APRIL 9, 1959

DR. KEMBLE WIDMER, *Chief*
Bureau of Geology and Topography
Division of Planning and Development
520 E. State Street
Trenton, New Jersey

FORMAL OPINION 1959—No. 7

DEAR DR. WIDMER:

You have requested our advice as to whether or not the State well drilling law may be enforced against persons constructing wells on Federal property. Laws of 1947, c. 377, N.J.S.A. 58:4A-5, et seq. This law provides that no person may serve as a well driller in New Jersey without being personally licensed (N.J.S.A. 58:4A-6) and empowers the Commissioner of Conservation and Economic Development to appoint an examining board of well drillers who in turn are authorized to issue licenses to qualified persons seeking to engage as well drillers. Additionally the act forbids the drilling of any well even by a licensed well driller unless a permit therefor has been first secured from the Division of Water Policy and Supply. N.J.S.A. 58:4A-14. Nothing in the act vests the Division with power to refuse a permit provided that application accompanied by a fee of $3.00 is properly made. While the act does empower the Department of Conservation and Economic Development to promulgate rules and regulations in furtherance of its general power and supervision over the natural resources in the State, no such rule or regulation has ever been adopted. N.J.S.A. 58:4A-5.

Proper disposition of this question requires an analysis of the nature of Federal property holdings within New Jersey. The Federal government may own property with either a legislative or proprietary jurisdiction. Legislative jurisdiction authorizes exercise of governmental control over the property. Except for a common proviso permitting service of process Federal legislative jurisdiction is usually exclusive and thereby precludes the State from exercising any co-extensive legislative jurisdiction. On the other hand, the Federal government may own property without accompanying legislative jurisdiction. Such proprietary ownership in itself vests the Federal government with no privileges beyond those possessed by private owners.

Federal legislative jurisdiction may be derived from three sources, one of which was contemplated by the Constitution and two of which have been recognized by the case law and statutory development. Article I, Section VIII, clause 17 of the Federal Constitution provides that Congress shall have the power to exercise exclusive legislative jurisdiction 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." Although this clause by enumeration of types of places for which legislative jurisdiction may be established could have been construed to forbid establishment of legislative jurisdiction for other uses, the cases relying on the term "needful Buildings" have generally held that it authorizes Congress to establish exclusive legislative jurisdiction for any lawful purpose involving a structure. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937); *United States* v. *Tucker*, 122 Fed. 518, 522 (W.D. Ky. 1903) ("all structures and all places necessary for carrying on the business of the national government"); *Sharon* v. *Hill*, 24 Fed. 726 (C.C.D. Cal. 1885), *appeal dismissed*, 131 U.S. 438 (1888); *Ex Parte*

Tatem, 23 Fed. Cas. 708, No. 13759 (E.D. Va. 1877); *Wills* v. *State*, 50 Tenn. (3 Heisk) 141 (1871). In addition, the Supreme Court of the United States has recognized that Federal legislative jurisdiction may be established by cession from the State to the Federal government or may be retained over Federal territory within a State being admitted to the union. *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525 (1885). Notwithstanding the seemingly mandatory requirement in Article I, Section VIII, clause 17 that Federal legislative jurisdiction be exclusive it may whether derived from consent, cession or reservation be partial or concurrent with jurisdiction retained by the State. *James* v. *Dravo Contracting Co.*, *supra*. Jurisdiction may be concurrent if the State consent or cession statute saves a reservation of jurisdiction or if since 1940 the Federal government chooses to accept less than complete jurisdiction. See 54 Stat. 19 (1940), *as amended*, 40 U.S.C. § 255 (1952), discussed *infra*.

As a result of two statutes most Federal land in New Jersey is under virtually exclusive legislative jurisdiction. Joint Resolution No. 6 adopted September 11, 1841, codified in Section 355 of the Federal Revised Statutes of 1877, required the Federal government to secure the consent of the State Legislature to the purchase of realty before the Federal government could spend money for the erection of public buildings on it. Such consent if unconditionally given vested exclusive legislative jurisdiction in the Federal government under Article I, Section VIII, clause 17. Though this act was amended in 1940 to make optional the establishment of such jurisdiction, 54 *Stat.* 19 (1940), *as amended*, 40 U.S.C. § 255 (1952), almost all Federal enclaves established during the intervening 99 years remain subject to exclusive Federal legislative jurisdiction. A list of 37 special statutes consenting to particular Federal acquisitions of land within New Jersey and ceding jurisdiction with exceptions relating only to service of process is found in a revisor's note following R.S. 52:30-1. From 1907 the State of New Jersey has by general statute and with the usual process reservation consented to the acquisition by the United States of land within this State "for the erection of dock-yards, customs houses, court houses, post offices or other needful buildings" acquired "pursuant to the provisions of Article I, Section VIII, paragraph 17 of the Constitution of the United States." Laws of 1907, c. 19; R.S. 52:30-1, et seq. Although this statute is *prima facie* rather narrow, *cf. United States* v. *Hopkins*, 26 Fed. Cas. 371, No. 15387A (C.C.D. Ga. 1830); but *cf. Ex Parte Tatem, supra*, it is in *pari materia* with the cited constitutional provision and was intended to implement it. See 2 *Sutherland, Statutory Construction*, § 5206 (3d ed. 1943). Since Article I, Section VIII, clause 17 had been construed long before 1907 to authorize the exercise of exclusive Federal legislative jurisdiction over any lands needed for any Federal structure, the New Jersey consent statute must be treated as similarly broad. *United States* v. *Tucker, supra*; *Sharon* v. *Hill, supra*; *Ex Parte Tatem, supra*; *Wills* v. *State, supra*. In addition, the title to the act, "An act ceding to the United States jurisdiction over lands acquired for public purposes within this State," supports this view. In cases of ambiguity in the body of a statute the title may be consulted in aid of construction. *Pancoast* v. *Director General*, 95 N.J.L. 428 (E. & A. 1921). Therefore, the century long Congressional requirement of securing State consent to establishment of Federal enclaves coupled with the New Jersey acquiescence in this policy resulted in the creation of virtually exclusive Federal jurisdiction over the numerous Federal properties acquired in New Jersey between 1841 and 1940. Since retrocession of jurisdiction has not been general these areas of exclusive jurisdiction have survived the repeal of the Resolution of 1841.

The abandonment in 1940 of the requirement of consent which had thereby resulted in establishment of exclusive Federal jurisdiction did, however, make possi-

ble a significant prospective change. Since 1940 the appropriate official in charge of each Federal agency has been given discretion "at such times as he may deem desirable" to secure partial or complete legislative jurisdiction over lands subject to his control. 54 Stat. 19 (1940), *as amended,* 40 U.S.C. § 255 (1952). But unless formal notice of acceptance of jurisdiction is given the proper State officer it is "conclusively presumed that no such jurisdiction has been accepted." *Ibid.* In fact, since the Federal administrative policy since 1940 has been not to secure legislative jurisdiction, most Federal enclaves established or expanded within the last eighteen years are not subject to Federal legislative jurisdiction.

While it is not possible to detail within this opinion the jurisdictional status of all Federal property in New Jersey, nonetheless since your question particularly concerned Lakehurst Naval Air Station the status of that installation will be given. Lakehurst was initially a site of approximately 1,450 acres purchased by the Federal government in 1926 and 1929. While there is no specific New Jersey statute consenting to this purchase, it was clearly within the general act of 1907. Hence under Article I, Section VIII, clause 17 the Federal government has exclusive jurisdiction over this land except for the statutory reservation pertaining to service of process. See 38 *Opinions of Attorneys General (United States)* 185 (1935). But in 1942 and 1944 Lakehurst was expanded by the acquisition of two tracts of 5,838.12 and 5,076 acres, respectively. We understand that notwithstanding the New Jersey Act of 1907 the Federal government has never accepted jurisdiction over these lands. Accordingly these two tracts are held in a mere proprietary capacity.

Land within a State subject to exclusive Federal legislative jurisdiction is withdrawn from the operation of *subsequently* enacted State laws. *Pacific Coast Dairy, Inc.* v. *Department of Agriculture,* 318 U.S. 285 (1943). Therefore absent an appropriate reservation in the grant of jurisdiction, State laws requiring licenses are ineffective within previously established Federal enclaves. *Collins* v. *Yosemite Park and Curry Co.,* 304 U.S. 518 (1938); *cf. In re Ladd,* 74 Fed. 31 (C.C.D. Neb. 1898). Under these decisions it is clear that the well drilling law at its enactment in 1947 could not apply in Federally owned areas in New Jersey subject to exclusive Federal legislative jurisdiction. However, slightly different considerations apply to areas which become subject to exclusive Federal legislative jurisdiction after 1947. International law has long provided that when one sovereign takes legislative jurisdiction from another, local statutory law not inconsistent with the public policy of the successor sovereign is continued in force notwithstanding the change in sovereignty. *Chicago, Rock Island and Pacific Ry.* v. *McGlinn,* 114 U.S. 542, 546 (1885). Therefore, it is *prima facie* possible to apply the well drilling law in areas becoming subject to exclusive Federal legislative jurisdiction subsequent to its adoption. However, to this general rule of international law there is an applicable exception; State law contemplating administrative action is not retained in an area when sovereignty is transferred. *Stewart & Co.* v. *Sadrakula,* 309 U.S. 94 (1940). As above noted the well drilling act requires administrative action in two ways: (1) the issuance of a license qualifying a would-be well driller; (2) the issuance of a permit for each well to be drilled. Under these circumstances the well drilling law cannot as a matter of sovereign prerogative be enforced in areas of Federal legislative jurisdiction even though established after 1947. See also *In re Ladd,* 74 Fed. 31 (C.C.D. Neb. 1896) (Nebraska statute requiring that persons dispensing liquor be licensed cannot be enforced on an area becoming subject to exclusive jurisdiction subsequent to the enactment of the licensing law).

We do not believe that the provisions of the Federal Assimilative Crimes Act of 1948 require a result different from that above reached. 18 U.S.C. § 13 (1952). That act provides that if any person in any Federal enclave "is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment." At most the Assimilative Crimes Act would render persons failing to secure licenses and permits liable to Federal punishment. But even if the failure to secure a license or permit is a Federal crime, nothing in the act authorizes State authorities to themselves enforce State law on Federal reservations. *Crater Lake Nat'l Park Co.* v. *Oregon Liquor Control Comm'n*, 26 F. Supp. 363 (D. Ore. 1939); *Johnson* v. *Yellow Cab Transit Co.*, 137 F. 2d 274, 278 (10th Cir. 1943) (concurring opinion), *aff'd*, 321 U.S. 383 (1944). Additionally, it is extremely doubtful that the act is intended to assimilate crimes involving violation of regulatory statutes. See *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 390-91 (1944). Finally it should be noted that violations of the State Well Drilling Law are dealt with in penalty actions. N.J.S.A. 54:4A-24. Since such actions are civil rather than criminal they probably are not within the scope of 18 U.S.C. § 13 (1952). See *Sawran* v. *Lennon*, 19 N.J. 606, 612 (1955).

The recent case of *Mississippi River Fuel Corp.* v. *Fontenot*, 234 F. 2d 898 (5th Cir. 1956), *cert. denied*, 352 U.S. 916, suggests that the above rules of sovereign claims and tolerances may be superseded by simple contract law. The Court of Appeals there approved the imposition of a State tax upon the severance of gas and oil from an area subject to exclusive Federal legislative jurisdiction. Its theory was that the lessee by contract with the Federal government obliged himself to obey local laws and payment of taxes was contemplated by this contractual obligation. In this sense the State law was enforced not as a matter of sovereignty but rather because the State was a third party beneficiary to the contract between the Federal government and its contractor. Similarly, if in New Jersey the Federal government by its contracts with the well drillers provides that the drillers abide by local law, the State as a third party beneficiary of these contracts may require the well drillers to secure licenses and permits under the act. The requirement could be enforced in a civil action. While we are not cognizant of whether such agreements are now extracted by the Federal government since it is a beneficiary of the information compiled pursuant to the well drilling law, it might be induced to require its contractors to secure licenses and permits. In any event this contractual means of enforcement of the well drilling law should not be overlooked.

The State Well Drilling Law may be enforced against contractors employed by the Federal government on land held in a solely proprietary sense. It is well established that persons doing business with the Federal government can be required to comply with nondiscriminatory State regulations so long as such compliance only incidentally affects the Federal government. Hence, minimum price regulations for the sale of milk can be enforced against a dealer selling to the Federal government in an area not under exclusive Federal legislative jurisdiction. *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261 (1943); *cf. United States* v. *Detroit*, 78 S. Ct. 474 (1958). Since the well drilling act merely requires a well driller to be licensed and provides for the ministerial issuance of well drilling permits, it can in no sense be deemed to directly limit the Federal government. Under these circumstances the

act as now written may be enforced in any area not subject to the exclusive Federal legislative jurisdiction. It should be noted, however, that in view of Article IV, Section 3, clause 2 and Article VI, clause 2 of the Federal Constitution serious problems would be raised if regulations are promulgated which limit drilling in certain areas. Article IV, section 3, clause 2 provides:

> "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."

Article VI, clause 2 provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The cases under these sections establish that Federal use of Federal property may not be regulated by the State and that the Federal government is generally free from State control. *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 403-05 (1917); *Hunt* v. *United States*, 278 U.S. 96 (1928). *M'Cullough* v. *Maryland*, 17 U.S. (4 Wheat) 316 (1819); *United States* v. *Chester*, 144 F. 2d 415 (3rd Cir. 1944).

In summary, therefore, it appears that the State Well Drilling Law can be enforced on Federal property in New Jersey to the extent outlined above. Specifically contractual drillers at Lakehurst are subject to the act only if drilling on those areas of the base added after 1940. Only in cases in which the contractor is drilling on property held in a proprietary sense or has agreed to abide by local law can a license or permit be required. While the distinctions made here may seem to make the act difficult to administer, this may be ameliorated either by procuring an agreement from the Federal government that they will require contractors to get licenses and permits or by promulgating a regulation excluding all Federal property. N.J.S.A. 58:4A-5.

Very truly yours,

DAVID D. FURMAN
Attorney General

By: MORTON I. GREENBERG
Deputy Attorney General