

790

FOREST LANDS—UNITED STATES—FEDERAL FOREST PURPOSES—INTEREST IN PARTICULAR LANDS—MINERAL RIGHTS, EXTRACTION OF MINERALS—STRIP MINING METHOD—STATE THROUGH POLICE POWER MAY REGULATE AND CONTROL OPERATIONS—ENFORCEMENT—NO INTERFERENCE WITH POWER DELGATED TO FEDERAL GOVERNMENT—OHIO COAL STRIP MINE AND RECLAMATION ACT—USC TITLE 16, SECTION 516—ARTICLE IV, SECTION 3, CLAUSE 2, US CONSTITUTION—SECTION 898-223 ET SEQ., G. C.

SYLLABUS:

Where the United States has acquired, under authority of Title 16, Section 516 U. S. C., for federal forest purposes, an interest in particular lands, which is so limited by the reservation to third parties of mineral rights, including the right to extract minerals by the strip-mining method, that the federal government is without power to regulate and control the operations of such third parties in the extraction of such minerals, the regulation and control of such operations by a state in the exercise of its police power does not constitute an interference with any power delegated to the federal government by Article IV, Section 3, Clause 2, United States Constitution; and the Ohio Coal Strip Mine and Reclamation Act, Section 898-223, et seq., General Code, may be enforced in such case with respect to such operations.

Columbus, Ohio, September 28, 1951

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

Dear Sir:

I have before me your request for my opinion, which reads as follows:

“I wish to thank you for the prompt attention which you gave to my recent letter, requesting an opinion as to whether or not the strip mine laws of Ohio were applicable to the Federal Forest Lands of this State.

“Your opinion has definitely set forth that the land owned by the Federal Government for forest purposes is exempt from the strip mine laws of Ohio. However, in reading through your opinion, it appears to me that it has been assumed in assembling this opinion that the Federal Government has full power to pro-

tect and control the use of its land, and also to make the necessary regulations for control, particularly the utilization of the mineral resources of such land. This is not the case with some of the Federal Forest Lands in this State. Representatives of the Federal Forest Service have informed me that some of the forest lands have been purchased where only the surface right was secured and the mineral rights, with the privilege of mining by stripping, had been previously purchased by another party. The land purchased under these conditions may have the surface destroyed, and the Federal Government does not have the authority to regulate the mining or to require any regrading or replanting of the land affected after the mining operation. It is also my understanding that not only in the past has land been purchased under these conditions, but that the Federal Government is continuing to purchase land on which the mineral and mining rights have been reserved.

“If the Federal Government does not have control over the strip mining operations on some of the Federal Forest Lands in Ohio, I wish to question whether or not those affecting this land shall be exempt from both the authority of the Federal Government and the State of Ohio.

“Therefore, I wish to submit the following question for your consideration and opinion :

“Are the strip mine laws of Ohio applicable to the land where only the surface is owned by the Federal Government for forest purposes with the mineral and mining rights being owned by someone else, and where the Federal Government does not have the authority to require the land affected by strip mining to be reclaimed?”

In my opinion No. 152, ante, I had under consideration the extent to which the State might exercise its police power on forest lands wholly owned by the United States, by the enforcement of the Ohio strip-mining laws. The syllabus in that opinion is as follows :

“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 was reached largely on the basis of the controlling effect in the circumstances which must be attributed to Article IV, Section 3, Clause 2, 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.” (Emphasis added.)

This clause was under scrutiny in *Utah Power & Light Company v. U. S.*, 243 U. S., 388, 61 L.Ed., 791. In the opinion by Mr. Justice Van Devanter in this case the following statement is found:

“Not only does the Constitution (Art. 4, Sec. 3, Cl. 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 public offenses such as murder or larceny committed on such lands, and may tax private property such as livestock, located thereon, it may not tax the lands themselves, or invest others with any right whatever in them. *United States v. McBratney*, 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.)

With reference to the authority of a state over federally owned lands, the following statement of Mr. Chief Justice Stone is found in *Wilson v. Cook*, 327 U. S., 474, 487, 90 L.Ed. 793:

“* * * 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.)

In this state of the law consideration was given in Opinion No. 152, ante, to the very considerable extent to which the enforcement of the

Ohio strip-mining statutes would interfere with the right of the United States to choose and carry out the land reclamation and erosion control measures necessary to the control by the United States of navigable streams under the interstate commerce clause. After noting the several requirements in the Ohio strip-mining statutes, with reference to land reclamation measures to be taken by strip-mine operators, the following conclusion was stated:

“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.”

In the new factual situation which you describe, however, it appears that certain so-called federal forest lands have been acquired subject to mineral rights owned by third parties, i. e., persons other than the grantor to the United States; and that the estate owned by such third parties is such as to vest them with the right to extract such minerals by the strip-mining method. In short, it appears that the estate owned by such third parties is of such extent, and the estate owned by the United States is so limited, that the Secretary of Agriculture of the United States is without authority to prescribe regulations governing the utilization of mineral rights therein as he may do under authority of Section 518 and 520, Title 16, U. S. C., with respect to forest lands federally owned in fee simple. We may, therefore, specifically assume that in the situation you describe the United States possesses no power to prevent or regulate strip-mining on the particular tracts here involved.

It is, of course, well known that in the usual course of strip-mining operations the surface of the land, as it had theretofore existed in the natural state, is virtually destroyed. Specifically, it is so uprooted and disarranged as (1) to lose, through burial, all of the topsoil which might support vegetation and (2) to present a sharply graded series of ridges and depressions which greatly intensify and accelerate erosion of the soil.

In these instances, when the prime object in the acquisition of such

lands by the United States is to achieve drainage and erosion control through the growth of forest and other soil cover, and when the title acquired by the United States is such that the federal government possesses no power to prevent the virtual destruction of the surface of the land so acquired, it must be concluded that the United States has not, in such cases, acquired such "territory or other property," within the meaning of Article IV, Section 3, Clause 2, as would justify the exercise of a federal function in the protection of such land surface which could be interfered with, within the meaning of the rule in the Wilson case, *supra*, by an exercise of the state's police power in regulating strip mining operations on such land.

It was observed in my opinion No. 152, *ante*, that the acquisition of forest lands by the United States did not have the effect of precluding the exercise of the state's police power within the territory in which such lands lie. The reasoning on this point is set out in that opinion as follows:

"* * * 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.”

In these circumstances, therefore, since the estate in particular forest lands owned by the United States is not sufficient to justify the exercise of the federal power to control the extraction of minerals therefrom by the strip-mining method, it cannot be said that a federal power is interfered with by the exercise by a state of its police power to regulate and control such extraction of minerals through the enforcement with respect to such lands, of the Ohio Coal Strip Mine and Reclamation Act.

Respectfully,

C. WILLIAM O'NEILL

Attorney General