remarks which bear upon other points than the one upon which the opinion of the eourt rested are omitted.) Had the United States any title to land covered by navigable water, after the admission of Alabama into the union? Judge Catron has decided in favor of the United States, but the court has expressed no opinion in preceding cases. The land in question was a part of the shore of the river when Alabama was admitted, and was so when the act of 1824 passed. It was a part of the river. What is a river? Are not its banks included? In the language of courts, there are two distinct parts of a river, its shore and its channel. The shores sometimes extend a mile out. They may be left bare at low tide, but are still a part of the river, either for the purposes of navigation or fishing. Beyond that is the channel. The record describes this land as being bounded by the channel of the river. The question, whether the United States had a title after 1817, was not decided in 14 Pet., nor in 16 Id., nor in Pollard v. Files. It is of little importance to the United States, because free navigation is secured, but of great magnitude to the state. It has been said, that if the decision be against the United States, the shores must remain unimproved. But not so. Their improvement requires local regulation. They are avenues to navigation, and want a nearer guardian than the United States. Other states have the control of similar property. The United States describe the limits of a port in their revenue laws, and if they want a local property they buy it. A state can manage this sort of property better than the United States, who have never done any thing with it. The question is important to the new states, as involving an attribute of sovereignty, the want of which makes an invidious distinction between the old and new states. In 9 Port. (Ala.), 577, there is an outline of the argument upon this subject, and the authorities are cited. See also 589, 591. It is not material for me to examine the power of the King of Spain, because after the transfer in 1803, the country became subject to the common law and statute laws of the United States, except as to previous grants. At page 596, this particular question is examined, and the case in 10 Pet. referred to. It appears, therefore, that the Supreme Court of Alabama studied the subject, and there is no adverse decision in this or any state court. On the contrary, the decision of Alabama has been sustained by this court in principle. A right to the shore between high and low water-mark is a sovereign [44 U.S. 212, 216] right, not a proprietary one. By the treaties of 1803 and 1819 there is no cession of river shores, although land, forts, &c., are mentioned. Why? Because rivers do not pass by grant, but as an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in the state or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land, which may be sold, and the right to them passes with a transfer of sovereignty. 16 Pet., 367, 413, 410, 416.

It follows from this decision, that the rights over rivers became severed from the rights over property. In Pennsylvania, after the Revolution, an act was passed confiscating the property of the Penn family; but no act was passed transferring the sovereignty of the state. The reason is, that no act was necessary. Sovereignty transferred itself, and when this passes, the right over rivers passes too. Not so with public lands. The right which New Jersey acquired in 16 Peters was precisely the right which Alabama claims now. There can be no distinction between those states which acquired their independence by force of arms and those which acquired it by the peaceful consent of older states. The Constitution says, the latter must be admitted into the union on an equal footing with the rest. The dissenting opinion of Judge Thompson (page 419) is not inconsistent with this.

If these positions are right, the United States had nothing below high water-mark. They might have reserved it in the compact with the state. The third article of the treaty with Spain (1 Land Laws, 57,) contains such a reservation. But as it is, the United States have nothing in Alabama but proprietary rights.