

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

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Solicitor

M. 27657.

The Honorable

The Secretary of the Interior.

My dear Mr. Secretary:

You have submitted for my consideration two questions relating to Mount Olympus National Monument: (a) Whether certain proclamations by the President reducing the area of the monument were valid; and (b) if not, whether the jurisdiction of the Department of the Interior extends to the boundaries of the monument as it was originally established by proclamation on March 2, 1909.

Mount Olympus National Monument was created by presidential proclamation on March 2, 1909, under authority of the act of June 8, 1906 (34 Stat. 225). It is located within the exterior boundaries of the Olympic National Forest. After its creation it was reduced in area by three Executive orders: (1) April 17, 1912, eliminating 160 acres; (2) May 11, 1915, eliminating approximately half the former area; and (3) January 7, 1929, eliminating 640 acres. The second proclamation was issued after a Solicitor's Opinion was promulgated to the effect that the President was vested with the authority so to reduce the monument. Solicitor's Opinion of April 20, 1915. Since that time, however, two Solicitor's Opinions have been written to the effect that such reductions can be accomplished only by legislation.

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Solicitor's Opinions of June 3, 1924, Nos. M. 12501 and M. 12529; cited in Solicitor's Opinion of May 16, 1932, M. 27025.

I am of the opinion that the Executive orders reducing the area of the monument in this case were valid, there being no resultant interdepartmental transfer of jurisdiction over the area involved; and that, consequently, the jurisdiction of the Department of the Interior extends only to the area now defined as a monument by existing Executive orders.

In considering this question, we are met at the outset by a series of rulings by the Attorney General to the effect that military reservations created by Executive order cannot thereafter be returned to the public domain by Executive order unless such action is authorized by Congress. 10 Op. Atty. Gen. 359; 16 Op. Atty. Gen. 121; 17 Op. Atty. Gen. 168; 21 Op. Atty. Gen. 120. See also Solicitor's Opinions of June 3, 1924, Nos. M. 12501 and M. 12529. In addition, the Attorney General has ruled that land cannot be transferred between Departments save by legislative authority. 28 Op. Atty. Gen. 143; 36 Op. Atty. Gen. 75. The language used by the Attorney General is broad and seemingly governs the present case, but an examination of the facts in the cases cited indicate either that Congress had by various acts indicated that it meant not to relinquish control over the disposition of abandoned military reservations (see 10 Op. Atty. Gen. 359,

and act of June 12, 1858 (11 Stat. 336), and act of March 3, 1819 (3 Stat. 520)), or had provided specific methods for their disposition. Act of July 5, 1884 (23 Stat. 103).

I am of the opinion that the present case is a situation where Congress has neither negated the existence of the implied power of the President to reduce the area of Executive order reservations, nor provided specific means for accomplishing this.

There must, however, be shown either an express or implied grant of power from Congress, because primary control of all Government property is vested in that body. United States Constitution, Article IV, Section 3; United States v. Gratiot (14 Pet. 526). In this case the power must be implied for there is no express grant of it concerning the monument (see act of June 8, 1906, supra) and no general grant concerning this type of situation.

That there is the implied grant is shown by applying the doctrine of the case of United States v. Midwest Oil Co. (236 U. S. 459) to the facts of the present and analogous cases. The court there held that, although the primary power to withdraw lands was vested in Congress, there was an implied grant of such power to the President as shown by long continued acquiescence of Congress in its exercise by the President. The facts showed that 243 Executive orders relating to the establishment or enlargement of Indian, military and bird reservations had been promulgated without general or special legisla-

tive authority. Of this practice the court said:

"It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department - on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. * * * "

The history of Executive order national monuments and analogous Executive order Indian reservations shows a similar long continued exercise of the power to reduce the area of these reservations by the President with the acquiescence of Congress. A summary and incomplete canvass of Executive orders of this kind relating to Executive order Indian reservations shows that 23 such orders were issued concerning the Mission Indian Reservation, the White Mountain Reservation and the Malheur Reservation between the dates of February 17, 1871, and February 20, 1912. Similar orders were promulgated affecting the Walapai, Navajo, Sioux, Camp Verde, Pima and Papago Reservations. See Indian Laws and Treaties, Volume 1, pages 801 to 935; Volume 3, pages 667 to 695. Eight such Executive orders concerning national monuments (Casa Grande Ruin, Navajo National Monument, Petrified Forest National Monument, Katmai National Forest and Mount Olympus National Monument) have been promulgated between the dates of December 10, 1909, and January 7, 1929. Three of these orders concerned Mount Olympus National Monument. Congress has made no

objection to these orders, and so far as has been determined it has continued to appropriate money for the administration of the reduced areas. See act of February 17, 1933 (47 Stat. 820). These facts are sufficient to show the existence of the implied power of the President to reduce the area of Executive order reservations under the doctrine of the Midwest Oil case, supra.

This conclusion is supported by the strong dictum in the case of Grisar v. McDowell (6 Wall. 363). In that case the land involved in the suit was added to an Executive order military reservation by Executive order, the contention being that there was no authority for such action. The same order actually reduced the area of the reservation. The court did not question the validity of the order on this ground and it said of the action of the President in modifying the first order:

"He possessed the same authority in 1851 to modify the reservation of 1850, by enlarging or reducing it, that he possessed to make the reservation in the first instance."

The Department has reached a similar conclusion with respect to forest land reservations. 14 L. D. 209.

Again in United States v. Railroad Bridge Co. (6 McLean 517, Fed. Case No. 16114), the court held that the President had the implied power to return to the public domain an abandoned military reservation. That case, however, has been criticized by the Attorney General and perhaps rightly so in view of certain facts pointed out by him. See 10 Op. Atty. Gen. 359.

A further argument in favor of the validity of this conclusion can be made by considering the language of the act of June 8, 1906, supra. Section 2 of the act provides in part as follows:

"That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected; * * *" (Underscoring supplied.)

The record shows that Mount Olympus National Monument was set apart as an area having peculiar scientific interest because of its numerous glaciers and because it was the summer range and breeding ground of Olympus elk cervus roosevelti. The record shows that it was the opinion of this Department and the Department of Agriculture in recommending the area reduction in question that the area set apart was larger than necessary for the protection of the summer range (report of H. S. Graves, 1915) and existing maps indicate that the glaciers are all well within the present area of the monument (Olympic National Forest Map, 1930). The action of the President, on the recommendation of this Department and the Department of Agriculture, was therefore only made in accordance with the requirement of the act that the area set apart should be confined to the smallest area compatible with the proper care of the objects sought to be protected.

The conclusion is not altered by the fact that Congress has given authority in two classes of cases to reduce reservations by Executive order. Act of June 4, 1897 (30 Stat. 34), relating to national forests; and act of June 25, 1910 (36 Stat. 847), relating to temporary withdrawals for public purposes. It cannot be argued from this that Congress meant to deny the authority in other cases where it has made no provision. Were the argument sound the court would have had to hold in the Midwest Oil case, supra, that the President had no authority to make the withdrawal there in question. This is true because at the time the withdrawal was made, although there was no express authority to make it, there was express authority vested in the President to withdraw lands for other purposes. Act of March 3, 1891 (36 Stat. 1095, 1103).

The conclusion is not altered by the ruling laid down by the Attorney General to the effect that no transfer of land between Departments can be effected by Executive order without express legislative authority. 28 Op. Atty. Gen. 143; 36 Op. Atty. Gen. 75. The Executive order here in question did not operate to transfer land between Departments. Prior to the creation of Mount Olympus National Monument that area was a part of the Olympic National Forest under the jurisdiction of the Department of Agriculture. The monument when created was also under the jurisdiction of the Department of Agriculture and it was provided in the proclamation setting it

apart that the forest reservation should remain unaffected thereby save that it would be subservient to the dominant monument reservation. The order reducing the area of the monument was promulgated while the monument was still under the jurisdiction of the Department of Agriculture. Upon its promulgation, the monument reservation was to that extent canceled, leaving the original forest reservation in effect. Therefore there was no prohibited transfer of jurisdiction between Departments. Although such a transfer could now be effected under the act of March 3, 1933 (47 Stat. 1517), this act has no bearing on the validity of the order in question.

My conclusion is, therefore, that the order reducing Mount Olympus National Monument was a valid exercise of power by the President and that the jurisdiction of the Department of the Interior extends only to the boundaries of the monument as defined by the various Executive orders relating to it.

This conclusion might be questioned in view of the numerous opinions by the Attorney General which appear to lead to the contrary result. Granting that the conclusion is not unassailable in view of these opinions, nevertheless, since the reduction was made by Executive order, that order should be observed by this Department as a valid exercise of Executive power until it has been rescinded or in some other manner set aside. See 22 L. D. 196.

If the Department wishes to secure jurisdiction of the area as it was originally set apart, this should be accomplished by a new Executive order rather than by attempting to show that the Executive order in question was invalid.

Respectfully,

(sgd.) Nathan R. Margold,
Solicitor. *4 full.*
done up

Approved: JAN 20 1925

(sgd.) J. A. Shannon
First Assistant Secretary. *Spec*

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