

**Editor's note: 79 I.D. 67**

ARIZONA PUBLIC SERVICE COMPANY

IBLA 71-281

Appeal from decision (Arizona 6014) by the Phoenix land office, Bureau of Land Management, rejecting right-of-way application in part.

Affirmed.

Patents of Public Lands: Generally--Rights-of-Way: Generally

Generally, when public lands are patented all title and control of the land passes from the United States and this Department has no authority to issue rights-of-way over the patented lands.

Patents of Public Lands: Reservations--Power: Transmission Lines--Rights-of-Way: Generally-- Withdrawals and Reservations: Power Sites

Patents cannot convey what the law reserves, therefore, patents issued after the Federal Power Commission had granted a license for a transmission line are subject to the reservation prescribed

by section 24 of the Federal Power Act regardless of whether or not the reservation was stated in the patent.

Patents of Public Lands: Reservations--Power: Transmission Lines--Rights-of-Way: Generally-- Rights-of-Way: Act of March 4, 1911

Where lands are patented subject only to a reservation under section 24 of the Federal Power Act, the Department of the Interior has no authority under the Act of March 4, 1911, to grant a right-of-way to maintain an existing transmission line which had been licensed by the Federal Power Commission even though the Commission has determined the line is not a primary line within its licensing authority.

Power: Transmission Lines--Rights-of-Way: Act of March 4, 1911

The Department of the Interior has authority under the Act of March 4, 1911, to grant rights-of-way over public lands for hydro-electric transmission lines which are not primary lines under the jurisdiction of the Federal Power Commission.

Patents of Public Lands: Reservations--Power: Transmission Lines--Rights-of-Way: Generally-- Rights-of-Way: Act of March 4, 1911

Quaere: Whether the Department of the Interior has authority to reserve a right when lands are patented to grant rights-of-way

under the Act of March 4, 1911, over the patented lands.

Even if there is such authority, but the language of the regulations and of the insertions in patents does not clearly reserve the right in the future to grant the right-of-way under the Act of March 4, 1911, where a right-of-way was then licensed under a different act, a reservation of the right will not be presumed.

Keating Gold Mining Company, Montana Power Company,

Transferee, 52 L.D. 671 (1929), overruled in part.

APPEARANCES: Anthony R. Kulina, Senior Right-of-Way Agent, Land Department, Arizona Public Service Company.

OPINION BY MRS. THOMPSON

Arizona Public Service Company has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Lands, Phoenix land office, Bureau of Land Management, dated April 23, 1971, which rejected in part its right-of-way application, Arizona 6014, to maintain a constructed transmission line presently licensed by it under Federal Power Commission License No. 150. 1/ The application was rejected as

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1/ The application stated it was for "a right to replace Federal Power Commission License #150 and covers an existing 69 KV transmission line originally constructed in 1922." It stated that the total length of the line to be installed is 29.489 miles, including 24.709 miles on lands owned by the United States.

to lands which had been patented by the United States. The decision indicated that further processing of the application would continue as to the remaining federal lands under Bureau of Land Management jurisdiction.

The application was filed pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1964), which provides:

The head of the department having jurisdiction over the lands be, and he is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: Provided, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: Provided further, That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

The land office decision indicated that there is no authority under this Act to issue a transmission line right-of-way over lands which have passed from federal ownership.

Appellant disagrees with this conclusion, contending there is authority in the Bureau by virtue of the effect of section 24 of the Federal Power Act, 16 U.S.C. § 818 (1970), upon the lands in question.

Appellant points out that Federal Power Commission License No. 150, which was granted April 14, 1922, will expire April 30, 1972, and that the Federal Power Commission has declined to renew the license on the ground that the transmission line no longer qualifies as a "primary line" as that term is used in the Federal Power Act (16 U.S.C. §§ 791-823 (1970)). 2/ Appellant states that its license was one of the earliest licenses issued by the Federal Power Commission for hydroelectric transmission purposes. It asserts that the lines of many utilities which were initially licensed as "primary transmission lines"

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2/ Appellant has furnished a copy of a letter dated September 9, 1970, to it from the Secretary, Federal Power Commission, stating in part: "On the basis of a recent staff study it appears that this transmission line is not a primary line or part of a 'project' as defined in Section 3(11) of the Federal Power Act and, therefore, would not be within the licensing authority of the Commission." There is no information in the record to indicate whether appellant exhausted the administrative processes before the Commission in determining whether a renewal would be granted. It has submitted a copy of its letter dated January 19, 1972, to the Commission requesting a one-year license. Apparently, it would surrender a license granted by the Commission, if this Department were to grant its right-of-way application.

no longer serve primary line purposes and will be subject to similar renewal problems upon their expiration. It states that the decision on this appeal will establish a precedent which will have far reaching effect on utilities throughout the country whose licenses were of a later date. It contends that the integrity of the existing transmission systems should be preserved "which in this day of environmental concerns would be extremely difficult to replace or relocate."

Appellant further contends that the lands included in its license were withdrawn from entry, location or other disposal, and pursuant to section 24 of the Federal Power Act the withdrawal could not be vacated without affirmative action by the Federal Power Commission or Congress. Therefore, it asserts, the owners of the patented land do not have complete title to the land now and will not automatically gain complete title at the expiration of the license.

Appellant's contentions rest primarily upon the effect of section 24 of the Federal Power Act upon land patented after its application for a license was filed with the Federal Power Commission and was granted. This is the first time in an appeal proceeding in this Department this question has been raised.

Section 24 of the Federal Power Act was first enacted as section 24 of the Federal Water Power Act of 1920, 41 Stat. 1075. That

Act was generally revised and made Part I of Title II of the Public Utility Act of 1935, receiving the name of the Federal Power Act, 49 Stat. 803. Section 24 had only minor, insignificant changes made then. Id. at 846. The Act of May 28, 1948, 62 Stat. 275, added a proviso not pertinent here. As amended by the 1935 Act, section 24 provides pertinently as follows:

Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. Whenever the Commission shall determine that the value of any lands of the United States so applied for, or heretofore or hereafter reserved or classified as power sites, will not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws, the Secretary of the Interior, upon notice of such determination, shall declare such lands open to location, entry, or selection, for such purpose or purposes and under such restrictions as the Commission may determine, subject to and with a reservation of the right of the United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for the purposes of this Part, which right shall be expressly reserved in every patent issued for such lands; \* \* \*

It is true, as appellant contends, that the land was withdrawn under this provision when the application for the license for the transmission line was filed with the Federal Power Commission. But, the section provides that upon direction of the Commission or Congress

such lands could be made available under the public land laws subject to any restrictions by the Commission, and subject to the reservation provided in that section. A direction as to the availability of lands occupied by transmission lines has been prescribed by the Commission and is set forth in this Department's regulation 43 CFR 2344.2 (1972) as follows:

(a) On April 17, 1922, the Federal Power Commission made a general determination "that where lands of the United States have heretofore been, or hereafter may be, reserved or classified as powersites, such reservation or classification being made solely because such lands are either occupied by power transmission lines or their occupancy and use for such purposes has been applied for or authorized under appropriate laws of the United States, and such lands have otherwise no value for power purposes, and are not occupied in trespass, the commission determines that the value of such lands so reserved or classified or so applied for or authorized, will not be injured or destroyed for the purposes of power development by location, entry or selection under the public land laws, subject to the reservation of section 24 of the Federal Water Power Act."

This Department has issued patents under the authority of this general determination, including those involved in this case. The only limitation specified by the Commission was the reservation under section 24 of the Federal Water Power Act, which required that any patent expressly reserve the right of the "United States or its permittees or licensees to enter upon, occupy, and use any part or all of said lands necessary, in the judgment of the Commission, for

the purposes" of the Act. Forty of the 55 patents in question here contained the reservation referring to section 24 of the Federal Water Power Act. Appellant expresses concern over 8 patents issued without such a reservation.

When patents have issued for public land, the general rule is that all title and control of the land passes from the United States. See, e.g., United States v. Schurz, 102 U.S. 378, 396 (1880). Thus, generally, this Department disclaims jurisdiction and refuses to consider applications for rights-of-way over land which has been patented. Cf., Florida State Road Department, A-28914 (June 21, 1962). The Supreme Court, however, in considering what rights a permittee of an electric transmission line granted by the Secretary of the Interior under the Act of February 15, 1901, 43 U.S.C. § 959 (1970), had to the use of the line as against homestead patentees said, in Swendig et al. v. Washington Water Power Company, 265 U.S. 322, 329 (1924):

It was competent for Congress to make subsequent homestead entries subject to the Act of February 15, 1901, and to the regulations fixed by the Secretary. And undoubtedly the power and authority of the Secretary under the act may be so exercised as to affect the rights and limit the title of subsequent homestead entrymen. Within the scope of the authorization, he may make, and from time to time change, regulations for the administration of the act. The rights of appellants as entrymen were subject to the proper exercise of that power. \* \* \*

Although there was no reservation of the right-of-way within the patent, the court held that the patentees took subject to the right-of-way, and that, under the regulations in effect when the patents issued, only the Secretary of the Interior could revoke the right-of-way; the issuing of the patents did not do so. It emphasized, at 332:

\* \* \* The issuing of the patents without a reservation did not convey what the law reserved. They are to be given effect according to the laws and regulations under which they were issued. \* \* \*

See also, United States v. Frisbee, 57 F. Supp. 299 (D. Mont. 1944), holding that where a statute required that minerals be reserved to an Indian tribe, a patent issued without such a reservation could not convey what the law reserved.

Since the Federal Water Power Act required the section 24 reservation where a license had issued by the Federal Power Commission, this case does not squarely fall within the general rule expressed above, as a right to the United States and its permittees or licensees has been reserved by virtue of section 24. For the purpose of this decision, we assume that the Swendig rule controls and that all of the patents, whether the reservation was expressed therein or not, are subject to the reservation made by section 24 of the Federal Water Power Act. The crucial issue raised is whether the Department

has authority to issue a right-of-way for the right reserved by section 24.

In contending that the Bureau has authority to issue the right-of-way under the Act of March 4, 1911, where lands have been patented, subject to section 24 of the Federal Water Power Act, appellant cites the following provision of the Bureau of Land Management Manual, Manual Release No. 240 of February 5, 1963, Vol. V, Chap. 9, 3.9.102:

.102 On receipt of a report from the FPC, and when all else is regular, a right-of-way will be issued for all lands formerly used under the FPC license whether or not the lands were subsequently patented.

A. Rental charges will be made accordingly and will be applicable from the date of cancellation of the FPC license.

B. Any right-of-way so granted will be made subject to the terms and conditions of 43 CFR, Part 244. [Now 43 CFR, Group 2800 (1971).]

(1) Each such right-of-way permit will contain the following statement when all or part of the lands were patented subsequent to the issuance of the FPC license:

"This right-of-way, as shown on the attached map(s) marked Exhibit\_\_\_\_, is effective as to the public lands, and to such of the privately-owned lands crossed by the right-of-way as were patented subject to the provisions of Section 24 of the Federal Water Power Act (16 U.S.C. 818)."

The Bureau of Land Management Manual is an intra-Departmental instruction guide for employees administering the laws under the

Bureau's jurisdiction. It does not have the force of a regulation or a Departmental decision. It does, however, reflect an understanding by the Bureau of its authority to issue rights-of-way where section 24 of the Federal Water Power Act is effective. Other intra-Departmental communications, specifically, memoranda issued by the Associate Solicitor for Public Lands, reflect a different understanding. In an unpublished memorandum to the Director, Bureau of Land Management, December 28, 1961, the Associate Solicitor indicated that where land within a right-of-way granted by the Act of March 4, 1911, was subject to the reservation of section 24 of the Federal Water Power Act

\* \* \* upon expiration of the original term of a right-of-way granted under the Act of March 4, 1911, supra, over lands subsequently embraced within a power site reservation or withdrawal and thereafter patented, even though the right-of-way grantee may have no right of renewal under that Act or applicable regulations, he may still secure the right to the continuance of his use of the land, provided it is for a purpose under the Federal Water Power Act, supra.

This is converse to the situation presented here. Nevertheless, although not clearly stated therein, it appears from this memorandum that the Associate Solicitor considered the licensing of a right-of-way where lands had been patented subject to section 24 of the Federal Water Power Act to be exclusively within the province of the Federal Power Commission, since he indicated there could not be a renewal under the Act of March 4, 1911. This position is also manifest in

another unpublished memorandum dated December 13, 1967, to the Chief, Division of Lands and Minerals Program Management, where the Associate Solicitor, in referring to the section 24 reservation, stated:

\* \* \* The reservation pertains to the power values in the land; the reserved power values are administered by the Federal Power Commission. The use right is not public land nor an estate in public land which is under BLM administrative control. It is not necessary, at this time, to inquire into the extent of the Federal Power Commission's authority.

The language of section 24 of the Federal Power Act supports this view that the Commission may have exclusive jurisdiction since it expressly refers to the right to use the lands "necessary, in the judgment of the Commission, for the purposes of this Part." This indicates a determination is to be made by the Commission that the use is necessary for the purposes of the Act. If the Commission has exclusive jurisdiction over the right reserved by section 24 of the Federal Power Act, which could not be transferred to another agency, it would not appear that this Department would have any authority under the Act of March 4, 1911, since the Act grants the authority to issue rights-of-way to the "head of the department having jurisdiction over the lands." Thus, even if the term "public lands and reservations of the United States" in the Act of March 4, 1911, could be construed as applicable to the reserved right in patented land under the Federal Power Act, it is questionable

whether this Department is the authorized agency to grant such a right.

The literal language of the Federal Power Act and the Act of March 4, 1911, supports a conclusion that this Department is not authorized under the Act of March 4, 1911, to issue a right-of-way where lands are patented subject only to a section 24 reservation whether or not expressed in the patent.

We do note that this position with respect to patented lands subject only to the section 24 reservation of the Federal Water Power Act is different from the situation obtaining where public lands are involved. The line of demarcation between the authority of the Federal Power Commission and this Department, however, to issue rights-of-way over public lands for hydro-electric transmission purposes has not always been clear. For a number of years following the enactment of the Federal Water Power Act, the view in this Department was that the Act of March 4, 1911, had been superseded by the Federal Water Power Act as to all hydro-electric power projects unless allotted Indian lands were involved. Thus, the Department ruled that it had no authority to issue a right-of-way over lands embraced in a license issued by the Federal Power Commission even though the applicant for the right-of-way and the licensee were the same person. Nevada Irrigation District, 52 L.D. 371, on rehearing, 52 L.D. 377 (1928).

It was also held, even though no license had been issued by the Federal Power Commission, that this Department had no authority to grant a right-of-way over public lands for power purposes under the Act of March 4, 1911, for another period or to extend the life of an original grant under the Act for an additional period of years. Keating Gold Mining Company, Montana Power Company, Transferee, 52 L.D. 671 (1929). Over the years, however, a shift in the view that the Federal Power Commission had exclusive jurisdiction over licensing all projects involving hydro-electric power, including distribution lines which were not primary lines, has evolved to the position now manifest in the regulations (43 CFR 2850.0-3(c)(1972)) that this Department has jurisdiction to issue rights-of-way over public lands for transmission lines which are not primary lines. <sup>3/</sup> The present

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<sup>3/</sup> A review of the changes in the regulations shows the development of the Department's understanding of its authority and that of the Federal Power Commission with respect to rights-of-way for transmission lines. Footnote 78 under Part 245 of 43 CFR, 1938 edition, stated that the Act of March 4, 1911, and the Act of February 15, 1901, "are applicable only to projects for generating or conveying power other than hydro-electric, or in case of projects involving allotted Indian lands." The 1939 Supplement to the regulations at 43 CFR 245.2 was to the same effect, adding that no application for a right-of-way for transmission lines should be filed under the 1901 and 1911 Acts, "unless the electrical energy to be generated or conveyed is to be generated by means other than by water power, or the lands affected are allotted Indian lands. All other applications for power plants or transmission lines must be filed with the Federal Power Commission, \* \* \*". The 1944 Cumulative Supplement at 43 CFR 245.2 changed this to "transmission of hydro-electric power defined in section 3(11) of the act [Federal Power Act], excepting distribution lines and rights-of-way over allotted Indian lands." It stated:

"All applications for rights-of-way for power plants or transmission lines, other than hydro-electric plants and main or primary

position is in conformity with a holding by the United States Court of Appeals for the District of Columbia Circuit, Pacific Power & Light Co. v. Federal Power Commission, 184 F.2d 272 (1950). To the

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fn. 3 (cont.)

hydro-electric power transmission lines should be made under the act of February 15, 1901, or the act of March 4, 1911, and this part. Applications for hydro-electric power plant sites or rights-of-way for main or primary hydro-electric power transmission lines, excepting where the lands affected are allotted Indian lands, must be made to the Federal Power Commission."

The 1949 edition had a similar provision, 43 CFR 245.2. By Circular 1825, 17 F.R. 5902 (July 1, 1952), that regulation was renumbered and set forth basically similar in language as 43 CFR 244.39(c), adding that "Rights-of-way for transmission lines which are not primary lines must be secured under the act of February 15, 1901, or the act of March 4, 1911. See 18 CFR 2.2." This same provision is now set forth as 43 CFR 2850.0-3(c) (1972).

The first instructions of this Department under the Federal Water Power Act, (Circular No. 729) issued November 20, 1920, 47 L.D. 595, provided that any application filed after June 10, 1920, the enactment of the Federal Water Power Act, which was wholly in conflict with lands reserved or classified as power sites, or covered by a power application under the Act would be rejected, except for certain circumstances not of note here. If an application conflicted with a transmission-line withdrawal "of a strip of land crossing the land applied for" entry would be allowed but notation on the entry and record would be made that it is subject to the conditions and reservations of section 24, Federal Water Power Act. The instructions stated that "withdrawn public lands are not subject to lease, or other disposition, other than such as is specifically recognized by [t]he Federal Water Power Act." 47 L.D. 597. They also stated that the lands within transmission-line permits or approved rights-of-way under the Act of March 4, 1911, are deemed "classified as valuable for power purposes," and, "whether withdrawn as power-site reserves or not, occupy the status of withdrawn lands for the purposes of these regulations." 47 LD. 598. The import of this latter statement is now set forth in the present regulation, 43 CFR 2344.1 (1972), stating:

"The following classes of lands are considered as withdrawn or classified for power purposes for the purposes of section 24 of the Federal Power Act: \* \* \* lands within transmission-line permits or approved right-of-way under \* \* \* the act of March 4, 1911 \* \* \*."

Thus, this Department has treated transmission-lines granted under the Act of March 4, 1911, as within the power purposes of the Federal Power Act, at least, for the purpose of the reservation in section 24 of that Act.

extent the Keating case, *supra*, may be read that this Department has no authority to issue rights-of-way over public lands for hydro-electric power lines which are not primary lines it is overruled.

This discussion brings into focus two additional issues involved in this case which were not pointed out in the decision below. The first issue is whether this Department has authority to reserve a right to grant rights-of-way under the Act of March 4, 1911, when lands are patented. The second issue, corollary to the first, is whether, if it has such authority, it has been exercised here so as to afford a basis for granting the right-of-way.

It is unnecessary in this case to resolve finally the first question since, as will be discussed, we conclude there has not been a clear exercise of such authority if it exists. We note, however, that the Associate Solicitor in the December 13, 1967, memorandum has expressed the view that the United States cannot effectually reserve rights under the 1911 Act, although, he recognizes that a patentee may take land subject to an easement or other right-of-way. We question whether this view is correct. The Swendig case, *supra*, is good authority for the proposition that the Secretary in implementing an act, such as that involved there, the Act of February 15, 1901, and the Act of March 4, 1911, which is very similar, which

gives him authority to prescribe rules and regulations, may condition and limit grants under other acts by such regulations. An insertion in a patent also would make the reserved limitation even stronger.

Furthermore, where the act under which a patent is issued gives discretionary authority to the Secretary in allowing patent, it has been recognized that he may qualify grants of benefits under the act by making them subject to certain limitations and restrictions. See the discussion in the Solicitor's Opinion, 60 I.D. 477 (1951); John L. Rice, 61 I.D. 175 (1953). Therefore, we raise this issue of the authority of the Secretary to reserve a right in patented lands to grant rights-of-way under the Act of March 4, 1911, for further consideration in the Department.

Even if this Department has such authority, nothing has been shown in this case to support a conclusion that it has been exercised in such a manner as to make clear that there was a reservation of the right to the United States which could be exercised by this Department under the Act of March 4, 1911, after the appellant's license with the Federal Power Commission expired. The regulations do not so clearly provide. <sup>4/</sup> Although appellant has not discussed any of the patent provisions, except as discussed previously, we have checked the patents covered by appellant's applications. The strongest

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<sup>4/</sup> See n. 3, supra, and 43 CFR 1821.4-1 and 2, and Parts 2800 and 2850 (1972).

argument that this Department has reserved a right may be made from ten patents (three of which also mentioned the section 24 reservation of the Federal Power Act) issued under the Small Tract Act, 43 U.S.C. § 682a (1970), during the period 1955 to 1957, which stated:

Subject to such rights for electric transmission line purposes as the Arizona Public Service Company may have under the Act of March 4, 1911 (36 Stat. 1253), as amended (43 U.S.C. Sec. 961).

Nevertheless, after considering arguments why this provision might or might not constitute a reservation, we are not convinced that it is. Appellant has not advanced legal arguments concerning this provision. It is sufficient to say that at the time the patents issued with this language the Arizona Public Service Company was not licensed under the Act of March 4, 1911. We believe this language is inadequate to compel a conclusion that the United States reserved a right in the future to grant a right-of-way under the Act of March 4, 1911. In these circumstances a reservation of the right will not be presumed.

We realize that this Department's refusal to issue a right-of-way for the reasons heretofore expressed exposes a seeming hiatus in the Government's manifested authority to authorize the maintenance of this existing transmission line if the Federal Power Commission decides further that it has no authority to issue additional licenses to maintain the right-of-way. We offer no comments on whatever rights

appellant may have under state law to maintain the line in such eventuality, nor need we comment further on the Commission's authority in this regard.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed for the reasons above-stated.

B. Thompson, Member

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Joan

We concur:

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Edward W. Stuebing, Member (see additional concurring statement)

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Douglas E. Henriques, Member

I dissent in part:

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Frederick Fishman, Member

Edward W. Stuebing, concurring specially.

I am in agreement with the panel majority as to its findings with regard to the effect of section 24 of the Federal Power Act, its findings as to the applicability of the 1911 statute, and with the result reached in the case. The purpose of this separate opinion is to express in more positive terms my view with reference to the effect of the provision inserted in the several small tract patents regarding the use of the land under the Act of March 4, 1911 (36 Stat. 1253; 43 U.S.C. § 961 (1964)).

The question is whether the inserted provision made the patented lands subject to a right-of-way under the 1911 Act. The majority opinion holds that the provision "will not be presumed" to constitute a reservation under the Act. Although I agree, I regard this as a rather equivocal disposition of a salient issue. The dissenting opinion takes the position that it operated as a reservation to the United States of the right to grant a way under that Act. This I view as error. The provision in these several patents reads:

Subject to such rights-of-way for electric transmission line purposes as the Arizona Public Service Company may have under the Act of March 4, 1911 (36 Stat. 1253) as amended (43 U.S.C. sec. 961).

All agree that the Arizona Public Service Company had no right-of-way under the Act of March 4, 1911, for electric transmission line purposes at the time that the patents issued and that it has not since been granted any. It is apparent, at least to me, that

since the provision was limited to such rights-of-way as the company had under the Act, and since the company had none, no right of way could be imposed, or reserved, by the provision.

It is my surmise that at the time these patents issued the issuing officer entertained some doubt as to whether the transmission lines which crossed the land were authorized exclusively by section 24 of the Federal Power Act, or whether the Arizona Public Service Company might also have some right-of-way by virtue of the Act of March 4, 1911. He did not want to issue a patent in derogation of the right of the company, neither did he wish to make the land subject to a use which did not exist. He happily avoided any chance of error in this regard by providing, in effect, that to whatever extent the company had a right-of-way over the land under the 1911 Act at the time the patent issued, the land would remain subject to such use. In so doing he assured that if the company did have a right-of-way under the 1911 Act it would be preserved. If not, no harm would be done the grantee because the words of condition and limitation would prevent the provision from taking effect.

The language employed is explicit and the meaning thereof is clear. The provision is simplicity itself. There is no ambiguity which requires construction, no doubts to be resolved, no obscure implications to be drawn. Nothing suggests that the draftsman was

unskilled in expressing his meaning. On the contrary, the provision obviously means precisely what it says. Where the language is sufficiently clear to define the character and extent of the reservation or exception it must be given effect. In fact, in order to broaden the meaning of the provision so as to imply a continuing right in either the United States or the appellant, it would be necessary to ignore the words of condition and limitation which were deliberately written into it. However, the exception in the patents is restricted and limited by a condition which prevents its operation and effect if the condition does not exist, and that condition has never existed.

While I find no fault with the principles of law enunciated in the dissenting opinion, it is my view that they have no application to this facet of the case.

Frederick Fishman, dissenting in part.

I question that portion of the decision which deals with the impact of the language contained in the ten small tract patents and concluded in essence that the language was nugatory.

The provision inserted in the small tract patents reads as follows:

Subject to such rights for electric transmission line purposes as the Arizona Public Service Company may have under the Act of March 4, 1911 (36 Stat. 1253), as amended (43 U.S.C. sec. 961).

The main opinion addresses itself to that provision as follows:

\* \* \* It is sufficient to say that at the time the patents issued with this language, of course, the Arizona Public Service Company was not licensed under the Act of March 4, 1911. We believe this language is inadequate to compel a conclusion that the United States reserved a right in the future to grant a right-of-way under the Act of March 4, 1911. In these circumstances a reservation of the right will not be presumed.

The first issue to be resolved is whether the United States is authorized to make a conveyance under the Small Tract Act, as amended, 43 U.S.C. §§ 682a-682e (1970), reserving a right to issue a right-of-way over the land after it has passed into private ownership. Stated broadly, the first proposition is whether an administrative officer,

in whom a statute vests discretionary power to grant or deny requested benefits, may qualify the grant of benefits by making them subject to terms deemed by him to be appropriate, if such terms are not prohibited by law.

In Southern Pacific Co. et al. v. Olympian Dredging Co., 260 U.S. 205, 208 (1922), the court, in discussing a discretionary authority of the Secretary of War, stated: "\* \* \* The power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to \* \* \* condition an approval."

See Golden Gate Bridge and Highway Dist. of Calif. v. United States, 125 F.2d 872 (9th Cir. 1942), cert. denied, 316 U.S. 700 (1942).

With respect to a public sale under 43 U.S.C. § 1171 (1970), a statute vesting discretionary authority in the Secretary of the Interior, the court said in Ferry v. Udall, 336 F.2d 706, 709 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965):

Since the Secretary has discretionary power to refuse to sell at all, he also has the authority to set any conditions consistent with the Act, upon which the sale may be made. Cf. Southern Pacific Co. et al. v. Olympian Dredging Co., 260 U.S. 205, 208, 43 S. Ct. 26, 67 L. Ed. 213 [1922].

The authority to impose conditions with respect to an exercise of discretion is stated in Sunderland v. United States, 266 U.S. 226, 235 (1924), as follows:

\* \* \* Indeed, we think the authority of the Secretary to withhold his consent to the proposed investment of the proceeds subject to his control, includes the lesser authority to allow the investment upon condition that the property into which the proceeds are converted shall be impressed with a like control. \* \* \*

Sunderland also stands for the proposition that a deed provision imposed by the United States is not to be tested by the power of an ordinary grantor to impose a like restraint on an ordinary grantee.

The Department has recognized the principle 1/ that a discretionary conveyance by it may be made subject to reservations, neither explicitly authorized nor specifically forbidden by law. Solicitor's Opinion, 60 I.D. 477 (1951). Indeed, in John L. Rice, supra, the Department authorized the insertion in a patent of a reservation of a right-of-way for driving sheep across the land and of overnight stopover privileges for such sheep. Cf. Solicitor's Opinion, 62 I.D. 22, 24 (1955).

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1/ I have not relied upon Swendig et al. v. Washington Water Power Company, 265 U.S. 322 (1924), as authority for the proposition that, under the regulations in effect at the time the patents were issued, the Secretary of the Interior may reserve, in an instrument of conveyance the right to continue a right-of-way. Swendig rests upon a departmental regulation 41 L.D. 152, par. 9 (1912) which reads as follows:

"The final disposal by the United States of any tract traversed by a right of way permitted under this act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act."

The second area of concern is the meaning and effect of the language included in the small tract patents.

The rule of interpretation of patents is set forth in Northern Pacific Ry v. Soderberg, 188 U.S. 526, 534 (1903), as follows:

\* \* \* Nothing passes by implication, and unless the language of the grant be clear and explicit as

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fn. 1 (cont.)

In contradistinction, 43 CFR § 2234.1-3(a)(2) (1964) provided:

"All persons entering or otherwise appropriating a tract of public land, to part of which a right-of-way has attached under the regulations in this part, take the land subject to such right-of-way and without deduction of the area included in the right-of-way."

This latter regulation is ambiguous with respect to the term "subject to." As pointed out, infra, the term is susceptible to meaning either (a) a recognition of a servitude, or (b) a reservation to the United States. In keeping with the doctrine that regulations should be so clear that there is no basis for disregarding them in affecting rights, I am constrained to the view that the term "subject to" in the 1964 regulations must be read as the recognition of a servitude. See Mary I. Arata, 4 IBLA 201, 78 I.D. 397 (1971).

However, I do regard Swendig as authority for the proposition that the Secretary has authority to preserve his control by regulation over rights-of-way granted by him even though the land is subsequently patented. Cf. BLM Chief Counsel's Opinion, August 27, 1951. In essence, the Secretary can so specify in the instrument of conveyance and in general regulations. I am aware of the opinions which indicate otherwise and are found in the Department's litigation file re State of Washington v. United States, Civil No. 1895, U.S.D.C. Washington, S.D. None of these documents addresses itself to Swendig. The opinions are based upon the rules of real property controlling private conveyances. As pointed out in Sunderland, a deed provision imposed by the United States is not to be tested by the power of an ordinary grantor to impose a like restraint on an ordinary grantee. Cf. United States v. Union Pacific R.R., supra.

If it is determined to be the policy of the Department to endeavor to retain control over rights-of-way despite subsequent alienation of the fee, it may wish to consider the feasibility and desirability of formulating appropriate regulations.

to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

The doctrine is again enunciated in United States v. Union Pacific R.R., 353 U.S. 112, 116 (1957), as follows:

\* \* \* Such a construction would run counter to the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language and that if there are doubts they are resolved for the Government, not against it. Caldwell v. United States, 250 U.S. 14, 20-21 [1919]. \* \* \*

Caldwell recites "\* \* \* the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language -- inferences being resolved not against but for the Government." \* \* \*

See also Great Northern Ry. v. United States, 315 U.S. 262 (1942).

The concept is often enunciated that only reservations specifically authorized by law may be inserted in patents, relying on Davis's Administrator v. Weibbold, 139 U.S. 507 (527-528); Deffeback v. Hawke, 115 U.S. 392, 406 (1885); Burke v. Southern Pacific R.R., 234 U.S. 669,

699-705 (1914). However, as clearly shown in the Solicitor's Opinion, 60 I.D. 477 (1951), that principle applies to " \* \* \* statutory provisions which placed upon this Department the mandatory duty of conveying public lands to persons who met certain requirements prescribed in the controlling legislation." \* \* \* In the case at bar, we are concerned with a different situation--the Small Tract Act is a discretionary statute.

In the frame of reference of construing ambiguities in patents in favor of the United States, we next consider the language of the provision inserted in the small tract patents.

Concededly, the term "subject to" in an instrument of conveyance ordinarily connotes that the estate transferred is subordinate or subservient to a servitude.

However, in public land parlance, the term "subject to" is often used in the sense of "reserving to the United States." 2/ It is noteworthy that every one of the small tract patents in issue recites in part as follows:

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2/ E.g., see patent no. 1228506 issued to the State of Alaska on July 20, 1962, approved by the Attorney General on September 4, 1962. This patent recites in part that it is " \* \* \* subject, however, to \* \* \* (2) a right-of-way for ditches or canals constructed under the authority of the United States, as authorized by the act of August 30, 1890 \* \* \* (3) a right-of-way for the construction of railroads, telegraph and telephone lines in accordance with the act of March 12, 1914 \* \* \*."

This patent is subject to a right-of-way not exceeding 33 feet in width, for roadway and public utility purposes, to be located \* \* \* [along the boundaries of said land]. 3/

If the right-of-way is "to be located," it is obvious that it was not an existing servitude affecting the land at the time patent issued. It is in essence a reservation of a right-of-way.

It should be noted that at no time did the Arizona Public Service Company have a right-of-way across the lands in issue under the 1911 Act. What meaning, if any, then is to be given to the phrase "Subject to such rights for electric transmission line purposes as the Arizona Public Service Company may have under the Act of March 4, 1911 (36 Stat. 1253), as amended (43 U.S.C. sec. 961)?"

I am unwilling to conclude that the language is without effect. Concededly, it is inartfully phrased and, at best, is ambiguous. Applying the rule of construction that provisions in a patent are to be construed in favor of the United States, it appears, although not completely free from doubt, that the patents were intended to reserve to the United States the right to grant a right-of-way to the appellant, for the existing line, under the 1911 Act.

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3/ The bracketed material appears in several of the patents. Other small tract patents involved recite, in lieu of the bracketed material "across said land or as near as practicable to the exterior boundaries."

The question next to be faced is whether the retained interest in the United States is within the ambit of "public lands and reservations of the United States" and does this Department have "jurisdiction over the lands"? <sup>4/</sup>

Solicitor's Opinion, M-36703 (April 7, 1967) states:

We believe that "reservations of the United States" as used in the subsection includes Indian [R]eservations. The phrase "all public lands and reservations of the United States" is one of art used by the Congress when it means to encompass all lands in which the United States has an interest, and has been consistently so interpreted by the courts and this Department. [Emphasis supplied.]

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<sup>4/</sup> The Act of March 4, 1911, supra, reads in part as follows:

"The head of the department having jurisdiction over the lands be, and he is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: Provided, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: \* \* \*" [Emphasis supplied.]

My view that the retained interest is within the ambit of "reservations" is further buttressed by the definition embodied in § 3(2) of the Federal Power Act of June 10, 1920, as amended, 16 U.S.C. § 796(2), as follows:

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws: \* \* \* [Emphasis supplied]

Cf. FPC v. Oregon, 349 U.S. 435, 446-448 (1955).

This leads us to the question whether the Secretary of the Interior is "[t]he head of the department having jurisdiction over the lands \* \* \*."

Section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1970), provides in part as follows:

Any lands of the United States included in any proposed project under the provisions of sections 792, 793, 795-818, and 820-823 of this title shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located. \* \* \*

This quote seemingly impels the conclusion that land in a project is under the exclusive jurisdiction of the Federal Power Commission. In construing the 1911 Act, the Bureau of Land Management recognized that:

It is clear from the statute that the Congress recognized that more than one federal agency might have some jurisdiction as to lands embraced in a reservation and that as a condition precedent to the granting of a right-of-way under the law [the 1911 Act] all such agencies having any jurisdiction over reservations must consent thereto. [Footnotes omitted.]

Washington Water Power Company, Idaho 09429 (April 10, 1959); cf. Middle Park Conservancy District et al., Denver 050054 (August 13, 1957).

Sec. 24 of the Federal Power Act, as amended, explicitly recognizes that upon a favorable determination by the Federal Power Commission that the value of public lands for power purposes will not be destroyed by disposal:

\* \* \* The Secretary of the Interior upon notice of such determination, shall declare such lands open to location, entry, or selection. \* \* \*

This is precisely what happened. The Federal Power Commission had made a general determination that transmission lines would not bar the disposal of public lands, subject to the reservation embodied

in section 24 of the Federal Power Act, as amended. The Department thereafter favorably considered the small tract applications, and under my concept of the case, reserved a right to issue under his jurisdiction and authority a right-of-way under the 1911 Act to the appellant over the lands patented. It would seem to follow that the Secretary of the Interior is "[t]he head of the department having jurisdiction over the [interest in] lands. \* \* \*"

I recognize that the result with respect to the small tract patents reached in the major opinion would be compelled if the conveyance had been made by a party not the sovereign. That result in my judgment, disregards the principles governing interpretation of federal patents.

