

DEPARTMENT OF THE INTERIOR

WASHINGTON

April 20, 1915

Dear Mr. Secretary:

You have requested my opinion upon the legal questions arising out of the proposed elimination of certain lands from the Mount Olympus National Monument. The questions arising are: (1) Has the President the power without specific legislation from Congress to reduce the area of a national monument; (2), should the eliminations be made, will the lands so excluded from the national monument be part of the public domain or remain within the Olympic National Forest.

The national monument was created by proclamation of March 3, 1909 (35 Stat., 2247), under authority of the act of June 8, 1906 (34 Stat., 225). Section 2 of that act provides in part:

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.

Taking up the first question, I find that an exactly similar question was considered by Assistant Attorney-General

Shields, relative to the power of the President to restore to the public domain, lands included within a forest reserve, without special statutory authority from Congress, the opinion being rendered prior to the passage of the act of June 4, 1897 (30 Stat., 34), expressly conferring such power upon the President. The opinion is found in 14 L. D., page 309, and takes the position that the President had the power to restore lands reserved as a forest reserve to the public domain without specific statutory authority for the restoration. Mr. Attorney-General Shields, upon page 210 of the opinion, used the following language, which is pertinent to the present question:

The act in question is in the nature of a discretionary statute. The location, the extent and the time of creating the reservations, is left wholly within the discretion of the President. Both the language of the section, and the theory which prompted the legislation, seem to have recognized that said reservation might be temporary or permanent, as, in the discretion of the President, the good of the public service might demand; had it been otherwise, it is but reasonable to assume that Congress would have established the boundaries of tracts to be reserved, as was done in the case of the Yellowstone National Park, and the forest reservations in California, created by the acts of September 25, and October 1, 1890 (26 Stat., 478 and 650). Again this view is sustained by the consideration, that, as the result of erroneous information a tract of land not intended to be included, and the reservation of which would inflict great hardship on the public might be reserved by the President. To await action by Congress for the restoration of the land would result in much loss to the public, hence, in my opinion, Congress intended to recognize the principle that the President has the power to withdraw public lands, and to restore the same to the public domain, as the public good may demand.

In United States v. The Railroad Bridge Company (6 McLean 517), concerning the Rock Island Military Reservation, whose use had been discontinued by the United States, the Circuit Court for the Northern District of Illinois, held that the President might revoke the previous reservation for military purposes, and restore the land to the public domain. The court stated, at page 537:

The President, under a general power given him by the Act of 1809, selected a part of the land on Rock Island for a military site, on which Fort Armstrong was built. And when he finds the place no longer useful as a military post, or for any other public purpose, he has a right to abandon it, and notify the land offices where the reservation was entered. The entry on the books of the land offices within which the reserved site is situated, and the occupancy of the place by the government, are the only evidence of the reservation. And when this evidence is withdrawn, and the site is abandoned, the reserve falls back into the mass of the public lands subject to be sold under the general law.

Likewise, in Grisar v. McDowell (6 Wal., 363), the Supreme Court held that the President might modify, by reduction or enlargement, a reservation of public lands previously made.

It is true that in the case of the Rock Island Military Reservation, Attorney-General Bates rendered an opinion (10 Op. Atty. Genl., 359), that the President had no power to restore to the public domain lands previously reserved for military purposes in the absence of specific authority to that ef-

fect from Congress. This view was also adhered to in the cases of Camp Wright, California (16 Op. Atty. Genl. 121), and the Military Reservation at Fort Fetterman (17 Op. Atty. Genl., 168). These opinions rested somewhat upon the premise that the President had no power to withdraw or reserve public lands in the absence of specific authority from Congress. This position is no longer tenable in view of the recent decision of the Supreme Court of the United States in United States v. The Midwest Oil Company et al, date February 23, 1915.

The reasoning of Assistant Attorney-General Shields which is in harmony with the cases of United States v. The Railroad Bridge Company and Grier v. McDowell, supra, appears to me to be sound, and I am accordingly of the opinion that the President has the power to reduce or modify a previous reservation as a national monument.

The Olympic Forest Reserve was originally created by proclamation of February 22, 1897. Its boundaries were changed by supplemental proclamations, but were fixed as they existed at the time of the creation of the national monument by the proclamation of March 3, 1907. The proclamation establishing the national monument, contained the following language:

The reservation made by this proclamation is not intended to prevent the use of the lands for forest purposes under the proclamations establishing the Olympic National Forest, but the two reservations shall both be effective on the land withdrawn

but the National Monument hereby established shall be the dominant reservation and any use of the land which interferes with its preservation or protection as a National Monument is hereby forbidden.

The act of June 8, 1906, authorizing the creation of national monuments provides in its first section that it shall be a criminal offense to appropriate, excavate, injure or destroy, any historic or prehistoric ruin or monument, or any object of antiquity situated on lands owned or controlled by the Government of the United States,

without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated.

Section 3 provides for the issuing of permits for the examination of ruins, the excavation of archeological sites etc., by the Secretaries of the Interior, Agriculture and War, "upon the lands under their respective jurisdiction." Section 4 authorizes the Secretaries of the respective Departments to make uniform rules and regulations for carrying out the provisions of the act.

The act of June 8, 1906, of itself, contemplates that lands placed within a national monument shall be in the same category as they had been, and they are, therefore, in this particular matter, still national forest lands. The revocation of their reservation as a national monument does not affect their status as national forest lands, and such revocation does

not restore them to the public domain. This is made all the more clear in the particular case here under consideration by the language above quoted from the proclamation of March 2, 1909, creating the Mount Olympus National Monument which distinctly provided that both reservations as a national forest and a national monument should continue.

The Olympic National Forest was created long prior to the passage of the act of March 4, 1907 (34 Stat., 1256 at 1271), prohibiting the further creation of forest reserves or additions thereto within the State of Washington, except by act of Congress. The lands within the Mount Olympus National Monument were within a national forest prior to the passage of the act of March 4, 1907, and their elimination from the national monument, therefore, simply removes one of the reservations made and leaves in effect the original forest reservation. Such action is neither the creation of a new forest reserve nor any addition to one already in existence.

I am accordingly of the opinion that the reduction in area of the national monument will not result in the restoration of the lands so eliminated to the public domain, but that such lands will still remain and be a part of the Olympic National Forest.

Cordially yours,
W. H. West

The Honorable,
The Secretary of the Interior.

Solicitor.