Applies §274

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D. C.

1. Jurisdiction, Regulatory (Federal Enclaves)
2. State Regulation of Atomic Energy (Agreement State Program)
3. AEAct §274

Legal Memorandum
Office of the
General Counsel

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Licensing and Compliance

May 22, 1963

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SUBJECT: JURISDICTION TO REGULATE PRIVATE LICENSEES CONDUCTING ACTIVITIES ON FEDERAL ENCLAVES WITHIN AN AGREEMENT STATE

It is the purpose of this memorandum to determine whether the AEC or an Agreement State has jurisdiction to regulate, for purposes of protection against radiation hazards, the activities of persons conducted on federal enclaves within an Agreement State. More specifically, this memorandum will consider the following questions:

1. Federal Government jurisdiction over federal enclaves;

2. Termination of Federal Government jurisdiction over federal enclaves; and

3. Effect of an Agreement entered into with a state under Section 274 of the Atomic Energy Act of 1954, as amended, on Federal Government jurisdiction over federal enclaves.

This memorandum does not discuss whatever immunities from state jurisdiction a person may have under the Constitution and federal statutes because he acts as an arm of the Federal Government by conducting activities essential for the performance of Federal Government functions. These immunities would be available regardless of the nature of the jurisdiction over the area on which the activities are carried out. These immunities have constitutional bases other than the constitutional basis for exclusive federal jurisdiction over certain federal areas within the states.1/

## SUMMARY AND CONCLUSION

An Agreement State would have no jurisdiction to regulate, for purposes of protection against radiation hazards, the activities of persons in a federal enclave over which the Federal Government exercises exclusive

1/ See, e.g., McCulloch v. Maryland, 4 Wheat 316 (U.S. 1819); Carson v. Roane-Anderson Company, 342 U.S. 232 (1952); Leslie Miller, Inc. v. State of Arkansas, 352 U.S. 187 (1956); and Charles Paul v. United States, 31 LW 4109, 4113 (January 14, 1963).

jurisdiction. In a federal enclave over which the Federal Government exercises concurrent, partial, or proprietorial jurisdiction, an Agreement State would appear to have jurisdiction to regulate the activities of persons for purposes of protection against radiation hazards, assuming that the activities are not immune from state regulation for other reasons. There is the possibility that the partial jurisdiction which the Federal Government has retained over a federal enclave might be sufficiently broad to include exclusive jurisdiction to regulate for purposes of protection against radiation hazards.

## I. FEDERAL GOVERNMENT JURISDICTION OVER FEDERAL ENCLAVES

A federal enclave is an area within the territorial boundaries of a state over which, as a result of state consent and cession statutes, reservations by the United States at the time of admission of the state into the Union, or federal statutes, the Federal Government exercises varying degrees of jurisdiction.

The power of the Federal Government to exercise "exclusive legislation" over a federal enclave stems from Article 1, Section 8, Clause 17, of the Constitution which reads in relevant part:

> "The Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over the District of Columbia . . . as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over 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, dock-Yards, and other needful Buildings."

The power of Congress over federal enclaves that come within the scope of Article 1, Section 8, Clause 17, is obviously the same as the power of Congress over the District of Columbia.

For almost a century the Federal Government acquired what land it needed by the method specified by the Constitution: purchase with the consent of the states. Such consent usually reserved to the states the right to serve civil and criminal process within the area. See, e.g., Rogers v. Squier, 157 F. 2d 948 (9th Cir. 1946). This reservation was upheld as a precaution against such lands becoming asylums for fugitives from justice but any qualifications beyond this were deemed incompatible with exclusive federal jurisdiction. Then in Kohl v. United States [2/], the Supreme Court provided for another method of acquisition by holding that "the right of eminent domain . . . [in the Federal Government] ... may be exercised within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." But without

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2/ 91 U.S. 367, 372 (1875).

the state's "consent", the Federal Government does not obtain the benefits of Article 1, Section 8, Clause 17, its possession being simply that of an ordinary proprietor.

Mr. Justice Field, speaking for the Supreme Court in Fort Leavenworth Ry. v. Lowe [3], decided that when land is acquired other than by purchase with consent, the states, in ceding jurisdiction to the United States, can reserve such powers as are not inconsistent with the effective use of the property for the purpose intended. The Supreme Court has also decided that a state may reserve powers other than the right to serve process even over lands purchased with consent and may cede jurisdiction over lands acquired for a purpose not specified in Article 1, Section 8, Clause 17 of the Constitution. See, e.g., James v. Dravo Contracting Co., 302 U.S. 134, 148, 149 (1937); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).

Thus, if the United States acquires with the "consent" of a state land within the borders of that state by purchase or condemnation for any of the purposes mentioned in Article 1, Section 8, Clause 17, or if the land is acquired without such consent and later the state gives its "consent", the jurisdiction of the Federal Government becomes "exclusive". [4]

The cases make clear that the grant of "exclusive" legislative powers to Congress over enclaves that meet the requirements of Article 1, Section 8, Clause 17, by its own weight, bars state regulation without specific congressional action. The question was squarely presented in Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285, 294, 295 (1943) which involved an attempt by California to fix the prices at

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3/ 114 U.S. 525, 527 (1885).

4/ See dissents of Justices Frankfurter and Murphy in Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285, 296, 303 (1943). Justice Frankfurter said in part (p. 300): "Enough has been said to show that the doctrine of 'exclusive jurisdiction' over federal enclaves is not an imperative. The phrase is indeed a misnomer for the manifold legal phases of the diverse situations arising out of the existence of federally-owned lands within a state - problems calling not for a single, simple answer but for disposition in the light of the national purposes which an enclave serves. If Congress speaks, state power is of course determined by what Congress says. If Congress makes the law of the state in which there is a federal site as foreign there as is the law of China, then federal jurisdiction would really be exclusive. But short of such congressional assertion of overriding authority, the phrase 'exclusive jurisdiction' more often confounds than solves problems due to our federal system." See and compare Penn Dairies, Inc. v. Milk Control Commission of Pennsylvania, 318 U.S. 261 (1943).

which milk could be sold at Moffet Field. The Supreme Court held that "sales consummated within the enclave cannot be regulated by California law" because such regulation by the State would be a denial of the federal power "to exercise exclusive Legislation" respecting lands purchased by the United States with the consent of the state, even though there was no conflicting federal regulation.

Against this background, Congress initiated in 1940 a major change in policy, Act of Feb. 1, 1940, 54 Stat. 19, amended by Act of Oct. 9, 1940, 54 Stat. 1083. 5/ The Act "was aimed at giving broad discretion to the various agencies in order that they might obtain only the necessary jurisdiction". Adams v. United States, 319 U.S. 312, 314 (1943).

Whether the United States has acquired exclusive jurisdiction over a federal enclave is a federal question. The Supreme Court stated in Silas Mason Co. v. Tax Commission, 302 U.S. 186, 197 (1937) that:

> "The question of exclusive territorial jurisdiction is distinct. That question assumes the absence of any interference with the exercise of the functions of the Federal Government and is whether the United States has acquired exclusive legislative authority so as to debar the State from exercising any legislative authority, including its taxing and police power, in relation to the property and activities of individuals and corporations within the territory. The acquisition of title by the United States is not sufficient to effect that exclusion. It must appear that the State, by consent or cession, has transferred to the United States that residium of jurisdiction which otherwise it would be free to exercise . . . . In this instance, the Supreme Court of Washington has held that the state has not yielded exclusive legislative authority to the Federal Government ... . That question, however, involving the extent of the jurisdiction of the United States is necessarily a Federal question."

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5/ These Acts are codified in 40 U.S.C. § 255 which provides in part: "Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head . . . of any department . . . or agency . . . may, in such cases and at such times as he may deem desirable, accept or secure from the state in which any lands . . . are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands . . . as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States . . . . Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired . . ., it shall be conclusively presumed that no such jurisdiction has been accepted."

A difficulty arising from cession of exclusive jurisdiction to the United States is that there is no complete body of federal law to supplant the state laws from whose reach the areas are at least theoretically removed. One attempted solution to this problem has been the application of the international law principle that the laws of the old sovereign, not incompatible with those of the new, remain in force until changed or abrogated by the new government. This principle has been applied particularly to protect private civil rights. "This assures that no area however small will be left without a developed legal system for private rights." James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100 (1940). 6/ See also Chicago Ry. v. McGlinn, 114 U.S. 542, 547 (1885). See and compare Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).

By parity of reasoning, post-cession changes in state private law are without effect in an enclave, in the absence of special permission. 7/ Arlington Hotel Co. v. Fant, 278 U.S. 439 (1929); Pacific Coast Dairy, Inc. v. Department of Agriculture, 318 U.S. 285 (1943). But, on occasion, Congress has acted to permit the continued operation of particular types of state laws. See, e.g., Act of Feb. 1, 1928, 45 Stat. 54 (actions for wrongful death or injury); Act of June 25, 1936, 49 Stat. 1938 (Workmen's Compensation Acts); Act of Oct. 9, 1940, 54 Stat. 1060 (sales, use, and income taxes).

It is emphasized that even when such state laws remain in force in an enclave, their authority and their administration may not interfere with the carrying out of a national purpose. See, e.g., James v. Dravo Contracting Co., 302 U.S. 134, 147, 161 (1937). "Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way." Stewart v. Sadrakula, supra at 103, 104.

In the Stewart case, a contractor was constructing a post office in New York City at a site over which the Federal Government had acquired exclusive jurisdiction through purchase with the consent of New York. One of its employees fell from an unplanked tier of steel beams and

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6/ In this decision, the Supreme Court said at pages 99, 100:

> "The Constitution does not command that every vestige of the laws of the former sovereign must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights."

7/ The difficulty with this reasoning is that state laws in force at the time of cession continue in effect indefinitely. Neither a subsequent repeal by the state nor adoption of a new law has any effect in the federal area. See, e.g., United States v. Paul, 6 Pet. 141 (U.S. 1832).

was killed. A New York statute required steel beams to be planked during construction work, and the state trial court found that the proximate cause of the accident was the contractor's failure to plank the beams as required by the New York Statute. The contractor contended that the requirements of such law could not be binding on one engaged in construction work for the United States. This contention was rejected by the Supreme Court. The decision turned on the fact that requiring a contractor doing work for the United States to follow the New York safety regulation would not interfere with the federal construction. (Id. at 104).

It should also be emphasized that the Stewart decision and others which establish the principle of continuation of certain state laws in an area under exclusive federal jurisdiction do not hold that state regulatory and administrative authority in such an area also continue in effect. Such authority is not continued in effect. See, e.g., Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 532 (1938); compare Murray v. Joe Gerrick & Co., 291 U.S. 315, 319 (1934).

As indicated previously in this memorandum, a state may condition its "cession" statutes or other "consent" to the acquisition of land by the Federal Government upon its retention of jurisdiction over its lands consistent with the federal use. James v. Dravo Contracting Co., supra 146-149. While the general limitation of non-interference with federal use has been stated to apply to the exercise by a state of its right to reserve a quantum of jurisdiction in its cession or consent statute, apparently in no case to date has a court had occasion to invalidate a reservation by a state as violative of that general limitation.8/ As a result of reservation of jurisdiction by a state, state and federal governments may exercise concurrent jurisdiction over a federal enclave. A state may consent to exercise of jurisdiction by the Federal Government only in certain specific areas, and in such case the Federal Government would only exercise partial jurisdiction over the Federal enclave. A state may reserve all of its authority over the enclave, in which case the Federal Government would have a proprietorial interest only. See "Jurisdiction Over Federal Areas," Part 1, pp. 13, 14. In areas in which it has not consented to exclusive federal jurisdiction, a state exercises jurisdiction over the enclave just as it does throughout the rest of the state, subject to the limitation that the state may not embarrass, impair, or defeat the effective use of the enclave for the purpose for which it is held, or interfere with the power of the United States to control and protect or dispose of the enclave. Fort Leavenworth Ry. v. Lowe, 114 U.S. 525, 527 (1885); Chicago Rv. v. McGlinn, 114 U.S. 542, 545 (1885); Surplus

8/ Jurisdiction Over Federal Areas Within The States, Report of The Interdepartmental Committee For The Study of Jurisdiction Over Federal Areas Within The States, Part II, A Text of The Law of Legislative Jurisdiction, p. 65 (1950), hereinafter cited as "Jurisdiction Over Federal Areas" with appropriate part and page reference.

Trading Co. v. Cook, 281 U. S. 647, 650 (1930); United States v. Unzeuta, 281 U.S. 138, 142 (1930). As mentioned previously in this memorandum, even though it does not have exclusive jurisdiction, the United States has certain sovereign powers under the Constitution to take such action and establish such regulations as are reasonably necessary to protect the enclave and control and regulate its use for national purposes.

## II. TERMINATION OF FEDERAL GOVERNMENT JURISDICTION OVER FEDERAL ENCLAVES

In general, Federal Government jurisdiction over an area within a state will terminate under any of the following three sets of circumstances: 9/

1. Where the Federal Government, by or pursuant to an act of Congress, retrocedes jurisdiction and such retrocession is accepted by the state;

2. Upon the occurrence of the circumstances specified in a state cession or consent statute for the reversion of legislative jurisdiction to the state; or

3. When the property is no longer used for a federal purpose.

For the purposes of this memorandum, only federal statutory retrocession of jurisdiction will be considered. The right of Congress to surrender jurisdiction acquired from a state has been sustained by courts. In State v. Board of Commissioners, 54 N.E. 809, 811 (Ind. 1899), the Indiana Supreme Court said, "the power of Congress to receive jurisdiction not required by the government purpose necessarily involves the power to transfer it. That Congress has constitutional sanction to retrocede to the states jurisdiction over such places has been often judicially declared." 10/

There have been relatively few instances in which the Federal Government has retroceded all jurisdiction over an enclave. In these instances a statute specifically retroceding jurisdiction in specific areas has been involved. Examples include statutes enacted to afford civil rights to inhabitants of federal enclaves, to give state or local governments authority for policing highways, to permit states to extend to such areas certain taxes on motor fuel, to permit

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9/ See Jurisdication Over Federal Areas, Part II, p. 84; and Twitty, The Respective Powers of The Federal and Local Governments Within Lands Owned or Occupied by the United States, pp. 36-37. (1944).

10/ See and compare Falls City Brewing Co. v. Reeves, 40 F. Supp. 35, 38, 39 (W.D. Ky. 1941); and Query v. United States, 121 F. 2d 631, (4th Cir. 1941)

states to apply sales, use, and income taxes to such areas, to tax certain private leasehold interests in such areas, and to extend to such areas their workmen's compensation and unemployment compensation laws. See Jurisdiction Over Federal Areas, Part II, 90-96, 190-213.

It has been held that statutes retroceding jurisdiction to a state must be strictly construed. See Oklahoma City v. Sanders, 94 F. 2d 323, 328 (10th Cir. 1938). This view was not followed in Offutt Housing Company v. County of Sarpy, 351 U.S. 253 (1956). There the Supreme Court said (p. 260):

> "... We could regard Article 1, Section 8, Clause 17 as of such overriding and comprehensive scope that consent by Congress to state taxation of obviously valuable private interests located in an area subject to the power of 'exclusive Legislation' is to be found only in explicit and unambiguous legislative enactment. We have not heretofore so regarded it, see S.R.A., Inc. v. Minnesota, 327 U. S. 558 . . .; Baltimore Shipbuilding Co. v. Baltimore, 195 U.S. 375 . . .; nor are we constrained by reason to treat this exercise by Congress of the 'exclusive Legislation' power and the manner of construing it any differently from any other exercise by Congress of that power. This is one of those cases in which Congress has seen fit not to express itself unequivocally. It has preferred to use general language and thereby requires the judiciary to apply this general language to a specific problem. To this end we must resort to whatever aids to interpretation the legislation in its entirety and its history provide. Charged as we are with this function, we have concluded that the more persuasive construction of the statute, however flickering and feeble the light afforded for extracting its meaning, is that the States were to be permitted to tax private interests, like those of this petitioner, in housing projects located on areas subject to the federal power of 'exclusive Legislation'. We do not hold that Congress has relinquished this power over these areas. We hold only that Congress, in the exercise of this power, has permitted such state taxation as is involved in the present case."

It is difficult to follow the Court's reasoning in the Offutt case that Congress would not have to relinquish the federal power of "exclusive Legislation" over the areas involved in order to permit state taxation. Imposition of taxes requires "jurisdiction" in the state over the subject matter, which would be lacking in areas over which the federal power of "exclusive Legislation" had not been relinquished.

III. EFFECT OF AN AGREEMENT ENTERED INTO WITH A STATE UNDER SECTION 274 OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, ON FEDERAL GOVERNMENT JURISDICTION OVER FEDERAL ENCLAVES.

On September 23, 1959, Congress enacted Public Law 86-373 which added Section 274, "Cooperation With States", to the Atomic Energy Act of 1954, as amended. The amendment was intended "to clarify the responsibilities of the Federal Government, on the one hand, and state and local governments, on the other, with respect to the regulation of byproduct, source, and special nuclear materials, as defined in the Atomic Energy Act, in order to protect the public health and safety from radiation hazards." It was also intended "to increase programs of assistance and cooperation between the Commission and the States so as to make it possible for the States to participate in regulating the hazards associated with such materials." S. Rep. No. 870, 86th Cong., 1st Sess., p. 8, Sept. 1, 1959.

The amendment authorized the Commission to enter into agreements with the governor of any state providing for discontinuance of regulatory authority of the Commission over certain materials. During the duration of such an agreement, a state would have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

Section 274 does not by its terms or by its legislative history afford even a "flickering and feeble light", applying the Offutt test of broad construction, that Congress intended to retrocede jurisdiction to an Agreement State to regulate, for purposes of protection against radiation hazards, activities conducted on a federal enclave. 11/

Moreover, Section 274 would appear to give the Commission exclusive authority to regulate, for protection against radiation hazards, all activities within a state (including those activities conducted on federal enclaves and elsewhere within a state) until such time as the state enters into an agreement with the Commission to assume such responsibility. S. Rep. No. 870, 86th Cong., 1st Sess., pp. 8, 12, Sept. 1, 1959. Once a state enters into an agreement to assume such responsibility, its authority to regulate would appear, subject to two qualifications, to include activities conducted on federal enclaves over which the Federal Government exercises concurrent, partial, or proprietorial jurisdiction. The first qualification is

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11/ Compare the language of Section 274 with that of Section 291 which states in part that:

> "There is hereby retroceded to the State of New Mexico the exclusive jurisdiction heretofore acquired from the State of New Mexico by the United States of America..."

that in an enclave under partial federal jurisdiction, the Federal Government may have the exclusive jurisdiction to regulate against radiation hazards, or may have jurisdiction over health and safety matters which is sufficiently broad to include radiation hazards. The second qualification is, of course, that state regulation cannot transgress constitutional limitations.

From the reservations of jurisdiction which may be made by states, coupled with permissive enactments of Congress retroceding certain quanta of jurisdiction, have emerged a welter of relationships between state and federal law in federal enclaves. Uncertainty about the status of jurisdiction in particular enclaves can be resolved only by detailed review and study of such reservations and enactments. Nevertheless, one can conclude with reasonable certainty that only the Federal Government at the present time has jurisdiction to regulate, for purposes of protection against radiation hazards, the activities of persons conducted within an Agreement State on federal enclaves over which the Federal Government has exclusive jurisdiction.