Monday the federal government filed a lawsuit against the state of California challenging SB 50, a state law that attempts to give the state the ability to purchase federal public lands that are sold or disposed of. The lawsuit has gotten a lot of attention in the press, some with assessments that the federal government's case is very strong. I think those assessments are too one-sided, and that the state actually has a better case than some of those analyses make out. Here I want to try and elaborate why that is the case (warning, this will get a little wonky).

I've written about SB 50 earlier, but the basic framework of the state law is this: California (like all states) has a land recording system in which sellers/buyers of property record their deeds at a county land records office. Recording your transaction is not a requirement for someone to transfer a piece of land, but if you don't record your transaction, you run the risk of losing the property to a later transaction, and the land becomes a lot harder to sell if you don't record the transaction (also banks won't generally give you a mortgage).

SB 50 prohibits land recording offices from recording a transaction from the federal government to a private party unless there is a certificate stating that the State Lands Commission (which manages California's state-owned lands) was offered a right of first refusal for the transaction, and declined to exercise that right, or the Commission waived its right of first refusal. The holder of a right of first refusal has the ability to match any other purchaser's offering price for a property.

The federal complaint claims that SB 50 has been interfering with routine property transactions by the federal government in California (e.g., selling off an excess Post Office site and transferring ownership of a shuttered military facility). It raises two legal claims: One, SB 50 violates the federal constitution by improperly imposing state regulation on the federal government (an "intergovernmental immunity" claim), and two, that SB 50 is preempted by the Property Clause of the federal constitution (which gives Congress the power to dispose or and issue rules and regulations for federal lands) and various federal land disposal statutes.

To me, the key question about the success of the lawsuit is the distinction between what are called facial versus as applied challenges to statutes. A facial challenge means that the plaintiff is asking the court to completely strike down the statute on the grounds that the statute is so unconstitutional that it should not be applied in any context at all. An as applied challenge means that the plaintiff is asking the court to strike down the statute only as applied to specific situations or circumstances. Courts generally tend to disfavor facial challenges to statutes, though they do sometimes grant them. The federal complaint reads to me as a facial challenge to SB 50 – while it gives specific examples of how SB 50 is

interfering with federal land disposal, it uses those only as illustrations, and the arguments it makes would generally lead towards completely striking the statute down.

The question is whether the court should strike down SB 50 as facially unconstitutional, or whether it should instead require the federal government to raise as applied challenges, and then determine whether SB 50 should apply to specific land transactions or not.

The federal government's intergovernmental immunity argument basically is that SB 50 interferes with a wide range of federal laws that provide for the federal government to dispose of its lands, discriminates against the federal government, and impairs the accomplishment of federal policy to the extent that it prevents sale or disposal of federal lands pursuant to those federal laws.

One argument that California is likely to make here is that SB 50 does not directly regulate the federal government – it regulates the private recipient of the land from the federal government who records their land transaction with the county. It's unclear how much traction this argument might get with the court, since there is caselaw indicating that intergovernmental immunity also applies to state regulation of federal contractors or employees, if the state regulation is intrusive enough.

The Property Clause argument by the federal government is that the constitution gives the federal government power to dispose of its lands, and any state interference with that power is preempted by the Property Clause (pursuant to the Supremacy Clause of the US Constitution, which provides that federal constitutional and statutory provisions are supreme over conflicting state laws). There is (fairly old) Supreme Court caselaw that holds that the Property Clause broadly restricts or prevents states from interfering with federal land disposal.

The federal complaint also points to a provision of the federal act admitting California as a state in which the state promised not to interfere with land disposal by the federal government, and to various federal laws that provide for land disposal. Again, the complaint argues that these preempt SB 50.

Based on these arguments, a court might hold that SB 50 is facially unconstitutional or preempted, and strike it down.

But there is an alternative way of understanding how federal power intersects with state power when it comes to the federal public lands. There are a number of recent Supreme Court decisions (such as *Kleppe v. New Mexico* and *California Coastal Commission v.*

Granite Rock) from the past 40 years in which the Supreme Court has considered how state regulation of activities on federal public lands interacts with federal power under the Property Clause. The basic principles that the Supreme Court has developed is that state law can apply to activities on federal public lands – even activities affirmatively authorized or approved by the federal government under federal law – so long as the state regulation does not conflict with the relevant federal law. For instance, states can impose at least a limited range of environmental regulations on mining activities on federal lands, so long as those regulations do not absolutely prohibit mining. (For more discussion of this caselaw, see earlier posts of mine on the Rinehart case from the California Supreme Court.)

From this perspective, state regulation of private parties who purchase or receive land from the federal government is no different than regulation of private parties who receive oil and gas leases from the federal government, or mining claims, or grazing permits. Such regulation is permissible if it doesn't conflict with the relevant federal laws. This framework would lead to an analysis that focuses on the specific federal statute that the land transaction occurred pursuant to, to determine whether state regulation is in conflict with that federal statute.

And that is where things get interesting. Because it turns out that at least some federal statutes expressly require the federal government to only transfer lands to private parties if the transfer is in compliance with state law. Most importantly from the perspective of transfer of federal public lands that are important for conservation, the Federal Land Policy and Management Act (FLPMA) provides the framework for land sales and disposal by the Bureau of Land Management (BLM) which controls large areas of the California desert. FLPMA has a provision that prohibits "conveyances of public lands containing restrictions which would, at the time of the conveyance, constitute a violation of any law or regulation pursuant to State and local land use plans, or programs." 43 U.S.C. § 1718. There is a good argument that SB 50 does not conflict with FLPMA or a land disposal pursuant to FLPMA – and thus it would not violate intergovernmental immunity or be preempted.

What about other federal statutes that do not explicitly specify that land transfers must comply with state law? Here the nature of the right that SB 50 seeks to exercise – the right of first refusal – is important, as I noted in my prior blog post. The right of first refusal (at least in theory) should not affect the sale price of the property – the state only gets to match the price agreed upon between the federal government and the buyer. So to the extent that the federal statute is only focused on the price, and not on the buyer, then the right of first refusal doesn't really conflict with the operation of the statute. Of course, there may be other issues that come up in analyzing whether there is a conflict between federal and state law in this context, but again, this would undercut the argument that there is always a

conflict between federal and state law here.

There may also be federal laws that seek to transfer federal lands to specific parties that are not the State of California, and these laws are much more likely to present a conflict with SB 50. Here, preemption is most likely to occur.

What about the act admitting California to the Union in which California disclaimed interference with disposal of federal lands? As A matter of constitutional law, the Supreme Court has held that acts admitting states to the Union cannot expand the constitutional power of the federal government vis-à-vis the states. So the question is really whether, as a matter of statutory law, this federal law preempts all state law here. FLPMA, for instance, was enacted long after California was admitted to the Union, and a good case can be made that FLPMA repeals any restrictions on state authority in this context, at least with respect to land disposal pursuant to FLPMA. That kind of analysis puts us back in the statute-by-statute specific analysis I indicated above.

How might a court decide whether to adopt a facial or as applied challenge approach? At least for the preemption issues, it will depend on whether the court believes that all state laws in this context are automatically preempted, regardless of any possible conflict (what is called field preemption) or whether only state laws that directly conflict with federal law are preempted (what is called conflict preemption). Again, more recent Supreme Court caselaw appears to take the conflict preemption approach, while older Supreme Court caselaw appears to take a field preemption approach.

It’s hard to say which approach a court will take at the moment – but hopefully this analysis has made clear that this is far from a slam dunk for the federal government.