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STRIP MINING OPERATORS—STATE OF OHIO—HAS NO AUTHORITY TO REQUIRE EITHER A LICENSE OR PAYMENT OF A LICENSE FEE BY STRIP MINING OPERATORS—CARRY ON OPERATIONS SOLELY ON FOREST LANDS OWNED BY UNITED STATES.

SYLLABUS:

The state of Ohio has no authority to require either a license or payment of a license fee by strip mining operators who carry on their operations solely on forest lands owned by the United States.

Columbus, Ohio, March 2, 1951

Hon. H. S. Foust, Director of Department of Agriculture
Columbus, Ohio

Dear Sir:

Your request for my opinion, under date of January 29, 1951, reads as follows:

"In connection with the administration of the Coal Strip Mine Land Reclamation Act, sections 898-223 to 898-242 inclusive, General Code of Ohio, the following questions have presented themselves, and I trust you can give me an opinion in the very near future.

"Section 898-228 reads in part as follows: 'On and after the date of this act it shall be unlawful for any operator to engage in strip mining without having a license to do so issued by the Chief of the Division of Reclamation in accordance with the provisions of this act * * *.' From this the question arises whether or not the Division of Reclamation as created by this act has authority to enforce this Coal Strip Mine Land Reclamation Act on land owned by the Federal Government. In some instances the Federal Government owns the land in fee simple, while in other cases they own only the surface rights and someone else owns the mining rights with the privilege of strip mining.

"Before the Coal Strip Mine Land Act went into effect, the Strip Coal Mining Act, Sections 898-203 to 898-222 inclusive, General Code of Ohio, was in effect. Licenses to strip mine coal were not obtained by strip mine operators when operating on Federal Land. This law was in force from January 1, 1948, to July 23, 1949. Section 898-242 General Code transferred the authority of administration of the Coal Strip Mine Law prior to July 23, 1949, to the Chief of the Division of Reclamation after that date.

"The questions we wish answered are as follows:

"1. Shall coal strip mine operators operating on Federal Lands be required to secure a strip mine license as required by section 898-228 General Code and post bond as described in section 898-229 General Code and meet the other requirements of this law?

"a. Subsequent to the above question, would the Chief of the Division of Reclamation have any authority to make any concessions to the Federal Government when they own the land in fee simple and can require the operator to post a cash bond with them to guarantee the reclamation of the land affected?

"2. Does the Chief of the Division of Reclamation have the authority under section 898-242 General Code of Ohio to require the stripping operators who affected land by coal strip mining during the period from January 1, 1948, to July 23, 1949, when the Strip Coal Mining Act was in force, to obtain a license, post bond, and reclaim the land in accordance with sections 898-203 to 898-222 General Code of Ohio?

"These are very pertinent questions, and we desire your official opinion to direct us in solving the problems present in connection with the operations on Federal Land. We have a large amount of information that we compiled in connection with the strip mine operators on this Federal Land in question and will be very glad to furnish it to you."

The first question here presented is essentially that of whether the state may exercise its police power within the territory encompassed by the federally owned lands which you have described.

It is well settled that where the United States acquires lands with the consent of a state, under authority of the 17th subsection of Section 8 of Article I of the United States Constitution, the federal government is empowered to exercise exclusive jurisdiction with respect to them. 14 Am. Jur. 925, Criminal Law, Section 225.

This constitutional provision relates, however, only to "such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance thereof by Congress, become the seat of the Government of the United States" and to "all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of *forts, magazines, arsenals, dockyards and other needful buildings* * * *." (Emphasis added.) It is apparent that national forest lands do not fall within the category of "places" here listed.

You have intimated, and for the purpose of this discussion I shall assume, that the federal lands mentioned in your inquiry are national forest lands as defined in Section 521, Title 16, U. S. C., and that they were acquired by the United States under authority of Section 516, Title 16, U. S. C. (Act of March 1, 1911, Ch. 186, Section 7, 36 Stat. 962, amended by the Act of March 3, 1925, Ch. 473, 43 Stat. 1215.) Section 516, Title 16, U. S. C., reads in part as follows:

"The Secretary of Agriculture is authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commis-

> sion at the price or prices fixed by said Commission. No deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this section until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. * * *"

The power exercised under this statute is conferred on the federal government by the commerce clause of the United States Constitution. U. S. v. Crary, 2 Fed. Supp. 870.

Ohio has consented to the acquisition of national forest lands by the United States by the enactment of Section 1177-11a, General Code. This section reads as follows:

> "Consent of the state of Ohio is given to the United States for the acquisition by purchase, gift, or condemnation with adequate compensation and subject to the provisions of section 1177-11b of the General Code, of such lands in the state of Ohio as in the opinion of the federal government may be needed for the establishment, consolidation and extension of national forests and for flood control and soil conservation work in the state. The state of Ohio retains concurrent jurisdiction with the United States over such areas in the matter of service thereon of all civil and criminal process issuing under the authority of the state of Ohio."

Although this statute purports to reserve to the state concurrent jurisdiction only in the matter of service of process, it is seriously to be doubted whether the federal government has acquired *exclusive* jurisdiction over such lands to the exclusion of the state's right to exercise its police power thereon. On this point it is first to be observed that the federal government is one of delegated powers only; and it is only in the 17th subparagraph of Section 8 of Article I of the United States Constitution that any power to acquire *exclusive* territorial jurisdiction over lands within a state is given to the federal government.

Secondly, it is obvious that there is no congressional intent to acquire such exclusive territorial jurisdiction with respect to lands so acquired. Section 521, Title 16, U. S. C., provides that such lands "shall be permanently reserved, held, and administered as national forest lands under the provisions of Section 471 of this title and acts supplemental thereto and amendatory thereof." Section 471, Title 16, U. S. C., relates to the establishment and administration of national forests and one of the

acts supplemental thereto is Section 480, Title 16, U. S. C. (Act of June 4, 1897, Ch. 2, Sec. 1, 30 Stat. 36; amended by act of March 1, 1911, Ch. 186, Sec. 12, 36 Stat. 963.) Section 480 reads as follows:

> "The jurisdiction, both civil and criminal, over persons within national forests shall not be affected or changed by reason of their existence, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such national forest is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State."

This congressional disclaimer of intent to acquire exclusive jurisdiction is in complete harmony with the rule stated in 14 Am. Jur. 925, Criminal Law, Section 225, as follows:

> " * * * The United States, however, as a mere proprietor of land which is situated within the limits of a state and which was acquired by purchase without the consent of the legislature, has no paramount authority derived from ownership of the soil. * * *"

See also: Gill v. State, 141 Tenn. 379, 210 S. W. 637; Van Devanter v. Tenn., 167 Tenn. 240, 68 S. W. (2d) 478, certiorari denied, 293 U. S. 581, 70 L. Ed. 677, 555 S. Ct. 94; Wilson v. Cook, 327 U. S. 474, 90 L. Ed 793.

Accordingly, in the absence of any delegation of authority to acquire exclusive federal jurisdiction over lands acquired in the exercise of the federal power under the commerce clause, and in view of the specific expression of congressional intent not to acquire such exclusive jurisdiction, I conclude that the state may lawfully exercise its general police power within the territory in which such lands lie.

A further constitutional question here involved is the application of Article IV, Section 3, Clause 2 of the United States Constitution, which reads as follows:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

This clause was the subject of consideration in Utah Power & Light Co. v. U. S., 243 U. S. 388, 61 L. E. 791, the first headnote in which case reads as follows:

> "The inclusion within a state of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what is commonly known as the police power."

In the opinion by Mr. Justice Van Devanter in this case, the following statement is found, pp. 403, 404:

> "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, and in support of this position they say that lands of the United States within a state, when not used or needed for a fort or other governmental purpose of the United States, are subject to the jurisdiction, powers, and laws of the state in the same way and to the same extent as are similar lands of others. To this we cannot assent. Not only does the Constitution (art. 4, §3, el. 2) commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired. True, for many purposes a state has civil and criminal jurisdiction over lands within its limits belonging to the United States, *but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them.* Thus, while the state may punish pubic offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves, or invest others with any right whatever in them. Unied States v. McGratney, 104 U. S. 621, 624, 26 L. ed. 869, 870; Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 168, 29 L. ed. 845, 851, 6 Sup. Ct. Rep. 670; Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341." (Emphasis added.)

The Utah Power case is cited with approval in Wilson v. Cook, 327 U. S. 474, 90 L. ed. 793, in which the following statement by Mr. Chief Justice Stone is found (p. 487):

"Upon admission of Arkansas to statehood in 1836 upon an equal footing with the original states, (Act of June 15, 1836, c 100, 5 Stat. 50) the legislative authority of the state extended over the federally owned lands within the state, to the same extent as over similar property held by private owners, *save that the state could enact no law which would conflict with the powers reserved to the United States by the Constitution.* Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 539, 29 L. ed. 264, 265, 5 S. Ct. 995; Utah Power and L. Co. v. United States, 243 U. S. 389, 404, 61 L. ed. 791, 816, 37 S. Ct. 387." (Emphasis added.)

Our question thus becomes one of whether the Ohio Coal Strip Mining Act, if enforced as to mining operation on national forest lands in Ohio, would constitute an extension of the state jurisdiction to matters that are inconsistent with "full power in the United States to protect its lands and to control their use."

It is to be observed that the Secretary of Agriculture of the United States has authority, under Sections 518 and 520, Title 16, U. S. C., to prescribe regulations governing the use of rights in lands reserved to the grantors in any conveyance by them to the United States for reservation and administration as national forests; and particularly to govern the utilization of the mineral resources of such lands. Regulations so prescribed have the force and effect of law. Bell v. Apache Maid Cattle Co., 94 Fed. (2nd) 847. Such regulations are superior to any policy of the state in which the land is located. United States v. Shannon, 151 Fed. 863. It must be concluded, therefore, that the federal power to control national forest lands, based as it is on the power to preserve the navigability of navigable streams, properly includes the power to control all factors on such lands which affect such navigability. I specifically conclude that such factors include soil erosion, reforestation, maintenance of soil cover vegetation, surface grading, and related soil reclamation measures; and I further conclude the federal power to control these factors on national forest lands is superior to any state power with respect thereto.

Under the state statute, Sections 898-224, et seq., General Code, strip mining operators, before beginning their operations, are required to (a) obtain a license, (b) pay a license fee of fifty dollars plus an amount equal to ten dollars per acre of land affected, and (c) deposit a surety bond conditioned upon the faithful performance thereafter of all things required to be done by them as provided for under this statute. Among the things so required to be done is the reclamation of affected land areas.

Such reclamation specifically includes (Section 898-232, General Code) the following action:

> "* * * (A) To grade the surface of all spoil banks in such area of land so as to reduce the peaks thereof and reduce the depressions between the peaks of such spoil banks to a surface which will be a gently rolling topography. Such grading shall be done in such a way as will minimize erosion due to rainfall and will also eliminate steep grades between peaks and make the surface more suitable for grazing cattle or tree cutting or logging operations. In any such areas in which any spoil bank contains isolated peaks, such peaks shall be graded to an approximately level surface having a width of not less than twenty feet.
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> "(B) To provide access roads and fire lanes in such area of land for the purpose of aiding in the prevention and suppression of fires;
>
> "(C) To construct, where to do so will not interfere with underground mining or plans for future underground mining, earth dams in the last cut of an operation in such area of land to aid in the creation of lakes and ponds;
>
> "(D) To plant trees, shrubs, legumes or grasses upon the parts of such area where re-vegetation is possible; * * *"

It is obvious that these specific and express provisions relative to reclamation of affected land areas would, if enforced as to mine operators operating on national forest lands, constitute a limitation or restriction of the discretion of the Secretary of Agriculture to prescribe a land reclamation program within and upon such lands; and I must conclude, therefore, that such enforcement would constitute an unlawful extension of the state jurisdiction to matters inconsistent with the full power in the United States to protect its lands and to control their use.

Although it has been held (Wilson v. Cook, supra) that a state may properly levy a tax upon activities carried on within the forest reserve purchased by the United States, it must be remembered that the license fee here is exacted on the basis of the extension of a privilege, i. e., to operate a particular business enterprise. This privilege, however, is wholly within the power of the United States to bestow, under authority of Sections 518 and 520, Title 16, U. S. C., as noted hereinbefore; and the issuance of a state license would be wholly meaningless and such license would be wholly without value to the licensee in the absence of a similar license or permit issued under authority of the United States.

Since it appears that this license fee is imposed in the exercise of a police power for purposes of regulation (and not for purposes of revenue), the amount so exacted must be limited and reasonably measured by the necessary or probable expenses of issuing the license, and of such inspection, regulation and supervision as may be lawful and necessary. 53 C. J. S. 517, Licenses, Section 19a. Accordingly, when the state possesses no power to regulate, inspect or supervise the business carried on by the licensee, it necessarily follows that the imposition of a license fee as an incident to the attempted statutory regulation of such business, cannot be sustained under this rule.

For this reason, I conclude that the state of Ohio has no authority to require either a license or payment of a license fee by strip mining operators who carry on their operations solely on forest lands owned by the United States. This conclusion with reference to your first question is such as to provide the answer to your second and third questions also, and separate consideration of them is not, therefore, deemed necessary.

Respectfully,

C. WILLIAM O'NEILL
Attorney General