March 16, 1955

From: American Law Division
Subject: Dinosaur National Monument

We regret that because of previously assigned work and the necessity to meet other deadlines, we have been unable to devote the time requisite to a complete answer to your questions. In response to the urging of Mr. Jex, we have stated below for your consideration the tentative results of our study. Preliminarily we quote and answer your questions as follows:

1. Are the conclusions of Committee Counsel George W. Abbott (Colorado River Storage Project Hearings . . . Committee on Interior and Insular Affairs, House . . . 83d Congress . . . on H.R. 4449, H. R. 4443, and H. R. 4453 . . . p. 719) acceptable? They are.

2. Did the 1938 enlargement of Dinosaur National Monument leave the power sites subject to the Federal Power Commission’s withdrawal authority? We think it did.

3. Under the Federal Power Act, are management and control of the power sites reserved in the Commission? We think they are, especially in view of the Roanoke Rapids decision, Chapman v. F. P. C. (1953) 345 U.S. 153. The turning point in that case was that Congress had not withdrawn the jurisdiction of the Federal Power Commission to issue a license (pp. 156-172). The basis for the other answers will appear in the following presentation.

The Act of March 3, 1922 (42 Stat. 1353-1354) provided:

That hereafter no permit, license, lease, or authorization for dams, conduits, reservoirs, powerhouses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as now constituted of any national park or national monument shall be granted or made without specific authority of Congress, and so much of the Act of Congress approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," approved June 10, 1920, as authorizes licensing such uses of existing national parks and national monuments by the Federal Power Commission is hereby repealed.

The import of the words of this Act, insofar as Dinosaur National Monument is concerned, is that it was to apply to existing national (parks and) monuments within their limits as then constituted. Dinosaur National Monument, as it
then existed under the proclamation of October 4, 1915 consisted of, and was limited to, 80 acres. That is the area taken from the possible jurisdiction of the Federal Power Commission. This interpretation coincides with the codified versions later appearing in the United States Code.

The 1934 edition of The Code of ... the United States ... is published by the Government Printing Office carries a codification of the statute in the following language (U. S. C. 16:797):

Provided further, That after March 3, 1921, no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as constituted, March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress:

This same wording appears in the 1925 Code of ... the United States ... (43 Stat. part 1) and in the note U. S. C. A. 16:797. While the Act of March 3, 1921 has some bearing as an indication of congressional policy at that time, we perceive of no present applicability to the monument in dispute. Its present status appears to be that of a dangling provision of law specifically saved from repeal by the proviso of section 212 of the amended Federal Power Act of August 26, 1935 (49 Stat. 847). See Hearings ... p. 729. This points up and narrows we believe the conclusion on p. 730 by Mr. Abbott. It indicates that the act was limited to parks and monuments "as constituted" on March 3, 1921.

We do not know the relative standing of the present Dinosaur National Monument area among the great scenic regions of the Earth and we do not intend to assume a position bearing on the merits of conservation or reservation in this instance. We do know that the area is still Dinosaur National Monument. It is neither Echo Park National Park nor is it even Echo Park National Monument.

The standard established by Congress for the establishment of a national monument is "the smallest area compatible with the proper care and management of the objects to be protected." This was 80 acres under the proclamation of October 4, 1915 and it apparently sufficed for nearly 23 years for the protection of "an extraordinary deposit of Dinosaurian and other gigantic reptilian remains of the Juratarias period." As an "existing" national monument on March 3, 1921, its area was withdrawn from the jurisdiction of the Federal Power Commission with the 80 acre limits as then constituted. When the reservationists sought enlargement of the Monument, there was unyielding opposition by the Federal Power Commission to the inclusion of certain damsites, and an agreement was reached or at least an arrangement was made, which obviously was intended to...
reserve the sites or at least the authority of the Federal Power Commission with respect to power sites. The new boundaries of the Monument were otherwise described by sections, surveyed and unsurveyed.

It is to be presumed that the President did not intend a nugatory act when he included in the Proclamation of July 14, 1938 (53 Stat. 2454) the exception "that this reservation shall not affect the operation of the Federal Water Power Act of June 10, 1920 (41 Stat 1063), as amended, and the administration of the monument shall be subject to the Reclamation Withdrawal of October 17, 1904, for Brown's Park Reservoir Site in connection with the Green River project." As a matter of hindsight, perhaps it would have been preferable to designate specifically the power site reserves. However, it is our understanding, after perusing the hearings and materials submitted, that there were a number of favorable sites and variant possibilities for locations, and therefore the exception was made in general language by reference to the Federal Power Act.

We have presumed that the President did not intend a nugatory act. Courts frequently have indulged in such a presumption with respect to legislative and other acts. A court is not always confined to the statutory written word. Construction is sometimes to be exercised as well as interpretation. U. S. v. Parchelt (1907) 206 U. S. 225, 229. In dealing with Congress, judges are not to be curious in nomenclature if Congress has made its will plain, nor allow substantive rights to be impaired under the name of procedure. Atlantic Coast Line R. Co. v. Burnette (1915) 239 U. S. 199, 201. Every legislative enactment is to be given effect if possible (ut res magis valeat quam pereat), "that the thing may rather have effect than be destroyed." Unity v. Burrage (1880) 103 U.S. 447, 457. Even where the construction of a deed is doubtful, courts will always prefer that which will confirm to that which will destroy any bona fide transaction. Griffith v. Bogart (1885) 16 Haw. 156, 163. It would be harsh indeed, and not consonant with accepted practice, to hold that an administrative act, having standing similar to a legislative act, was not entitled to the same considerations in its interpretation or construction as a legislative or even private act.

We indicated earlier that under section 2 of the Act of June 8, 1906 (34 Stat. 225; U. S. C. 16:431) the President is authorized, "in his discretion" to reserve as national monuments "parcels of lands, 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." It is our understanding
that the President also is authorized to reduce the area of a national monument. Op. Sol. July 21, 1947, M-38978 (60 I. D. 9-10). If this is so, can he not establish or enlarge a monument subject to limitations or reservations? We think he can.

We do not know the extent, number or the exact status of the power site reserves within the extended boundaries of Dinosaur National Monument. We assume that they come within the purview of section 24 of the Federal Power Act (U. S. C. 16:818) and remain reserved under the jurisdiction of the Federal Power Commission until otherwise disposed of by the Commission or by Congress. Indeed it has been held by the Interior Department that the language of the Federal Power Act is clear and decisive. "Under the first sentence of section 24 the mere filing of an application for water-power privileges operates automatically to withdraw water-power sites from entry, location, or disposal under other laws 'until otherwise directed by the commission or by Congress.' It is clear beyond question that the jurisdiction of this department over any lands of the United States included in any proposed project under the provisions of said act automatically terminates upon the filing of an application therefore with the Federal Power Commission, and this department has no further control of the lands until and unless jurisdiction is restored by the commission or by Congress." Nevada Irrigation District (on rehearing) (June 4, 1908) 52 L. D. 377, 378.

In view of the non-applicability of the Act of March 3, 1921 and the reservations existing at the time of the amendment of the Federal Power Act of August 26, 1935 (see the letters of the chairman, Federal Power Commission dated December 13, 1934 and January 9, 1936, ... Hearings ... pp. 728 and 731) we do not see how these sites could have been included in Dinosaur National Monument on July 14, 1938 except either by a release by the Commission or by an act of Congress. We have found neither.

It is true that the definition of "reservation", as enacted in section 201 of the Federal Power Act of August 26, 1935 (49 Stat. 838; U.S.C. 16:796(2)) excluded national monuments and reservations. The provision was explained as follows:

... The definition of the former term ("reservations") has been amended to exclude national parks and monuments. Under an amendment to the act passed in 1921, the Commission has no authority to issue licenses in national parks or national monuments. The purpose of this change in the definition of "reservations" is to remove
from the act all suggestion of authority for granting of such licenses . . . (H. Rept. 1318, 74th Cong., p. 22).

However, we have already shown that the power sites were not, indeed could not be, included in the Dinosaur National Monument, and there is nothing in this definition which changes that status.

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