

The Federal Land Rights Series Edition 12 - Examining the historical basis for the concept of sovereign immunity and its role in the resolution of easement issues

In several prior editions of this series we have observed the problematic nature of the interaction between federal and non-federal land rights, in the context of both federal easements upon private land and non-federal land rights upon or within federal land (FN 1). In this edition, we extend that line of examination in the land preservation context, focusing on how judicial review and interpretation of the balance of power between federal law and state law can influence or even dictate the outcome of land rights litigation. While state law obviously has a major role to play in virtually all land rights adjudication, both in state and federal courts, the presence of a federal land rights interest in any given location, at either the fee or easement level, introduces complications, most notably with regard to jurisdiction and sovereignty, making it necessary to determine the ramifications of any relevant federal law in each such scenario. The concept of sovereign immunity is not particularly difficult to understand, simply put it represents a legal shield which serves to protect public interests of many kinds from damage or destruction, by making it impossible for such interests to be legitimately assailed, and the justification for that concept lies in the fact that every sovereign is vested with some degree of control, and charged with some degree of responsibility, relating to the protection of genuinely public rights and interests. In effect, sovereign immunity represents open recognition of the fact that all public rights hold value and are worthy of protection, so it would be unwise to leave them exposed to every form of detrimental assault, thus the particular sovereign entity bearing the duty to safeguard any such public rights must be deemed to be immune to antagonistic legal action, to the extent that such immunization is appropriate or necessary to support and perpetuate vital public land rights interests. As we will learn, sovereign immunity has a major impact upon the operation of the laws, rules and principles which typically govern the judicial resolution of disputes, involving land rights as well as other matters, making conflict resulting from collisions of the often divergent sovereign forces of state and federal law inevitable, whenever both of those sources of sovereign authority are in play.

Our featured case, *Virginia B. Smith v City of Westfield*, arose in the venerable colonial dominion of Massachusetts, the cornerstone of New England, where land preservation has deep roots and is taken quite seriously indeed. First incorporated in 1669, Westfield is located in southwestern Massachusetts and is home to about 40,000 people today, but just as in countless other localities throughout our country, some privately owned land situated in Westfield was lost due to non-payment of property taxes during the Great Depression of the 1930s. Thus our story begins in 1939, when through typical tax delinquency proceedings resulting in foreclosure, Westfield acquired a 5.3 acre tract, which was apparently vacant and bore numerous old and attractive trees, making it a highly suitable site for a city park. Use of the land as a park by the public evidently began at that time and continued unimpeded, gradually increasing over the ensuing years, but formalities were not the order of the day, so this tract's status as a de facto city park was left undocumented upon the public record. During the late 1940s, recognizing that the local residents were enjoying their new park, and electing to acknowledge that the townsfolk had effectively appropriated the land for park purposes, the city council officially handed control over this tract to a local body known as the playground commission, thereby enabling public funds to be invested in its upkeep. Then in 1957, by virtue of a city ordinance, the park tract was given an official name, John A. Sullivan Memorial Playground, yet no formal

dedication of the land to park use was deemed necessary. Finally in 1979, Westfield began using federal funds, obtained pursuant to an Act of Congress known as the LWCF (FN 2) to maintain and improve this park site, along with other parks in the vicinity, and presumably the use of such funding to support Westfield parks continued during later years, although the exact amount of that money which was actually invested in this particular park is unknown. In 2011 however, the tract comprising the park site was conveyed by the city to the local school district, and plans to build a school upon it were publicized, producing controversy, then in 2012 local anger and consternation intensified when the site was cleared of its ancient trees in anticipation of construction, leading to the initiation of litigation.

In collaboration with several other city residents, who had long made regular use of the park and cherished the value that it added to their community, Smith filed an action seeking to have the construction project halted and deemed to be illegal, on the grounds that any such activity represented an unauthorized use of land which had very plainly been dedicated solely and exclusively to use as a park for several decades, in the hope of obtaining a judicial decree declaring that the subject property must perpetually remain open space. The critical importance of proper documentation of all land rights established for preservation purposes was starkly displayed, as the trial judge held that the land at issue was not subject to protection as a park and could be used as a school site, because no recorded documentation of any kind, specifying that the contested tract must forever remain open space, existed. Smith and her friends chose to appeal this result, but the Appeals Court of Massachusetts affirmed the lower court ruling, noting that the city's 1939 acquisition of the subject property carried no stipulations or requirements whatsoever regarding potential uses of the land, leaving the city free to use it in any manner at any time, without any regard for its legacy of usage as a park for over 6 decades. In response to Smith's reference to the application of federal funds to the land in contention, the appellate panel noted its agreement with the trial judge that "a federal or state agency is not free to promulgate regulations which conflict with the state legislature" and went on to state that "a federal or state agency's regulations cannot conflict with the ... Massachusetts Constitution ... (and) cannot infringe upon the formalities for (state) constitutional protection ...". Thus the Appeals Court held state law regarding land use, as set forth in the Massachusetts Constitution, to be the sole controlling factor, rejecting the assertion that the 1979 federal grant of funding in support of the use of the relevant land as open space was capable of introducing any additional land rights into this scenario, while holding that federal funding did not legally operate as a formal dedication of the subject property. Although the plaintiff local residents met with defeat once again at this stage of the action, they wisely did not give up and elected to press on, taking this matter to the Supreme Judicial Court of Massachusetts (FN 3).

Upon observing the injustice that was plainly manifested in the city's victory, the Massachusetts Supreme Court (MSC) set out to identify a valid basis for reversal, and upon applying closer scrutiny to the language of the relevant federal law, the LWCF, the 6 MSC Justices readily and unanimously found solid grounds supporting vacation of the challenged judgment. Denying the validity of the proposition that federal law cannot overcome and effectively subjugate state law, which the lower courts had endorsed, the MSC found the language of the LWCF to be the dispositive element, dictating the outcome of the litigation, explaining that "the determinative factor was the acceptance by the city of federal conservation funds ... by doing so the city surrendered all ability to convert the playground to a use other than outdoor recreation without the approval of the Secretary (of the Interior) ... the parcel ... became dedicated once the city

accepted federal funds pursuant to this condition ... the land is protected, judgment should enter for the plaintiffs" (FN 4). The lower court rulings could not stand, because adequate documentation mandating that the park comprised dedicated open space did in fact exist, it was simply non-typical protective documentation, embedded in federal law rather than state law, which had gone unrecognized and overlooked, except by Smith's legal advisors, who were astute enough to understand its controlling significance, because it was not ensconced in any courthouse records. Thus the MSC concluded that the city had wrongly acted upon the false assumption that the land was unprotected and that the trees were subject to removal, failing to recognize the power of federal authority, which always comes into play when federal funding is accepted and put to use at the state, county or city level, while also noting that the lower courts had likewise improperly discounted the force and effect of a dominant federal interest in the land at issue, which both the state and the city had implicitly accepted and adopted, by taking the federal money and putting it to use. In the view of the MSC, the tract in question had in fact been legitimately dedicated, and the public easement thereby produced carried and embodied potent federally mandated stipulations pertaining to its use, including the open space requirement, which the US Congress had expressly approved and linked to all properties that have been supported by the application of LWCF funds (FN 5).

Although the Westfield case obviously transpired in a state court system, rather than the federal court system, and there was no contention over the appropriateness of state jurisdiction, proper conception of sovereign authority was instrumental to the outcome, and diverging judicial views regarding the crucial nexus between state and federal law were clearly on display. Since all of the litigants were initially unaware of the significance of the federal interest in the subject property, which as we have seen proved to be equivalent in terms of legal efficacy to a typical conservation easement, once its presence was recognized, no issues pertaining to sovereignty were argued, so there was no need to expressly address the interaction of sovereign forces in resolving the controversy. Nonetheless, the MSC plainly relied upon the principle of federal law supremacy, cognizant that the federally authorized open space restriction could not be challenged in any legal action at the state level, and that it effectively negated any state law which would operate to the contrary, thereby demonstrating that the relevance and controlling force of federal law is not limited to federal court actions. The MSC determined that the relevant federal land use requirements, having been put in place by the US Congress, could not be ignored or bypassed, either intentionally or unintentionally, by any officials, legislators or judges at the state, county or city level, implicitly acknowledging that the applicable federal law, embodied in the LWCF, was immune to any adverse impact produced by any state laws, rules or regulations. As can readily be seen, by the same token, the MSC deemed the applicable state law, although it stemmed directly from the Massachusetts Constitution, to be subordinate to federal law, and not immune to the impact of federal law. Thus the MSC resolved the matter without any need for federal intervention or involvement in the litigation, by upholding the principle of federal sovereign immunity, even in the absence of any participation by any federal legal personnel, while effectively overruling the application of the corresponding principle of state sovereign immunity, with respect to its purported nullifying effect upon federal law, which the lower courts had seen fit to uphold. The Westfield case therefore underlines the importance of first recognizing the presence of a federal interest in land, whenever such an interest may be present, and then taking appropriate steps to ascertain the true legal significance of that interest, which typically lies in its origin. But was the MSC right about the legal implications of a federal land rights interest and the legal consequences when federal and state law intersect? A

concise tour of the historical development of case law on this subject will provide valuable clarification.

With the expansion of our nation since the colonial era, once prevalent historical conditions have obviously been swept away by vast and dramatic societal changes, and one fundamental aspect of that change was the formation of the post-colonial states, upon land which was previously territory of the US. The gradual conversion of the central and western portions of our nation from territorial ground into sovereign states was among the most significant developments of the Nineteenth Century, because by that means multiple seats of sovereignty came into existence, giving rise to potential conflict between sovereign entities. US sovereignty over the western territories, and along with it sole federal jurisdiction over those western lands, as they came under US control, was never seriously doubted or questioned, but as the western states were formed federal sovereignty faced a mounting challenge. As the decades passed, less and less territorial ground remained, and of course the new states began to create their own laws, effectively exerting state sovereignty in a wide variety of ways and circumstances, sometimes to the exclusion of US sovereignty, so conflicts between state law and federal law, requiring resolution through adjudication, quite naturally began to appear with increasing frequency in the latter portion of the Nineteenth Century. The concept of state sovereignty has never been challenged in principle by the federal government, but tension and friction pertinent to the operation and legal impact of state law, when it proves to be incongruent in some respect with federal law, gradually escalated with the closing of the western frontier, as state sovereignty became applicable all the way from the Atlantic coast to the Pacific coast. In the land rights context, the concept of eminent domain, supporting the condemnation of land or land rights, represents an especially powerful element of sovereignty, so its not surprising that many disputes involving sovereign authority and implicating sovereign immunity have arisen, as we will see, from condemnation scenarios. We will begin as always by taking note of some early cases which provide historical context and perspective upon the progress and development of the law, advancing chronologically to the present day, to observe how the decisions and conclusions of the past provide a foundation for contemporary rulings on this subject, such as the one resulting from the Westfield land use controversy.

In 1812, Fort Armstrong was erected by the US on Rock Island in the Mississippi River, the land represented territory of the US at that date, but 6 years later it became part of Illinois, when statehood arrived in 1818. In 1825 the Secretary of War formally declared the fort to be a US military reservation and in 1835 the General Land Office officially reserved the entire island, preventing federal disposal of any land on the island, but then in 1836 the fort was abandoned and thereafter the island was used by the US only as a site for the storage of ammunition and other military equipment or supplies. Between 1847 and 1851 laws were passed by Illinois authorizing the condemnation of railroad right-of-way by railroad companies, and in 1853, in reliance upon those laws of Illinois, the Railroad and Bridge Company (RBC) created plans to build a railroad bridge across the Mississippi, connecting Illinois to Iowa, which called for bridge abutments to be situated on Rock island. RBC then began construction work on the island in anticipation of successfully obtaining a right-of-way through condemnation, in accord with the process established by the aforementioned state laws, but the US objected to the project and filed an action in federal court, seeking to shut the work down, by preventing RBC from obtaining any land rights on the island. The US maintained that the island plainly constituted federal land and therefore was not subject to condemnation, insisting that the state

condemnation statutes had no application to the island, even though the island was clearly within the boundaries of Illinois, on the grounds that the state had no jurisdiction over the island and no state statute could authorize the condemnation of any federal land. In the course of rejecting the US position and giving RBC a green light to proceed with the project as planned, the federal court, focusing upon the significance of state boundaries, extensively contemplated the questions attending this problematic collision of state legislation with federal sovereignty in the context of land rights:

"Whether a state has power ... to authorize a rail or turnpike road through the lands of the US has not, it is believed, been judicially decided. The first impression would be probably that a state cannot exercise such a power. But first impressions are rarely to be followed on constitutional questions ... bearing on federal and state powers ... the states reserved to themselves all powers not conferred on the general government ... the Constitution provides that Congress shall have power ... respecting the territory or other property of the US ... but ... the proprietary right to lands in a state held by the federal government is, in many respects, similar to that of an individual ... proprietorship of land in a state by the general government cannot ... restrict the sovereignty of the state. This sovereignty extends to the state limits ... state power extends as well over the lands owned by the US as to those owned by individuals ... it is difficult to perceive on what principle the mere ownership of land by the general government within a state should prohibit the exercise of the sovereign power of the state in so important a matter as easements ... the right of eminent domain appertains to state sovereignty ... free from the restraints of the federal constitution ... no reason is perceived why ... the Union should not be subject to it ... these easements have their source in state power ... they are necessary ... and essential to the interests of the people ... of the new states ... the right of eminent domain is in the state ... and the exercise of this right by a state is nowhere inhibited ... the complainants are not entitled to the relief asked." (FN 6).

Thus in 1855, as a titanic clash between the Union and a number of the states loomed on the horizon, a federal court found the concept of federal sovereign immunity to be no obstacle to the exertion of sovereign authority by individual states for purposes of land rights jurisdiction, on the grounds that the creation of a new state effectively terminated the sole authority of the US over the land comprising the state, which had existed when that land was US territory. In so holding, the court cited some of the early federal land grant statutes, accurately noting that the Congress of the US had consistently adhered to a highly liberal policy, fostering the establishment of right-of-way for public purposes upon the federal public domain, and this decision was clearly influenced by the tenor and spirit of such Nineteenth Century federal law, which persisted for several decades, until the Twentieth Century brought more restrictive federal land rights policies into play. This particular court was evidently unconvinced that US sovereignty over all federally held lands survived the creation of a new state, and was therefore unwilling to agree that federal sovereign immunity was applicable to the property at issue, viewing the US merely as a typical title holder, subject to the legislative authority of the state like all other title holders, with regard to the land in question. Although the view judicially expressed here regarding state jurisdiction over all land within state boundaries remains relevant today with regard to certain aspects of the law, and this ruling is quite understandable given the absence of any explicit prohibitions or limitations on state condemnation of federal land emanating from either the US Congress or the US Supreme Court prior to 1855, to the extent that it suggests that state law can adversely impact congressionally authorized federal

land rights this judicial position was destined to be eclipsed, as we shall learn.

As the nation healed in the aftermath of the Civil War, the spirit of federalism gained renewed traction, and in 1875 amidst that climate a case arose requiring the US Supreme Court (SCOTUS) to squarely address a challenge, which was founded upon state law, to the use of eminent domain by the federal government within the boundaries of an existing state. In 1872 Congress had authorized the Treasury Secretary "to purchase a central and suitable site in the city of Cincinnati, Ohio" for the construction of a federal office building, and federal funds to be used for the required acquisition and construction were also congressionally authorized. Certain denizens of the Queen City, including Kohl and an unspecified number of his business associates were evidently the holders of various interests in the land which was federally selected for that purpose, and desiring not to relinquish their property they elected to resist the US acquisition, so the US initiated a condemnation action against them in federal court, where the US prevailed, leading the Kohl group to elevate the matter to the attention of SCOTUS. The Kohl group and their legal counsel took the position that the US had no authority to complete any such condemnation of land within the boundaries of Ohio, without the collaboration or express approval of the state, asserting that the states represented the sole source of sovereign authority for all such land rights purposes and that state courts had full and sole jurisdiction over all such proceedings. SCOTUS was unreceptive to Kohl's position however, and proceeded to succinctly inform the plaintiffs that:

"No one doubts the existence in the state governments of the right of eminent domain ... the right is ... inseparable from sovereignty ... but it is no more necessary for the exercise of the powers of a state government than it is for ... federal government. That government is as sovereign within its sphere as the states are ... its sphere is limited ... but its power ... is as full and complete as is the power of the states over subjects to which their sovereignty extends ... the right of eminent domain exists in the federal government, it is a right which may be exercised within the states ... the US have the power ... it can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner in which it must be exercised. The consent of a state can never be a condition precedent to its enjoyment." (FN 7).

On this occasion, SCOTUS declined to accept the suggestion that use of condemnation by the US to obtain land or land rights, within the boundaries of a state but independent of the state and without any support from the state, was unjustified and represented a violation of the sovereign authority and immunity of the states, putting to rest the notion that the condemnation authority of the US was limited to territorial areas, where no state authority or jurisdiction was applicable. Under this view of the relationship between federal and state sovereignty, the concept of sovereign immunity at the state level is effectively negated by federal intervention, on the basis that no state law can operate to defy the will of Congress, and no property rights held under state law can withstand or resist congressionally authorized federal acquisition efforts, so the sovereign status and authority of each state must be subjugated to the accomplishment of duly authorized goals by federal personnel, such as the mission which triggered this controversy. Here SCOTUS also confirmed, by an 8 to 1 margin, the validity of federal court jurisdiction over all federally initiated condemnation proceedings, eliminating any federal dependency upon state courts to review or approve federal condemnations. This ruling was a harbinger of things to come, in what was still the fairly distant future at this time, but a momentous judicial shift toward the accommodation of federal acquisition efforts had begun,

the individual states would no longer dominate the arena of eminent domain, and in 1888 Congress bestowed its formal approval upon the federal condemnation process, expressly authorizing federal procurement of real estate through condemnation and designating federal district courts as the appropriate venue for all such proceedings (FN 8).

In 1917, 100 years ago as this is written, SCOTUS produced a seminal ruling on the subject of federal law supremacy in the land rights context, setting forth what have become the modern parameters of the relationship between the powers and rights associated with federal sovereignty and those associated with state sovereignty, in the process of approving federal authority to implement a land use permitting system throughout the west, within state boundaries and without the consent of individual states. As the production and transmission of electrical power became vital to our society and our national economy, near the close of the Nineteenth Century, Congress enacted laws pertaining to such activity, and by 1896 use of federal land for such purposes required a federal permit. A series of federal statutes put in place by Congress between 1896 and 1905 consolidated and replaced numerous prior federal statutes and expressly bestowed federal permitting authority, over all uses of federal land for power supply purposes, including existing usage as well as any future usage, upon the Executive Branch, marking the origin of the permitting authority entrusted to the Departments of Agriculture and Interior in this field (FN 9). A century ago however, several western states asserted full jurisdiction and a right of sole control over all existing power works and structures within their boundaries, although many such improvements were situated within protected federal lands, on the basis of state sovereignty, so the Attorneys General of Colorado, Idaho, Nebraska, Nevada & Utah all formally objected to the federal permitting process, charging that the rules associated with that process comprised an unconstitutional violation of the sovereign status and power of their states. SCOTUS was thus required to address their assertion that power providers in their states need not submit to federal permitting authority, and in the course of upholding a lower court ruling against them, requiring them to accept and acknowledge the legitimacy of federal authority within their respective states, the High Court expounded that:

"The first position taken by the defendants is that their claims must be tested by the laws of the state in which the lands are situate, rather than by the legislation of Congress ... they say that lands of the US within a state ... are subject to the jurisdiction, powers and laws of the state ... to the same extent as are similar lands of others. To this we cannot assent ... the power of Congress is exclusive ... only through its exercise in some form can rights in lands belonging to the US be acquired ... from the earliest times, Congress by its legislation, applicable alike in the states and territories, has regulated ... the use by others of the lands of the US ... and controlled the acquisition of rights of way over them ... the inclusion within a state of lands of the US does not take from Congress the power to control ... and to prescribe ... rights in them ... a different rule ... would place the public domain of the US completely at the mercy of state legislation ... the defendants ... have been mistaken, and are occupying and using reserved lands of the US without its permission and contrary to its laws." (FN 10).

The era of intensively regulated land use had dawned, going forward conflicts involving federal lands would increasingly be centered upon issues relating to regulatory authority and regulatory jurisdiction, as elemental attributes of sovereignty. Moreover, judicial resolution of such conflicts would typically revolve around the power of Congress, as the ultimate source of all

federal land rights authority, frequently supporting federally enacted measures of various kinds while inexorably eroding and marginalizing the efficacy of sovereign authority and immunity at the state level under such circumstances. Consistent with its ruling in the Kohl case 42 years earlier, again on this occasion SCOTUS was unwilling to allow the operation of the concept of sovereign immunity at the state level to block the implementation of congressionally authorized federal programs or activities involving land rights. In addition, once again at this juncture SCOTUS indicated that state boundaries are incapable of operating as a limiting factor upon federal authority in the land rights context, this time with respect to federal regulatory authority, just it had with regard to federal land acquisition authority in 1875 (FN 11). Emphasizing that all federal land rights lie within the dominion and control of Congress, by reiterating that Congress is constitutionally authorized to enact extensive legislation pertaining to both federal lands and their usage, which is fully binding upon all parties, including the sovereign states, here SCOTUS established a judicial course that was destined to be both staunchly adhered to and substantially fortified in subsequent decades.

During the 1930s a direct confrontation between state and federal land acquisition plans developed in Minnesota, which played out as a condemnation battle, leading to a power struggle with historically significant results, vividly demarcating the limits of state and federal authority in the land rights context. A 1926 Act of Congress authorized the creation of the Wild Rice Lake Indian Reserve along with the federal acquisition of about 4450 acres for that purpose, which included some land that was owned by Minnesota along with some private land, but federal acquisition efforts were hindered and impeded by local resistance. Then in 1929, the Minnesota Legislature took action, authorizing the acquisition by Minnesota of all of the land in the subject area that was not already owned by Minnesota, to facilitate the creation of a "public hunting ground and game refuge", to be administered by Minnesota under state law, rather than by the US, which comprised a distinctly preferable option in the eyes of the local residents. In 1934 Minnesota filed a condemnation action for that purpose, and it readily proceeded to successful completion in a state court, making Minnesota the owner of the entire area that had been outlined and targeted for federal acquisition by Congress in 1926. In response, Congress amended the 1926 Act in 1935, expressly authorizing the US to condemn the same land which Minnesota had just successfully condemned the previous year, and in 1939 the US proposal to condemn the Minnesota property was approved by a federal court. Minnesota took the position that the land in contention had been devoted to a legitimate public purpose by the state, and therefore was not subject to condemnation by the US, because as a sovereign state with vital public trust obligations Minnesota was immune to any such federal acquisition efforts, arguing that the US had no right or authority to take land in any state which was held by the state in a public trust capacity for a valid public purpose. Expressing a contrary view however, while citing the 1875 Kohl ruling, the federal judge lucidly clarified the law:

"... eminent domain is an attribute of sovereignty ... inseparable from sovereignty ... the US can only exercise ... powers conferred upon it by the Constitution ... Acts of Congress ... find support in constitutional power ... the attempt of the government to acquire a Reserve for the Indians ... is within the scope of constitutional power ... there is no reasonable doubt as to the authority of Congress to proceed by appropriate steps to obtain such lands ... obtaining the land as a Reserve for Indians ... comes within the purview of federal power ... in its activities in furtherance of a federal power the US is supreme and the state must give way ... the US is asserting its sovereign power ... there is

no question that this power is superior to that of the states ... the US being supreme. The laws of the latter are supreme everywhere, in the states as well as in the territories ... the federal government ... carrying out this federal power, cannot be restricted by the state ... the argument ... that the states have the ... highest dominion in the lands comprised within their limits, and that the US have no dominion in such lands, cannot avail to frustrate the supremacy given by the Constitution to the government of the US in all matters within the scope of its sovereignty ... the US ... may fully carry out the objects and purposes of the Constitution ... eminent domain ... must be received as a postulate of the Constitution ... the US is invested with full and complete power to execute and carry out its purposes." (FN 12).

A clearer or more emphatic exemplification of the concept of federal law supremacy in the context of the acquisition of land and land rights for specific federally sanctioned purposes could hardly be set forth. Thus even prior to the wave of nationalism brought by World War II it had plainly been established that state sovereign immunity was no barrier to full federal control over all land lying within the reach of Congress, with respect to both ownership and usage thereof. Because the proposed Reserve was congressionally authorized, no arguments put forth by Minnesota could prevent its creation, even though a federal taking of land owned by the state, completed contrary to the will of the state, was necessary to accomplish that goal, because no state has any power to resist the will of Congress in the realm of land rights. Interestingly, although the federal judge who authored this opinion predicated his statements regarding the primacy of congressional decisions, such as the creation of this Reserve, and the fundamental superiority of all congressional directives over the laws and the property rights of the individual states, primarily upon the authority of Congress to regulate commerce, appellate review produced a more broadly based castigation of the state's position. Neither the fact that a sovereign state was the holder of the federally condemned title, nor the fact that the state had put the land to a legitimately meritorious public use, held any relevance, in the eyes of the Eighth Circuit Court of Appeals, given the fact that state control over the contested land stood in direct defiance of Congress. In disposing of Minnesota's appeal, the Eighth Circuit declared that "there is no interference with the state's sovereignty by the US if the taking of the lands represents a valid exercise of congressional power", while deeming the presence or absence of the element of commerce to be "unimportant", and concluding simply that the states "must bow before the superior power of Congress" with regard to all such matters (FN 13).

Arguably the most important aspect of sovereignty, with respect to land rights, lies in the fact that either fee title held by a sovereign or control over land rights by a sovereign, often through ownership of an easement, typically signifies the presence of a public interest, invoking the public trust capacity of that sovereign entity, along with the core duty of that entity to serve as a protector of such rights. Throughout the Twentieth Century, a myriad of issues relating to the extent and limits of public trust protection under the law arose in the land rights context, forming a major theme in land rights adjudication. Only rarely in the last several decades has SCOTUS accepted cases centered upon specific easements, but in 1984 a conflict focused upon an easement, which implicated public trust issues, made the grade and was decided by SCOTUS. When the war between the US and Mexico ended in 1848, the land which Los Angeles now occupies became part of the US, by virtue of the Treaty of Guadalupe Hidalgo, including the Venice Beach area, which obviously comprises immensely valuable real property today. That area first came under private ownership in 1839, being part of a 14,000 acre Mexican land grant, and by the 1980s title to some of the tidal beachfront land within that grant was in

the hands of Summa Corporation. Pursuant to that treaty, an 1851 Act of Congress set forth a process through which any title that originated in a Mexican land grant could be formally confirmed and secured, to facilitate conclusive title determination. In 1852 the Mexican owners of the relevant land filed a claim under the 1851 Act, identifying the Pacific Ocean as the west boundary of their tract, then in 1873 a US patent was issued to them, confirming their title thus defined, and that patent constituted the root of the title held by Summa. California insisted however, that because it historically comprised tideland, a substantial portion of the Summa property was subject to an easement, held by the state in its sovereign stewardship capacity, enabling California to limit and control all use of that land, which was occupied by a tidal lagoon. The Supreme Court of California agreed, and held that as a sovereign state, constitutionally vested with powerful rights authorizing state control of all tidal lands, in accord with both federal and state law, California could not be denied the easement, but with unusual brevity and unanimity SCOTUS explained why the California position was baseless and no such easement existed in the subject location:

"Respondents (California) argue that ... a patent issued under a federal statute raises only a question of state law ... and ... the 1851 Act did not raise a substantial federal question ... but ... the provisions of the 1851 Act operate to preclude California from asserting its public trust easement ... The obligation of the US to respect the property rights of Mexican citizens was ... an international obligation ... the federal government of course cannot dispose of a right possessed by a state under ... the US Constitution ... but ... patents confirmed under the authority of the 1851 Act were issued pursuant to ... the United States ... international duty with respect to land ... the 1851 Act was intended to implement this country's obligations under a treaty ... California argues that its public trust servitude is a sovereign right ... but ... even sovereign claims, such as those raised by California in the present action, must like other claims, be asserted in the patent proceedings or be barred ... California cannot ... assert its public trust easement ... regardless of ... its sovereign capacity ... the judgment of the Supreme Court of California is reversed." (FN 14).

Until enlightened by SCOTUS, California officials were evidently unable to comprehend that no land rights of any kind upon the tideland in question had ever vested in the state, because the relevant American legal principles pertaining to the formation of a public interest in tideland applied only to tidelands of the US, and had no application to any foreign tidelands. The rights of the Nineteenth Century patentees, and of Summa as well, were founded in Mexican law, not American law, so the 1873 federal patent was powerless to either alter their existing land rights, which predated the federal acquisition of the contested coastal land by US conquest, or create any new land rights. That particular patent was merely a confirmatory document, issued under a specific congressional directive, targeted exclusively at providing title verification, so it represented neither the origin of any land rights nor an attempt to supersede Mexican law, which allowed full private control over tideland, with American law. Because neither the Act of 1851 nor the relevant patent stemming from it communicated any intention to either create or reserve any public land rights, or to generate any rights whatsoever at the state level, and the federal Act dictating the legal force and effect of the patent was focused solely upon the perpetuation of private land rights, the patented tract was never encumbered with any public burden at all. Once again, proper interpretation of the meaning and legal effect of an Act of Congress controlled the outcome here, effectively rendering the sovereign status of California nugatory and irrelevant, emphasizing that the sovereign powers of each state end and dissolve

when they collide with congressional authority over the fate of any land which comes within the control of the US. During the modern era of intensified federal land use policy, which began in 1976, cases such as this one, demonstrating the importance of accurate knowledge of the historical origin of all land rights, while also poignantly illustrating the controlling force of the intent embodied in Acts of Congress involving land rights, became decidedly more prevalent, as efforts to preserve the natural features, attributes and habitat with which our national landscape is endowed accelerated (FN 15).

Land patents issued by the US are widely viewed by land rights professionals as the official point of origin of any given private title that is situated upon land which was carved from the federal public domain, and in accord with that premise it is generally assumed to be sound practice to treat the rights that are expressly cited in a patent as the beginning point of any analysis of the presence or absence of land rights pertinent to any such property. As the Summa case reveals however, that premise is not universally applicable, because every federal patent represents nothing more and nothing less than documentation of the will of Congress, making it essential to fully understand the specific federal statutory authority under which any given patent was executed, in order to properly evaluate its legal ramifications with regard to the existence of land rights in any given location. The presence of federal easement rights in Florida came into question during the early 1990s, leading to conflict and litigation which parallels the Summa case, reinforcing the importance of high diligence when performing professional land rights evaluations. In 1941, Florida granted an easement to the US, to facilitate the construction of the Atlantic Intracoastal Waterway, authorizing the US to place dredged material upon the land bounding that waterway, then in 1953 Florida conveyed the land along the waterway to an unspecified private party or entity. However, the land burdened by the easement was not patented to Florida by the US until 1970, and that federal patent made no reference to any existing easements. Circa 1990, the federal easement was put to use by the US, and the owner of the subject property, who had obtained title insurance, quite naturally protested to the title company, requiring the company to take on the liability for the existence of the easement, since the relevant title policy failed to cite the existence of any such easement. In an effort to dodge that liability, the title company filed an action in state court, asserting that no federal easement existed, because Florida did not yet own the subject property when the easement was granted in 1941 and was therefore legally incapable of creating any easement in that location at that date. Additionally, the title company maintained that even if the easement had once existed it had been destroyed by the legal force and effect of the Florida Marketable Record Title Act (MRTA) but both of these contentions were rejected at the trial court level, leading the company to appeal, thus the Florida Court of Appeals was required to address the impact of state law upon federal land rights, in the course of very concisely upholding the title company's lower court defeat:

"Title to the subject property vested in Florida in 1850 by virtue of the Swamp Land Act (9 Stat 519) ... Florida's title ... became perfect as of the date of the grant ... it was not until 1970 that the US ... issued to Florida a patent ... however ... the state conveyed the subject perpetual easement to the US ... which easement was recorded in the public records of Indian River County in 1942. In 1953 the state ... conveyed a fee simple title ... without any reservation or restriction pertaining to the easement ... the patent issued in 1970 was an administrative action, required by the Swamp Land Act, to perfect the state's title, and operated merely as record evidence of the title, and added nothing to the

title itself ... the patent did not in law convey any title or appurtenances to the property that had been conveyed by the Act of Congress, but it did perfect the state's title, which had vested in 1850 ... issuance of the patent, without reservation of the US easement rights, did not operate to release or relinquish such easement rights ... for more than thirty years the US had not used the easement ... it was appellant's position ... that the US rights ... were extinguished under ... Florida Statutes, due to its nonuse for the statutory period ... to apply the provisions of the MRTA to extinguish the property interest of the US would violate ... the US Constitution." (FN 16).

The title company had adequate notice that an easement existed in the subject location, since it was recorded in the typical manner, decades before the title insurance policy was created, yet the company foolishly discounted the easement's legal significance, and either ignored it when compiling exceptions to the insurance policy, or perhaps simply failed to even discover its existence, because it predated the US patent, operating on the false assumption that the patent marked the inauguration of the title obtained by Florida, so no easements granted by Florida prior to 1970 could be valid. Once the title personnel were alerted to the validity of the easement however, presumably by federal personnel who explained that its origin was legitimate, under the Act of 1850, despite predating the 1970 patent and being uncited in that document, driven by desperation the title company took up the clearly untenable position that the Florida MRTA had eliminated the easement. The title company lost, and was required to bear the liability for the deficiency of the title policy it had created, because the title personnel failed to recognize that the legal force and effect of any federal patent is entirely dependent upon the particular federal statute which represents the congressional authorization providing the foundation for that patent, and additionally because they were apparently unaware of the invulnerability of federal land rights to destruction or impairment as a consequence of any state legislation. Thus the title personnel learned that an easement created by a patentee before the land was patented can be legally valid, because patent dates do not always mark the origin of title, and they also learned that neither the Florida MRTA nor any other Florida legislation was capable of negating any federal easement, based upon the constitutionally endowed sovereign immunity of the US, so the 1941 easement still existed, despite having gone unmentioned in both the 1953 state fee grant and the 1970 federal patent. As can readily be seen, in full accord with the ruling of SCOTUS in the Summa case, and the MSC ruling in the Westfield case as well, this pronouncement emanating from a state court demonstrates judicial recognition at the state level that neither a state's sovereignty nor its legislative authority has the capacity to abrogate any existing land rights which originated through an exertion of congressional authority (FN 17).

While the case just reviewed plainly illustrates the power of an easement acquired by the US, making the federal government the holder of the dominant estate, our next case features a scenario in which the easement at issue is not federally held, yet it has a connection to federal law, directly analogous to the Westfield scenario. The Youngstown & Southern Railroad (YS) owned a fee railroad right-of-way of unspecified width, which passed through Boardman Township, in Mahoning County, Ohio, and which contained multiple tracks used in conducting rail service between Ohio and Pennsylvania. In 1988, YS deeded a portion of that right-of-way to the Boardman Supply Company (BSC) which owned a parcel of unspecified size adjoining the right-of-way, thereby enabling BSC to expand its facilities and to build a new loading dock in the deeded area in 1994. Evidently unknown to the parties however, one of the existing railroad tracks was located within the deeded area, and YS continued to use that track to serve the nearby property of the Columbiana County Port Authority (CCPA) although no easement for

that purpose was reserved in the 1988 deed from YS to BSC. In 1996, all of the assets of YS were acquired by Railroad Ventures Inc. (RVI) and that transfer of assets was approved in 1997 by the Surface Transportation Board (STB) which under federal law, as the successor to the Interstate Commerce Commission (ICC) is required to review all such conveyances, but the STB refused to approve a proposal made by RVI to shut down the rail operations, so use of all of the tracks continued. In 1998, the BSC property was condemned by the Boardman Township Park District (BTPD) and when it was discovered that the railroad track serving the CCPA property was within the boundaries of the condemned property BTPD threatened to halt railroad service to CCPA, charging that no easement protecting the track which served CCPA existed, so BTPD had the right to remove that track. In 2001, pursuant to an STB order, RVI deeded all of its assets to CCPA, making CCPA the owner of the railroad right-of-way, but BTPD still refused to acknowledge the existence of any easement protecting the track in question, so CCPA filed a federal action seeking a judicial declaration that CCPA held a track easement crossing the BTPD property, in order to prevent the removal of that track. After agreeing that CCPA did in fact hold a track easement upon the BTPD property, the federal judge went on to very fully and lucidly explain the role which the presence of a federal regulatory interest played in shielding and perpetuating that easement, making it impregnable to the operation of state law:

"1988 ... YS conveyed a parcel of land to BSC ... the track was, and today is, apparent on the premises ... BTPD acquired the real estate interests previously held by BSC ... the track in question is subject to STB jurisdiction ... being used solely for interstate operations ... prior approval of the ICC would have been required before BSC could have lawfully acquired the track in 1988 ... RVI filed a petition with the STB, asking that it be ... relieved of its service obligations ... STB ordered that RVI shall convey to CCPA all land, track, and related material and property interests ... BTPD claimed to own the track ... through the appropriation process ... the STB has definitively ruled that ... the track has never been abandoned ... if the court were to bar CCPA from operating the track in question ... it would impermissibly intrude on ... STB authority with respect to the abandonment process ... federal preemption is rooted in the Supremacy Clause ... there is no doubt concerning the ability and intent of Congress to exercise its authority under the Commerce Clause to preempt state laws ... in 1980 ... by passing the Staggers Rail Act ... Congress expressly provided that states could only regulate if they applied federal standards ... with the enactment of the Interstate Commerce Commission Termination Act (ICCTA - 1995) Congress codified an explicit preemption clause ... the ICCTA has preempted all state efforts to regulate rail transportation ... Congress granted the STB exclusive jurisdiction ... to the exclusion of the states ... BTPD may not subject to state law property that Congress specifically put out of reach ... state law is preempted to the extent that it conflicts with federal law by standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ... because the state appropriation process interferes and conflicts with ... preservation of rail service it is preempted ... BTPD lacks any legal or equitable basis for claiming ownership of the easement ... the statutory condemnation authority granted to BTPD is preempted by federal law, specifically the ICCTA ... appropriation of the easement ... violates the US Constitution." (FN 18).

Harkening back to the 1855 Railroad Bridge case, we can readily see that the judicial perspective regarding rail transportation obviously changed dramatically during the Twentieth Century, and quite naturally so, given the rapid progression of modern events, along with numerous key

congressional enactments, bringing ever deeper and stronger federal involvement, and of course the principles seen in operation here apply very broadly, to a myriad of comparable circumstances, reaching far beyond the railroad context and beyond the transportation sector. The BTPD condemnation of the BSC property had no legal impact whatsoever on the existing railroad right-of-way because the condemned entity, BSC, never acquired or held any interest other than fee title to a portion of that right-of-way, since it was a federally protected right-of-way, which YS was therefore incapable of diminishing or disabling, by conveying any right of total control over it to anyone. Thus the original right-of-way survived the 1988 fee conveyance from YS to BSC and continued to comprise a federally regulated legal burden upon the BSC parcel, regardless of whether BSC or any other parties were ever cognizant of its presence or its true legal status. The full width of the right-of-way was necessarily and axiomatically retained in the form of an easement in 1988 by YS, regardless of the knowledge or intent of YS in conveying part of that right-of-way to BSC in fee, because neither of those entities had any authority to eliminate any existing federally controlled land rights interest, so the easement in contention legally passed, along with all of the other interests of YS, through RVI to CCPA, even if none of those parties understood its legal significance. As the court determined, it was simply not within the power of any of the relevant entities, although all of their activities, most notably including the condemnation proceedings, were carried out properly, under the authority of state law, to disturb the federally protected land rights associated with the railroad right-of-way, in this case not because it signified a land rights interest of federal origin, but because all such right-of-way, without regard for the legal source of its creation, exists under the exclusive control of federal regulatory authority, per the will of Congress, as stipulated by the ICCTA and implemented by the STB (FN 19).

Federal intervention in the railroad segment of the transportation sector is not unique of course, all forms of interstate travel have come under federal jurisdiction to some extent in the modern age, and our concluding case arises in the aviation context, yet again as a consequence of the legal implications of a federal presence combined with the use of eminent domain. As this case emphasizes, highly astute legal evaluation of the level of risk to any proposed project, presented by legal issues associated with federal authority, is indispensable, and in its absence even the brightest ideas can be derailed, when the impenetrable wall of federal sovereign immunity is met. Silverwing at Sandpoint, LLC (SSL) began as a brilliant and potentially very lucrative business venture in 2006, when SSL acquired land adjoining the boundary of a public airport operated by Bonner County and located in Sandpoint, an attractive resort destination situated in the Idaho panhandle. SSL then developed a construction plan, targeted at serving wealthy aviation enthusiasts, by providing private aircraft hangars along with luxurious residential quarters in close proximity to the airport. The key legal element of the SSL plan was direct and unlimited access back and forth across the airport boundary, between the airport tract and the SSL parcel, and the SSL project team knew that the project would collapse unless a suitable access easement were to be created and approved by all relevant authorities. In 2007, acting under their authority as legal entities of the state, and in full accord with state law, the city and county gave their approval to the SSL project, and supported it by providing the necessary access rights, at which point SSL hastily commenced construction, in the expectation of federal approval, investing millions in erecting buildings and a long commercial grade taxiway, connecting the SSL site to the airport's runway system. Federal approval was not forthcoming however, in 2008 the Federal Aviation Administration (FAA) nixed the SSL plan and informed the county that the airport could be shut down unless the county pulled out of its partnership

with SSL and took alternative action. Acting under FAA guidance, in 2011 the county informed SSL that the county had decided to condemn the SSL property, in order to bring the airport back into compliance with federal regulations. In response, SSL elected to institute a federal action, charging the county with multiple violations, while arguing that the proposed taking was unjustified. In the course of addressing the issues raised by SSL, a federal judge set forth the relevant aspects and parameters of federal law, as they currently stand:

"Silverwing argues that ... federal preemption does not extend to local decisions about siting or expanding airports; essentially arguing that the county controlled the decision to expand the airport, not the FAA ... it is well established that Congress has the power to preempt state law ... the Supremacy Clause of the US Constitution ... declares that the laws of the US shall be the supreme laws of the land, thereby invalidating state laws that interfere with, or are contrary to, federal law ... federal law ... is fundamentally a question of congressional intent ... congressional intent is the ultimate touchstone of preemption ... when Congress adopts a statute ... the scope of federal preemption is determined by the statute ... the Federal Aviation Act has no express preemption clause ... implied preemption applies ... Congress has indicated its intent to occupy the field of aviation safety ... the Federal Aviation Act is ... a uniform and exclusive system of federal regulation ... Congress intended to control airspace management ... in passing the Federal Aviation Act in 1958 ... under which the Secretary of Transportation is charged with ... maintaining safety ... in air commerce ... this power extends to ... airport runways ... thus regulation (under state law) of taxiways and runways is preempted by federal law ... Silverwing's claim for breach of the covenant of good faith and fair dealing is preempted by federal law ... Silverwing raises taking without compensation ... in order to prevail ... a plaintiff must prove ... deprivation of a right guaranteed by the US Constitution or a federal statute ... Silverwing has not suffered a deprivation of constitutional rights ... the county actions were motivated entirely to comply with FAA regulations ... the claims brought by Silverwing in this case fail, as a matter of law, because ... the county's efforts to bring the airport back into compliance with FAA regulations are not unconstitutional acts." (FN 20).

The fatal point, which doomed the SSL venture, resided in the fact that the SSL access easement produced unsafe airport operating conditions, in the eyes of the FAA personnel, so it had to be eliminated, regardless of the fact that it was legitimately created in all respects under Idaho law. Thus even the sovereign status of Idaho, Bonner County and Sandpoint, as governmental entities, was insufficient to prevent the elimination of the SSL easement, because sovereign immunity at the state level cannot prevent the imposition and operation of federal law, when land rights that are valid under state law stand in defiance of any congressional objective, such as the enforcement of aviation safety standards in this instance. The fact that the county personnel acted under federal directions, emanating from a congressionally authorized source, specifically the Secretary of Transportation, who has the capacity to order the implementation of FAA regulations at his or her discretion, effectively converted the county personnel into agents of the federal government, so in making their decision to utilize the condemnation option to resolve the problematic situation they were protected from liability by federal sovereign immunity. Conversely, all of the agreements and transactions which were made by and between the project partners, including the city and the county, despite being sovereign entities at the state level, were unprotected by the sovereign immunity of Idaho, so all of their arrangements and plans, including those involving easements or other land rights, were exposed to destruction

through exertion of federal regulatory authority, and thus were subject at all times to termination by the FAA. In addition, as can readily be seen, the fact that the SSL property was separate and distinct from the public airport property was insufficient to deprive the FAA of jurisdiction over the adjoining SSL land, showing once again, analogous to the *Columbiana* case, just previously reviewed, that boundaries of title very often do not represent or equate to boundaries of jurisdiction in the federal context, because Congress is constitutionally authorized to exert broad jurisdiction, unconstrained by either public or private property boundaries. And lastly of course, in stark contrast to the *Columbiana* case, here we have observed the destructive force upon easements which a federal presence can introduce, as opposed to the protective power which the presence of a federal interest brought into play to rescue a threatened easement in the *Columbiana* scenario, emphasizing that federal law can interact with easements of all kinds, either beneficially or adversely, even in locations where the federal interest does not represent any form of land rights.

As we have observed, when objectively viewed in historical context the MSC ruling in the *Westfield* case, illustrating the impact of a federal interest in land upon the application of state law, and thereby highlighting the fundamental dominance of such an interest over any non-federal rights or interests in the same land, dovetails with the modern judicial conception of federal law supremacy. Under this view, founded upon the supreme power and ultimate control over all land rights, which was relinquished by the individual states and constitutionally vested in Congress, although sovereign immunity certainly exists at the state level and can be exerted by the states in many instances, it shields neither the states themselves, nor any party or entity operating under state authority, from the irresistible force of federal authority, when state legislative enactments or other actions are found to be at cross purposes with any federal mandate bearing the approval of Congress. As the cases noted herein reveal, easements that are associated in any respect with interstate activities, such as those serving the utility and transportation sectors, along with those easements which were created for environmental protection purposes in connection with any federal program, often represent an easily overlooked federal land rights interest. Therefore, properly ascertaining the scope or legal efficacy of such easement rights typically requires resolution which accords with federal law rather than state law, making the importance of learning how to recognize and identify the presence of a federal interest in any given location a lesson of great value. The role of federal funding in the formation of federal land rights interests is enormous, the presence of any easement, public or private, upon which federal funds have been invested, either for purposes of its creation or its use, brings federal jurisdiction and federal sovereign immunity into play, with powerful implications, potentially sweeping state law aside, as we have seen. The presence of federal rights, by introducing some degree of federal control over land use, can create issues in some circumstances, but can also provide immense benefit, since federally endorsed protection brings the highest possible level of durability to land rights interests of every form, by disabling the potentially deleterious operation of state law upon such rights. So in the end, counterintuitive though it may appear, the uses to which a modest plot of typical urban parkland in Massachusetts can or cannot be put is, in this instance, as the MSC observed, a matter requiring federal attention and approval, since as the MSC wisely recognized, the real power to either enforce or decline to enforce the *Westfield* open space easement lies solely in federal hands.

Footnotes

1) Edition 2 (Summer 2015) reviewed the Otay Mesa case, in which a federal easement impacted the use of private land along the border of California and Mexico. Edition 3 (Autumn 2015) covered the case of *Rodgers v Vilsack*, in which controversy arose over the implementation of a conservation easement acquired from a private property owner in Missouri under a federal program. Edition 8 (Winter 2017) examined the *Katzin* case, which resulted from federal efforts to protect a substantial portion of an island representing US territory in the Caribbean Sea. Conversely, in Edition 4 (Winter 2016) we observed the current status of a long running RS 2477 conflict in Utah, noting how existing public rights crossing federal land can give rise to complex legal issues, Edition 7 (Autumn 2016) discussed issues associated with federal land acquisitions for protective purposes in the context of our National Park system, and in Edition 11 (Autumn 2017) we took note of the broad array of problems confronting a California land owner who sought to secure and confirm private access rights through federal land. These and other prior editions of this series of articles, all of which were published by *Multibriefs for NSPS News & Views*, are available in pdf form, free of charge through the web by means of a typical keyword search, and all prior articles and other published legal materials cited herein are also available directly from the author of this series at no charge upon request.

2) The federal Land and Water Conservation Fund Act of 1965 (78 Stat 900). Like other forms of federally authorized funding, financial assistance emanating from the LWCF was not free money with no strings attached, the LWCF contained potent language stipulating conditions, requirements and limitations linked to the acceptance and use of the federally dispensed dollars.

3) See 90 Mass. App. Ct. 80 (8/25/16) for the full text of the Appeals Court opinion and 478 Mass. 49 (10/2/17) for the corresponding Supreme Court opinion. Notably, the Appeals Court opinion contains a compelling and unusually cogent concurrence, in which it is suggested that the presence of federal land rights, attached to the grant of federal funding derived from the LWCF, may represent a matter of some importance and may be worthy of further consideration. Although the author of the concurrence apparently did not recognize the full legal impact of that federal interest, and therefore chose to concur rather than dissent, he nonetheless performed a highly valuable service by composing a particularly insightful concurrence, which was openly acknowledged by the author of the subsequent Supreme Court opinion, directing closer judicial attention to the fact that both the trial court and the Appeals Court rulings stood in conflict with federal law, as defined in the LWCF. In addition, it is certainly noteworthy that the Supreme Court opinion contains an excellent discussion of the subject of dedication, focusing upon common law dedication and the prior public use doctrine, with particular relevance to land preservation efforts, conservation easements, and the role of dedication with respect to the creation of protective interests in land. The interesting and important topic of dedication is not pursued or expanded upon herein however, for the sake of literary economy, so the many aspects of dedication and its legal implications are reserved as a separate topic, potentially to be explored in a future article in this series.

4) The relevant language of the LWCF, composed and duly adopted under congressional authority, which was noted and deemed to be decisive by the MSC, indicates that: "The purpose of the Act is to assure outdoor recreation resources ... for the benefit and enjoyment of the American people ... the Act imposed several key requirements on states seeking LWCF funding

... the LWCF funding process ... mandated that no property acquired or developed with assistance under this section shall ... be converted to other than public outdoor recreation uses without the approval of the United States Secretary of the Interior ... the grant (of federal funds from the LWCF) was expressly conditioned on compliance with the Act ... conversion could proceed only with the approval of the Secretary ... land acquired or developed with LWCF funds becomes protected under ... federal regulations and cannot be converted from intended use without permission from the National Park Service and Executive Office of Energy and Environmental Affairs ... the restrictions imposed by the Act on the management of land acquired or developed with LWCF funding remain in full effect." Thus the MSC outlined the specific text within federal law which controlled the rights of all of the parties in this scenario, highlighting the fact that it stood as a mandate enacted by the Congress of the US, and emphasizing that such congressional directives must be adhered to at the state, county and city levels, as legitimate exertions of federal authority, effectively negating any authority or immunity associated with the sovereign status of an individual state, such as Massachusetts in this case.

5) Despite the major judicial victory scored in 2017 by the plaintiffs in the Westfield case, as this article is being finalized at the dawn of 2018, the ultimate fate of both the controversial Westfield playground and the proposed school building remain uncertain. Assuming that a school is genuinely needed in the relevant area and the construction must proceed, it is still entirely possible that the school will eventually occupy the former park, despite the apparent triumph of Smith and her associates. The US could potentially facilitate the proposed school construction project, either by quitclaiming the federal interest in the subject property, or by simply disdaining to enforce that federal interest. Alternatively, another site for the school, presumably one unburdened by any federal interest, could be selected and utilized for that purpose, bypassing any need for federal approval of that construction project. However, even if the proposed school is either never built or is built elsewhere, the future use and condition of the former park tract nonetheless appears to be highly questionable, since there is no indication that there has been any agreement or stipulation regarding restoration of the lost trees, so the troubled tract could remain a scarred and barren wasteland, as it currently stands, for quite some time, and any future proposals regarding its use could very well generate further conflict.

6) See *United States v Railroad Bridge* (27 F Cas 686 - 1855). Federal personnel were convinced that the proposed bridge would obstruct river traffic on the Mississippi, and their concern formed the basis for the objection of the US to the contested bridge project. Controversies of this kind flared up in numerous locations all across the country, as the highways and railways comprising our nation's surface transportation infrastructure rapidly expanded westward, necessitating the erection of thousands of bridges across rivers that were already in use as productive routes of transportation. As a result of this rapid development, conflicts involving bridges popped up with great frequency during the late Nineteenth Century, leading to countless legal battles centered upon either the construction of new bridges or the legitimacy of existing bridges. Such cases often featured friction between state law and federal authority over river navigation, when bridges which were authorized by the various states created problems for those who were legally plying navigable streams, and many bridges were judicially deemed to be genuine obstructions, because they were poorly designed, leading to the formation of modern bridge construction standards. For example, in the 1897 case of *United States v City of Moline* (82 F 592) which took place in Illinois, just a short distance from Rock Island, an existing bridge across the navigable Rock River, despite having been built pursuant to state authorization, was

deemed to be an impediment to a congressionally approved federal plan to convert that river into a canal, making the bridge subject to removal, on the grounds that state laws facilitating bridge construction "must yield to the superior authority" of Congress, over all matters involving interstate commerce. The power of a federal interest in navigation was again demonstrated in 1900 in *Southern Railway v Ferguson* (59 SW 343) as the Supreme Court of Tennessee held that a railroad bridge over the navigable Hiwassee River, although having been authorized by state law in 1836 and used ever since that time, had to be either altered or removed, because it constituted a hindrance to river traffic. In so ruling, the Court recognized that federal authority over navigation represents a manifestation of federal sovereignty, which prevents prescriptive principles from supporting the preservation of any object that inhibits the use of a navigable river, so even the fact that the bridge at issue had been in use for several decades, with the approval of the Tennessee Legislature, provided that structure with no sanctification.

7) See *Kohl v United States* (91 US 367 - 1875).

8) See 25 Stat 357.

9) See 29 Stat 120 (1896) & 31 Stat 790 (1901) & 33 Stat 628 (1905).

10) See *Utah Power & Light v United States* (243 US 389 - 1917)

11) SCOTUS has acknowledged that state boundaries can be highly relevant to condemnation however, when no federal interest is present, as in the case of *Georgia v Chattanooga* (264 US 472 - 1924) which emphasizes the importance of understanding the essential distinction between title boundaries and jurisdictional boundaries. In that case, Georgia had acquired an 11 acre tract in Chattanooga from Tennessee in 1852, which Georgia used as a railroad yard, but this tract was situated on the Tennessee side of the state line. When Chattanooga eventually decided to take title to that 11 acre tract through condemnation, circa 1920 under Tennessee law, Georgia protested, maintaining that as a sovereign state all of its land was immune to condemnation. SCOTUS disagreed, and informed Georgia that the sovereign authority and immunity of every state ends at its jurisdictional boundaries, so the Georgia land in Tennessee was subject solely to Tennessee law and not Georgia law, thus the sovereign status of Georgia could not protect the tract at issue, enabling the condemnation to proceed to completion, empowered by the sovereign authority of Tennessee over all land within its boundaries. By means of condemnation therefore, Chattanooga, operating as a governmental entity of Tennessee, was able to eliminate the title held by Georgia, effectively reversing the 1852 conveyance of the subject property to Georgia by Tennessee. As clarified by SCOTUS, the acquisition of the tract by Georgia, although it extended Georgia's rights as a holder of title to land, did not extend the jurisdictional boundaries of Georgia, the land remained subject to Tennessee law rather than Georgia law, despite Georgia's acquisition thereof. While citing the 1855 Railroad Bridge case and the 1875 Kohl case among others, here SCOTUS refined the definition of eminent domain, indicating that it represents a power rather than a right, which comprises a vital distinction, because such governmental powers are "superior to property rights", which is why Georgia, as a mere property owner, holding title to land lying outside the boundaries of her sovereignty, could do nothing to prevent the application of the sovereign authority of Tennessee to the tract in contention.

12) See *United States v 4450.72 Acres of Land* (27 F Supp 167 - 1939). This federal district court ruling was fully upheld by the Eighth Circuit Court of Appeals in 1942, see 125 F2d 636.

13) Minnesota was not completely vanquished by the US however, after protracted legal wrangling that state actually emerged from the federal court system with a historically significant victory, the outcome of which is detailed in *State of Minnesota v United States* (305 US 382 - 1939 & 113 F2d 770 - 1940). In that scenario, Minnesota insisted that it had the authority to condemn an easement across federally protected Chippewa tribal land for the construction of a portion of US Highway 61, but the Secretary of the Interior, as the holder of the federal administrative authority over such lands, disagreed and refused to approve that proposed appropriation, forcing Minnesota to turn to SCOTUS in search of support. Following guidance provided in 1939 by SCOTUS, the Eighth Circuit approved the Minnesota condemnation proposal in 1940, on the grounds that a 1901 Act of Congress had waived the sovereign immunity of the US in a limited but sufficient manner by expressly acquiescing to potential condemnations of certain Indian lands. Thus in this instance, Minnesota proved that it is possible for a state to successfully condemn a right-of-way easement upon federally controlled land, despite objections lodged by a federal administrator with Secretarial authority, if and when such a taking of permanent land rights by a state within federally protected boundaries can be shown to have been congressionally authorized, silencing any such administrative protests on that basis. In addition, that same 1901 federal statute (25 USCA 357) is still in effect today, facilitating condemnations by states upon certain federal interest lands for certain purposes, see *Alaska DNR v United States* (816 F3d 580 - 2016) for a more recent example of its successful implementation.

14) See *Summa Corporation v California State Lands Commission* (466 US 198 - 1984). For another interesting case concerning title to tideland, which also demonstrates the importance of understanding the true extent of federal authority over title to such land, and in so doing illustrates how historical federal decisions and activities can limit the operation of state law, see *United States v Romaine* (255 F 253 - 1919) which documents a controversy over the boundaries of the Lummi Indian Reservation in western Washington.

15) A few cases centered upon wildlife protection, which were adjudicated shortly prior to the Summa case, are worthy of note at this juncture, as demonstrations of the basic principles that are applicable to direct interaction between state and federal law pertaining to land rights. Signaling the dawn of an era of closer federal attention to land use violations, SCOTUS handed down a powerful ruling sternly limiting the sovereign immunity of the individual states in *Kleppe v New Mexico* (426 US 529 - 1976) while upholding a 1971 federal law that banned the removal of wild horses and burros from the public domain, which according to New Mexico comprised an unconstitutional violation of that state's sovereign status and legislative authority. On that occasion, citing the 1917 *Utah Power & Light* case among many others, SCOTUS reiterated that "congressional power ... under the Property Clause of the US Constitution ... is without limitation ... state law notwithstanding", verifying that "federal legislation necessarily overrides conflicting state laws under the Supremacy Clause of the US Constitution". Similarly, SCOTUS handed defeat to North Dakota, striking down a state law which effectively blocked implementation of a federal waterfowl protection program that involved federal acquisition of protective easements, in *North Dakota v US* (460 US 300 - 1983). In that case the concept of federal law supremacy in the land rights context was again highlighted, as SCOTUS reminded

North Dakota that congressionally mandated federal easement agreements "may not be abrogated by state law." In addition, numerous courts at the state level have expressly acknowledged the concept of federal law supremacy in land rights litigation, as exemplified in *Commonwealth of Kentucky v Stearns Coal and Lumber* (678 SW2d 378 - 1984). In 1978 Stearns conveyed land which had been protected under state law since 1972, and thereby limited in terms of usefulness, to the US, then in 1981 Stearns was awarded financial compensation for a reduction in the value of that land by a state court in a typical inverse condemnation action. The Supreme Court of Kentucky struck down the monetary award obtained by Stearns however, on the grounds that Stearns had provided insufficient evidence that the land's value had actually been reduced in 1972, because the US is not legally bound to honor land use restrictions put in place by a state, so in reality the value of the land in question had undergone no reduction in value, since neither any state legislation nor any power of eminent domain held by an individual state can limit the use of land acquired by the US under a congressionally authorized federal program.

16) See *Chicago Title Insurance v Florida Inland Navigation District* (635 So2d 104 - 1994).

17) It may well be asked if the outcome of this case would have been any different had the litigation taken place in federal court, in reality however, the answer to that question explains why this action was launched in state court rather than federal court by the title company. Any such legal action, challenging the existence of federal land rights of any nature or variety, can only be prosecuted under the federal Quiet Title Act (QTA) which incorporates federal sovereign immunity as a jurisdictional element, and under the circumstances presented by this scenario no federal jurisdiction existed, due to limitations which are stipulated in the QTA, so filing an action in state court was in fact the only channel of litigation that was open to the title company. Prior articles in this series more fully discuss the QTA, readers who missed those articles are invited to request them directly from this author, using the contact info provided at the conclusion of these footnotes.

18) See *Columbiana County Port Authority v Boardman Township Park District* (154 F Supp2d 1165 - 2001).

19) The concept that federal regulatory authority extends to land rights, as well as utility operations, and supports the existence of a protective federal land rights interest, imbued with all of the powerful attributes of federal sovereignty, to the negation of state law, is not a new one, as the *Utah Power & Light* case of 1917, reviewed earlier herein, demonstrates. Several additional cases which verify that the dominance of federal sovereignty also extends to matters involving mineral rights interests merit reference and are listed here chronologically. See *United States v South Dakota* (212 F2d 14 - 1954) in which the Eighth Circuit ruled that any objection by South Dakota to a federal condemnation of mineral rights which were held under state law was not justified by the state's sovereignty and represented unacceptable resistance to the will of Congress. See *California Coastal Commission v Granite Rock* (480 US 572 - 1987) in which SCOTUS, by a 5 to 4 vote, confirmed that state mining regulations can be applicable even within the boundaries of a National Forest, but cannot displace or contradict any federal regulations that apply to the same land, and can be applied only where the state's regulations were developed under a federally instituted and congressionally authorized environmental protection program, envisioning and mandating state participation in land use regulation. See *Duncan*

Energy v United States (50 F3d 584 - 1995 & 109 F3d 497 - 1997) holding that all land access required by any owner of a mineral estate, which lies directly beneath a surface estate that is held in fee by the US, is subject to federal regulation, so any use of that surface estate by the mineral estate owner, based upon access rights which were vested in that party or entity under state law, without federal approval, is unjustifiable, because state law can never operate to negate federal regulatory authority. See United States v 99,223.7238 Acres of Land (2007 WL 9657678 & 2009 WL 10675512) a case centered upon proper valuation of a mineral rights interest in New Mexico that was surrounded by federal land, for purposes of a multi-million dollar condemnation, illustrating with particular poignancy the importance of recognizing that the presence of a federal land rights interest can arise through physical nexus where congressional intervention has taken place, and thereby showing that federal property boundaries do not always represent the limits of federal jurisdictional authority in the regulatory context.

20) See Silverwing at Sandpoint v Bonner County (2014 WL 6629600 & 700 Fed Appx 715 - 2017). The text quoted herein can be found in the first of these 2 cited opinions. In the second cited opinion, which ironically arrived less than 2 months after the MSC ruling in the Westfield case, the Ninth Circuit fully upholds the treatment of the federal preemption issue by the district court.

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