DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON 25, D. C.

1960

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STS

Memorandum

To: Director, Bureau of Sport Fisheries and Wildlife

From: Associate Solicitor, Territories, Wildlife and Parks

Subject: Jurisdiction over the Hawaiian Islands National Wildlife Refuge

Your memorandum of April 4, 1960, transmitted to us a letter dated March 15, 1960, written to you by Mr. Wayne D. Collins, Director of Agriculture and Conservation of the State of Hawaii, and requested our comments to assist you in the preparation of a reply to the questions raised therein.

In his letter Mr. Collins stated that the United States Coast Guard had requested that it be issued a license for the exclusive use and occupancy of Green Island of the Kure Island group for aids to navigation, national defense, and other purposes. Mr. Collins stated his uncertainty as to the status of the areas comprising the Hawaiian Islands National Wildlife Refuge and of the authority of his agency to issue permits of the type requested by the Coast Guard.

As you were advised in our memorandum of November 19, 1959, on the subject of the status of Kure Island and of the Hawaiian Islands National Wildlife Refuge, Kure Island is no longer a Federal Reservation but is under the jurisdiction and control of the State of Hawaii. Since you have so informed Mr. Collins, the immediate problem has been taken care of.

In answer to the other general questions, the lands and waters comprising the Hawaiian Islands National Wildlife Refuge were reserved and set apart by the President in Executive Order No. 1019 of February 3, 1909 "for the use of the Department of Agriculture as a preserve and breeding grounds for native birds." The Refuge is now the responsibility of the Department under the terms of section 4(f)

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of Reorganization Plan No. II of 1939 (53 Stat. 1431, 1433). In reply to his question concerning the precedence of Federal and State jurisdiction on the Refuge, Mr. Collins might be advised that this Federal area is within the jurisdiction of the State of Hawaii (including any appropriate political subdivisions of the State) in the sense that it is a part of the State and that the civil and criminal laws of Hawaii are in force throughout the reservation to the extent that their exercise is not inconsistent with the right of the Federal Government to protect its land and property and to control their use and disposition. The Federal Government alone has jurisdiction to administer this area comprising publicly-owned lands and waters set aside for governmental purposes. Except as properly authorized by the United States, by agreement or otherwise, the State of Hawaii has no right to administer or manage the Refuge or to interfere with activities being conducted thereon by the United States.

By the terms of an agreement entered into December 27, 1951, between the Fish and Wildlife Service and the Board of Commissioners and Forestry of the Territory of Hawaii, the latter organization, which was the predecessor of the Department of Agriculture and Conservation of the State of Hawaii, undertook the administration and management of the area. Among the duties devolving upon the Board by the terms of the agreement was that of issuing permits "for entry and economic uses in accordance with the laws and regulations governing National Wildlife Refuges".

It appears to us that the entry and economic uses contemplated by the quoted language are of the type comprehended by the regulations found in 50 CFR 18.111 rather than a more or less exclusive and permanent occupancy of the type sought by the Coast Guard on Kure Island. It is our opinion that any permit of this general type should be issued by the Department of the Interior rather than by the State agency.

A. M. Edwards
Associate Solicitor
Territories, Wildlife and Parks

file - Tern / 112
Boundary dispute

United States Department of the Interior

OFFICE OF THE SOLICITOR
Portland Region
Lloyd 500 Building, Suite 607
500 N.E. Multnomah Street
Portland, Oregon 97232

cc HA-Honolulu
DTC 8/8/79
RF

AUG 2 1979

In reply refer to:

Memorandum

To: Regional Director, FWS, Portland

From: Regional Solicitor

Subject: Legal Status of Tern Island

PRELIMINARY STATEMENT

Reference is made to the memorandum dated April 5, 1979, from the Acting Refuge Manager, Hawaiian/Pacific Islands National Wildlife Refuge Complex, which you have approved for response.

With said memorandum we were furnished copies of documents which may be summarized as follows:

1. Hawaii Senate Concurrent Resolution No. 27, promulgated on February 13, 1979. This document recited as follows: (a) Tern Island ("Tern"), French Frigate Shoals, was discovered November 6, 1786, and annexed by the Republic of Hawaii on July 13, 1895; (b) Tern was recognized as part of the Territory of Hawaii in the Organic Act of 1900; (c) In 1952 [1942], the Territory surrendered possession of Tern to the United States for military operations in World War II; (d) After Tern was returned to the Territory in 1946, the Territory issued a license to the Coast Guard ("CG") to use the island for a LORAN (Long Range Aid to Navigation) facility; (e) CG intends to cease operations on Tern Island in July 1979; (f) The state supports and endorses accelerated development of its local commercial fishery operations; (g) The waters around the Northwestern Hawaiian Islands ("Leeward Islands") hold "great potential in much needed fishery resources"; (h) because of the 200-mile fishery conservation zone around the islands and intensified research in that area, "the chances for a rapid growth of domestic fisheries have never been better";

(i) Tern is in the middle of the island chain, halfway between Kauai and the Midway Islands; and (j) As Tern has the only landing strip in more than 1,000 miles, it has potential for aiding in emergencies such as medical evacuation of injured or sick fishermen or supplying spare parts to disabled vessels.

The resolution concluded in part as follows:

> "BE IT RESOLVED by the Senate of the Tenth Legislature of the State of Hawaii, Regular Session of 1979, the House of Representatives concurring, that the Governor of the State of Hawaii take immediate action in initiating negotiations to arrange cooperative agreements with the Coast Guard Commandant of the Fourteenth District and the Secretary of Interior for the return of Tern Island and its facilities to the State of Hawaii; . . . ."

2. Senate Resolution No. 133, promulgated February 13, 1979. This document is identical to SCR No. 27.

3. FWS testimony before House Committee on Water, Land Use, Development and Hawaiian Affairs on Senate Concurrent Resolution No. 27 (April 4, 1979). This testimony made the following points: (a) Discussions between the state and Department of the Interior (DOI) are already in progress; (b) The Secretary has reaffirmed the DOI contention of ownership of Tern. He has made no commitment as to the fisheries support station, pending availability of fundamental data. He has stated that the state will be involved in the development of the management options to be presented in the Environmental Assessment; (c) The history of Tern is set forth; (d) Current plans are for use of the island as a research station. The airstrip would be available for use by small planes in emergencies and for resupply of the research station; (e) Manta Corporation is now under contract with FWS, assembling background data for use by FWS in developing an Environmental Assessment of options for the use of Tern; (f) The position of FWS is to continue support of the Tripartite Cooperative Agreement to gather information necessary to evaluate the fishery resource available in the Leewards and the probable impact of commercial activities on other wildlife in the area. FWS representatives would then work the state to resolve the future of Tern.

4. FWS testimony before the Hawaii Senate on SR 133 and SCR 27 (March 7, 1979).

5. Testimony of John P. Craven, Marine Affairs Coordinator of the state of Hawaii, before the Joint House Committee on Ocean and Marine Resources and Water, Land Use Development and Hawaiian Homes concerning SCR 27 (April 4, 1979). This testimony may be summarized as follows: (a) The ownership of the Leeward Islands appears to have been transferred to the Federal Government by President Roosevelt by Executive Order in 1909. Reversion to the state could also take place through Executive Order. (b) FWS claimed that the Navy occupied Tern illegally and thereafter unlawfully transferred Government property to the Territory.

We understand from the materials furnished us that the history of Tern is as follows:

1. In 1909, E.O. 1019 established the Hawaiian Islands Reservation for the Protection of Native Birds. French Frigate Shoal was specified as among the islets and reefs to be used for the Department of Agriculture ("DOA") as a preserve and breeding ground for native birds.

2. In 1939, Reorganization plan II, Section 4(A), transferred all lands reserved for wildlife from DOA to DOI.

3. In 1940, the names of Reservations were changed by Presidential Proclamation No. 2416 to National Wildlife Refuges. The name of Hawaiian Islands Reservation was changed to Hawaiian Islands National Wildlife Refuge. In 1940 the Governor of the Territory issued Executive Order No. 893 for use by the United States of East Island of the French Frigate Shoal group.

4. In 1942, the U.S. Navy commenced its World War II occupation of Tern. Tern was never transferred by DOI to the Navy.

5. In 1948 the Navy and the Hawaii Aeronautics Commission entered into an "Agreement" to abandon and transfer the airstrip and other Navy structures on Tern to the Territory.

6. In 1952, the Territory issued a permit to the CG for occupation of the facilities of French Frigate Shoals.

7. In 1966, the National Wildlife Refuge System Administration Act was enacted, creating the National Wildlife Refuge System.

8. In 1967, FWS and the CG entered into a cooperative agreement for CG occupation of Tern for a LORAN station.

9. In 1967, most of the lands and waters of the Hawaiian Islands NWR, including Tern, were designated as Research Natural Areas.

10. In 1975, a Tripartite Cooperative Agreement (among FWS, NMFS and the state) was entered into to study the resources of the Leeward Islands for five years.

You have requested our opinion on the following questions:

1. Can Tern be transferred out of the National Wildlife Refuge System by an Executive Order?

2. What is our opinion with respect to the following questions raised by Dr. Craven (testimony, pages 1-2):

> "The situation for Tern Island is more complex. Our report concludes that the U.S. Fish and Wildlife Service claimed that the Navy occupied Tern Island illegally and thereafter unlawfully transferred government property to the Territory. As a general rule, the controlling agency must consent to any use and occupation of set aside lands and receives any non-movable property upon abandonment of such use. No consent is evident here. Does this mean that the Navy trespassed and converted property to the Territory? If so, does the Territory have an enforceable interest in this property as a bonafide purchaser?" (Emphasis added)

3. Is Executive Order 893 of the Territory of Hawaii evidence "the state believed they had concurrent jurisdiction with the U.S. Government over the Leeward Islands"?

4. What is the effect on the Government's legal ownership of Tern of the following events described by Dr. Craven (testimony pages 2-3):

> "The disposition of lands acquired by the Departments of War and Navy in Hawaii during the war was the subject of the Land Use Committee convened by the Governor in 1946. Under instructions of the President to expedite the return of unneeded lands, the Secretary of Interior was instrumental in developing the following procedures: full exchange of civilian and military proposals for land use, joint recommendations wherever possible on the local level, and Washington review

by the Secretaries of War, Navy, and Interior for conflicting proposals (letter of January 23, 1947). Assuming that this memo was followed, the Tern facilities were classified surplus (not merely excess) property, joint recommendation was reached locally to transfer it to the Territory, and the recommendation was reviewed and ratified properly in Washington. Further investigation is required to determine whether the Secretary of Interior did in fact have opportunity to review and approve the transfer. The governing statute is the Surplus Property Act of 1944, 50 USCA §1622(g), as the Federal Property and Administrative Services Act of 1949 had not yet taken effect."

5. What is the nature and effect of the 1928 opinion of the Solicitor of DOA?

6. Does the fact that the Navy purported to transfer only the airstrips and facilities of Tern to the state have an effect on the state's contention that the Navy "returned" Tern to the state?

PRINCIPLES OF LAW

A. Status of Hawaiian lands.

The Hawaiian Islands were annexed to the United States pursuant to Joint Resolution of Annexation enacted by Congress effective July 7, 1898, 30 Stat. 750, which provided in part that the Republic of Hawaii had ceded to the United States absolute fee and ownership of all public and crown lands, and that such property was vested in the Government. Existing laws as to public lands did not apply, and Congress was to enact special laws as to the management and disposition of the lands.

Under the Hawaiian Organic Act, passed by Congress in 1900, the lands ceded to the United States pursuant to the annexation resolution, were to remain in Territorial possession, use and control until otherwise provided by Congress or until the President or the Governor of Hawaii might direct taking of any such lands "for the uses and purposes of the Unites States", 31 Stat. 131, 149, Section 91.

In 1910, the Organic Act was amended to empower the President, but not the Governor, to return to the Territory property previously taken by direction of President or Governor for the uses and purposes of the United States.

In 1927, Section 91 of the Organic Act, amended in 1910, was construed by the Attorney General in an opinion which held that Territorial lands reserved or set aside by Executive Order for use by the War Department might

be returned to the Territory by Executive Order. 35 A.G. 205 (1927). This opinion concluded that general federal statutes enacted later had not repealed by implication or otherwise the Presidential authority granted by the Hawaiian Organic Act, because (1) the statutes contained no provision for express repeal of that authority, and (2) the Joint Resolution of Annexation expressed the general policy that the general public land laws were inapplicable to the ceded Hawaiian lands and that Congress should "enact special laws for their management and disposition", 30 Stat. 750. While upholding the continuing authority of the President under then existing law, the opinion further stated that the power of Congress at any time to remove that authority and make other disposition of land is "beyond question", 35 A.G. at 207, 208.

In 1940, the Attorney General held that the President's authority to set aside Hawaiian public land by Executive Order for use by the United States for a particular public purpose included equal authorization to transfer the set aside land by Executive Order to another federal department for use for a different public purpose (in this instance, from Department of War, the Departments of Treasury and Commerce). This opinion held that legislation to effect such a transfer from department to department was unnecessary, because the transfer might be properly effected by Executive Order, 39 A.G. 460, 462 (1940).

Hawaii became a state on August 21, 1959 (24 F.R. 6868, Presidential Proclamation No. 3309), following a general election held July 28, 1959, pursuant to the provisions of Section 7 of the Hawaii Admission Act. 73 Stat. 4, 48 U.S.C. Prec. §491, Haw. Rev. Stat., Vol. 1, pp. 81-83).

The Admission Act provided for succession of the state to title to lands vested in the Territory at the time of admission, as well as with some exceptions, for grant by the United States to Hawaii of the United States' title to all "public lands" held by the United States immediately prior to admission. Exceptions included (1) Lands and other properties previously "set aside" for the use of the United States by Act of Congress, Executive Order, or Presidential or gubernatorial proclamation; and (2) Public lands or other public property not "set aside" to the United States at the time of admission, but which immediately prior to admission were controlled by the United States by permission of the Territory, in the event the same were "set aside" to the United States within a five-year period after admission by Act of Congress or Executive Order of the President. Sec. 5(2), (b), (c), (d), 73 Stat. 4, as amended, 48 U.S.C. Prec. §491.

The Admission Act further provided that each federal agency controlling the excepted lands should refer to the President, within five years from admission, the facts regarding its continued need for the lands. Any such land which the President might determine to be no longer needed by the United States, was thereupon required to be "conveyed" to the state of Hawaii. Sec. 5(e), 73 Stat. 4, as amended, 48 U.S.C. Prec. §491.

The term "lands and other properties" was defined in subsection (g):

> "As used in this Act, the term 'lands and other properties' includes public lands and other public property, and the term 'public lands and other public property' means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded."

The Hawaii State Constitution confirmed the title of the United States to "set aside" lands in accordance with the Admission Act, Hawaii State Constitution, Article XIV, Sec. 7 (See 6, renumbered 7 by Const. Con., 1968).

The term "set aside" as used in the Admission Act was construed in a 1960 Attorney General's opinion. That opinion held that the duty of each federal agency to report to the President facts in regard to its continued need for "set aside" lands did not apply to lands after-acquired by the United States, but only to lands ceded to the United States on annexation. 42 Op. A.G. 43.

In December 1963 (before the August 21, 1961 expiration date of the five-year period after admission) Congress provided a revised conveyance procedure whereby the excepted lands might be conveyed to the state of Hawaii (without monetary consideration) by the Administrator of General Services when determined by such Administrator to be "surplus property", with the concurrence of the department or agency head involved. 77 Stat. 472 (1963), 48 U.S.C. Prec. §491.

In 1976, the 1966 National Wildlife Refuge System Administration Act, 16 U.S.C. §668dd, was amended. It now provides in part as follows:

> "(3) Each area which is included within the System on January 1, 1975, or thereafter, and which was or is---
>
> (A) designated as an area within such System by law, Executive order, or secretarial order; or
>
> (B) so included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,

The foregoing principles are applicable whether or not the other party to a purported contract with the United States is a private party, territory or a state. An analogous situation is found in the application of the principle that the United States is immune from suit without its consent or permission. That rule generally applies whatever entity be involved. For example, a "suit by one of the states or by a foreign government is as much within the rule as is a suit by a private person. Such immunity from suit can only be waived by the authority of an act of Congress; no officer of the Federal Government not authorized to do so by congressional act can waive the immunity." 77 Am Jur 2d United States, §112.

The following definitions of "conversion" are also relevant, Black's Law Dictionary, Revised Fourth Edition, p. 402:

> "An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights . . . . Any unauthorized act which deprives an owner of his property permanently or for an indefinite time.
>
> "The act of actually appropriating the property of another to his own beneficial use and enjoyment, or to that of a third person, or destroying it, or altering its nature."

C. Effect of Surplus Property Act of 1944.

The Surplus Property Act of 1944, 58 Stat. 765, provided for disposal to "states and their political subdivisions and instrumentalities, and to top supported and nonprofit institutions," of surplus government property, including surplus real property, for the purpose of aiding "recoversion from a war to a peace economy and to establish a Surplus Property Board", 58 Stat. 765, 770, §13.

The term "states" is defined to include "territories". 58 Stat. 767, §3(i).

The Act required that each "owning agency" report to the Board surplus property under its control, 58 Stat. 769, §11. "Owning agency" was defined as meaning the executive department or government agency having control of the property "otherwise than solely as a disposal agency", 58 Stat. 767 §3(b). A "disposal agency" was a government agency designated by the Surplus Property Board to dispose of one or more classes of surplus property, 58 Stat. 767, §3(c).

In 1947, §13(g)(1) (later codified as 50 U.S.C. §1622(g)) was added to the 1944 Act, 61 Stat. 678. This amendment provided particularly for disposition of surplus government airports without monetary consideration, subject to certain conditions.

The "saving provisions" of the Surplus Property Act provided that the Act should not impair or affect any authority under other laws, 58 Stat. 783, §34(a); and do not provide for repeal of any laws.

D. 1928 opinion of DOA Solicitor.

The 1928 opinion of R.W. Williams, DOA Solicitor held that the DOA had title to all the lands in the Hawaiian Islands Reservation, established by Executive Order No. 1019 dated February 3, 1909, and that such lands were in the complete control of the Department of Agriculture.

The opinion cites the Solicitor's prior opinion in regard to the status of Laysan Island, as applicable to all the lands within the reservation. The prior opinion, dated February 11, 1925, held that the effect of Executive Order 1019 was to cause the title to all public and crown lands on Laysan Island to be in the United States and therefore such land was not subject to disposition by the Territory.

A copy of each of these opinions is attached to this memorandum.

The only reference to Tern in the purported "Agreement" of December 1, 1948, between the Territory (through the Hawaii Aeronautics Commission) and the United States (through the Department of the Navy) is contained in the first of the recitals in the document:

> "WHEREAS, the GOVERNMENT did, during the year 1942, enter upon and take possession of a certain area under the jurisdiction and control of the TERRITORY, said area being known and identified as 'Tern Island French Frigate Shoals';" (Emphasis added)

The recital immediately following describes the construction on the Tern Island of "an airstrip and certain area improvements for the purposes of Naval aviation; . . . there is no present or foreseeable need by the GOVERNMENT for the airstrip or the facilities thereon, the use of which by the GOVERNMENT has now ceased and determined; . . . ." (Emphasis added) The concluding recital states that "it has been determined to be advantageous and in the interest of the GOVERNMENT and in the public interest to abandon said airstrip, together with the facilities thereon, to the use of the TERRITORY in lieu of the payment of rent and/or restoration of the premises; . . . ." (Emphasis added)

In paragraph 1 of the "Agreement" the "transfer" is specifically stated as covering the "airstrip" and a list of partially identified buildings (such as "Quarters," "Recreation Hall," "Radio Building," etc.) and underground gasoline and oil storage tanks, and all these being denominated "improvements":

> "1. The GOVERNMENT does hereby abandon and transfer to the TERRITORY the airstrip aforesaid together with the following described property:
>
> ". . . .
>
> "TO HAVE AND TO HOLD the said improvements unto the TERRITORY and its assigns forever. No warranties are made concerning said improvements other than with respect to its GOVERNMENT'S title thereto." (Emphasis added)

The word "airstrip" is defined in Webster's Third New International Dictionary as follows:

> "[A] paved or unpaved runway that lacks normal airbase or airport facilities."

CONCLUSION

Based on the principles of law cited above, our opinion is as follows:

A. Question 1. Tern cannot be transferred out of the National Wildlife Refuge System by Executive Order.

1. The President's power under the Organic Act to restore lands to the Territory was repealed and superseded by the Admission Act, which provided for five-year review by the President, to be followed by conveyance to Hawaii if no need was found. This latter provision expired August 21, 1964.

2. Under the 1976 amendments to the National Wildlife Refuge System Administration Act, lands in the System are to continue as such until otherwise specified by Act of Congress. There has been no such Act.

3. The revised conveyance procedures, under which the General Services Administration was given power of conveyance to Hawaii of set-aside lands on determination as surplus with concurrence of the agency head, does not apply: (a) These are not a subsequent Act of Congress within the meaning of the National

Wildlife Refuge System Act. (b) The Administration Act is special legislation, applying to the National Wildlife Refuge System, which therefore takes precedence over the other Act. (c) The two Acts must be read together, so that the Administration Act applies specifically to Refuge lands and the revised procedures apply to other Federal lands. (d) In any event, the Secretary of the Interior would be required to concur in the special procedures.

B. Question 2. The answer to the following questions raised by Dr. Craven's testimony is "No": (a) Does the lack of FWS consent to Navy occupation of Tern Island mean the Navy trespassed and converted property to the Territory?; and (b) If so, does the Territory have an enforceable interest in the property as a bona fide purchaser?

1. Although the Navy's use of Tern was not authorized, it did not convert Tern to the Territory; (a) The surrender of the airstrip to the Territory was void for lack of authority. (b) The use of the Territory was not to the exclusion of FWS, the owner, did not deprive FWS of the property permanently, and did not destroy the property or substantially alter its character.

2. The Territory is not a bona fide purchaser: (a) The Territory in dealing with the Federal Government could not have this status. (b) The Territory was on notice that the Navy did not have authority to deliver the airstrip.

C. Question 3. Whether or not E.O. 893 of the Territory is "evidence" that Territorial representatives believed they had concurrent jurisdiction with the Federal Government over the Leeward Islands is not relevant to any question at issue.

Under principles of law set forth above, the state cannot assume a position of "innocent" belief of jurisdiction or ownership of Tern. E.O. 893 has no legal effect.

D. Question 4. The events described by Dr. Craven as under the Surplus Property Act of 1944 do not have any effect on the Government's ownership of Tern.

1. The Surplus Property Act of 1944 as amended (notwithstanding its inclusion of Territories) was not applicable to the public lands ceded to the United States or the annexation of Hawaii, because of its nature as a general statute which did not repeal expressly or by implication special provisions of the Hawaiian Organic Act.

2. The Surplus Property Act of 1944 by its own "savings provisions" makes clear that the authority provided by that Act is in addition to authority conferred by other laws, and indicates no legislative intention to repeal other legislation, either expressly or by implication.

3. The "events" described by Dr. Craven, accordingly, have no effect whatever on the status of Tern Island, which is determined by the 1909 Executive Order No. 1019.

E. Question 5. From our review of the 1928 opinion of the Solicitor of the Department of Agriculture, and the 1925 opinion which furnished the detailed basis for the 1928 opinion, we conclude that the effect of these two opinions is as follows:

1. To establish, by historical perspective and analysis, by a series of opinions of the United States Attorney General and by Hawaiian cases, that Hawaii by its cession to the United States at the time of annexation relinquished to the United States all title and rights in Hawaii on public or crown lands, and accordingly the effect of Executive Order 1019 setting aside lands of certain of the Leeward Islands (including Tern) was that (a) title to all such lands was and is in the United States and (b) such land was not subject to disposition by the Territory of Hawaii.

2. To support the interpretation of the Hawaiian Organic Act as authorizing the President not only to set aside public or crown land for the uses of the United States but to assign or transfer the custody and control of such lands to the appropriate department.

F. Question 6. For reasons set forth above, the state cannot contend that the Navy returned Tern to the state. Furthermore, the Navy clearly purported to transfer only the airstrip and other improvements. This is an additional contention to be used against the state.

If we may be of further assistance, please advise us.

Jean P. Lowman
Regional Solicitor

Enclosure

UNITED STATES DEPARTMENT OF AGRICULTURE

OFFICE OF THE SOLICITOR

WASHINGTON, D. C.

NOV 8 - 1928

Mr. Paul G. Redington,

Chief, Bureau of Biological Survey.

Dear Mr. Redington:

Reference is made to your communication of October 17, 1928, asking whether this Department has complete control over the lands in the Hawaiian Islands Reservation.

This reservation was established by Executive Order No. 1019 of February 3, 1909, which reads as follows:

> It is hereby ordered that the following islets and reefs, namely: Cure Island, Pearl and Hermes Reef, Lysianski or Pell Island, Laysan Island, Mary Reef, Dowsetts Reef, Gardiner Island, Two Brothers Reef, French Frigate Shoal, Necker Island, Frost Shoal and Bird Island, situated in the Pacific Ocean at and near the extreme western extension of the Hawaiian archipelago between latitudes twenty-three degrees and twenty-nine degrees north, and longitudes one hundred and sixty degrees and one hundred and eighty degrees west from Greenwich, and located within the area segregated by the broken lines shown upon the diagram hereto attached and made a part of this order, are hereby reserved and set apart, subject to valid existing rights, for the use of the Department of Agriculture as a preserve and breeding ground for native birds. It is unlawful for any person to hunt, trap, capture, willfully disturb, or kill any bird of any kind whatever, or take the eggs of such birds within the limits of this reservation except under such rules and regulations as may be prescribed from time to time by the Secretary of Agriculture. Warning is expressly given to all persons not to commit any of the acts herein enumerated and which are prohibited by law.
>
> This reservation to be known as the Hawaiian Islands Reservation.

In my communication of February 11, 1925, to Dr. Nelson, a copy of which is enclosed herewith, the status of Laysan Island, a part of the reservation, was dealt with and the opinion was expressed "that the title to all public and Crown lands on Laysan Island is in the United States and that such land is not subject to disposition by the Territory in view of the Executive Order setting it aside as a preserve and breeding ground for birds." My views with regard to the status of Laysan Island are applicable to all of the other lands within the reservation. I know of nothing that has occurred since the date of my communication to Dr. Nelson that affects in any way the status of the reservation, or that would cause me to change my views as expressed therein.

I advise you, therefore, that, in my opinion, there is no doubt as to the Department's having complete control over the lands in the Hawaiian Islands Reservation referred to in the papers accompanying your memorandum of October 17.

Your file is returned herewith.

Very truly yours,

Solicitor.

Enclosure.