PUBLIC LANDS: State laws respecting federally owned lands are junior to the federal laws thereover.

UNITED STATES GOVERNMENT:

June 17th, 1939.

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Hon. R. E. L. Marrs,
Secretary of the Senate,
Jefferson City, Missouri.

Dear Sir:

We acknowledge receipt of your recent letter with an enclosure of a certified copy of Senate Resolution No. 71, which letter and resolution are as follows:

"I have the honor to inform you that Senate Resolution No. 71 was offered into and adopted by the Senate of the 60th General Assembly on June 7, 1939, certified copy of which I am enclosing herewith."

SENATE RESOLUTION NO. 71.

"Whereas, Article 6, Chapter 88, Revised Statutes of Missouri, 1929 provides, under certain conditions of local option for an open range for stock, and

"Whereas, Certain counties in this state in accord with the Laws of Missouri do make the use of open range lawful and require the owner in such territory to maintain a lawful fence, and

"Whereas, If such lawful fence be not maintained by the owner of the land stock have the right of access to such land, and

"Whereas, The Government of the United States by permission of the State of Missouri has been permitted to acquire by gift or purchase lands for forestry and other purposes, and

"Whereas, Part of such land so purchased by the government of the United States lies within the region of open range; therefore, be it

"Resolved, that the Attorney General is hereby requested to advise the General Assembly of Missouri whether the Government of the United States may deny access to its lands in counties of open range if the said lands be not enclosed by a lawful fence; and, be it further

"Resolved, That upon the adoption of this resolution that the Secretary of the Senate is directed to certify it to the Attorney General of Missouri.

"State of Missouri
Jefferson City
Senate Chamber

I, R. E. L. Marrs, Secretary of the Senate, do hereby certify that the above and foregoing Senate Resolution was offered into and adopted by the Senate on the 7th day of June, 1939, and that the above and foregoing is a full, true and complete copy of said Senate Resolution as fully as the same is on file and appears of record in my office.

In testimony whereof, I have hereunto set my hand at my office in Jefferson City, Missouri, this 7th day of June, A. D. 1939.

R. E. L. MARRS,
Secretary of the Senate."

The Constitution of the United States, Section 3 of Article 4 thereof, at page 28 in the Revised Statutes of Missouri, 1929, in part states:

"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; * * * * * *."

The Supreme Court of the United States has, on several occasions, held that the property owned by the United States is subject to the power and Government of the United States superior to that of all else. In Gibson against Chouteau, 80 U.S. 92, 13 Wall. l.c. 99, the Court said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."

In United States v. Grimaud, 220 U.S. 506, 55 L. Ed. 563, see also Light v. United States 220 U.S. 525, 55 L. Ed. 570, the constitutionality of the laws is sustained by which Congress delegated to the Secretary of the Interior power to make rules as to grazing public lands and to charge therefor. At page 569, the court said:

> "It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes from which we have quoted declare that the privilege of using reserves for 'all proper and lawful purposes' is subject to the proviso that the person so using them shall comply 'with the rules and regulations covering said forest reservation.' The same act makes it an offense to violate those regulations; that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in Buford v. Houtz, 133 U. S. 326, 33 L. Ed. 620, 10 Sup. Ct. Rep. 305, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. Wilcox v. Jackson, 13 Pet. 513, 10 L. Ed. 271."

In Buford v. Houtz, 133 U. S. 321, 33 L. Ed. 618 (1889), Plaintiff sought to enjoin defendant from pasturing plaintiff's land on the theory that plaintiff owned alternate sections and the Government owned the others, and that the Defendant, in pasturing that part owned by the Government, would pasture that part owned by the plaintiff. The court denied an injunction and held that plaintiff had no authority without fencing his own lands to prevent defendant's sheep from grazing thereon. Speaking of the public lands, the court said at page 620:

"We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids this use. For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States in all its branches has known of this use, has never forbidden it nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.

"The whole system of the control of the public lands of the United States as it has been conducted by the government, under Acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable. They have always been open to sale at very cheap prices. Laws have been enacted authorizing persons to settle upon them, and to cultivate them, before they acquire any title to them. While in the incipiency of the settlement of these lands by persons entering upon them, the permission to do so was a tacit one, the exercise of this permission became so important that Congress, by

a system of laws called the Pre-emption Laws, recognized this right so far as to confer a priority of the right of purchase on the persons who settled upon and cultivated any part of this public domain. During the time that the settler was perfecting his title, by making the improvements which the Statute required, and paying, by installments or otherwise, the money necessary to purchase it, both he and all other persons who desire to do so had full liberty to graze their stock upon the grasses of the prairies and upon other nutritious substances found upon the soil.

"The value of this privilege grew as the population increased, and it became a custom for persons to make a business or pursuit of gathering herds of cattle or sheep and raising them and fattening them for market upon these uninclosed lands of the government of the United States. Of course the instances became numerous in which persons purchasing land from the United States put only a small part of it in cultivation, and permitted the balance to remain uninclosed and in no way separated from the lands owned by the United States. All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States and upon the uninclosed lands of the private individual without let or

hindrance. The owner of a piece of land, who had built a house or inclosed twenty or forty acres of it, had the benefit of this universal custom, as well as the party who owned no land, Everybody used the open uninclosed country which produced nutritious grasses as a public common on which their horses, cattle, hogs and sheep could run and graze.

"It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds or else would be liable for their trespasses upon the uninclosed grounds of his neighbors. Such a principle was ill adapted to the nature and condition of the country at that time. Owing to the searcity of means for inclosing lands, and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous and permitted to go where their dangerous character might produce evil results. Indeed, it is only within a few years past, as the country has been settled and become highly cultivated, all the land nearly being so used by its owners or by their tenants, that the question of compelling the owner of cattle to keep them confined has been the subject of agitation.

"Nearly all the States in early days had wat was called the Fence Law, a law by which a kind of fence, sufficient in a general way to protect the

cultivated ground from cattle and other domestic animals which were permitted to run at large was prescribed. The character of this fence in most of the Statutes was laid down with great particularity, and unless it was in strict conformity to the Statute there was no liability on the part of the owner of cattle if they invaded the inclosure of a party and inflicted injury on him. If the owner of the inclosed ground had his fence constructed in accordance with the requirements of the Statute, the law presumed then that an animal which invaded this inclosure was what was called a breachy animal, was not such animal as should be permitted to go at large, and the owner was liable for the damages done by him. Otherwise the right of the owner of all domestic animals to permit them to run at large, without responsibility for their getting upon the lands of his neighbor, was conceded.

"The Territory of Utah has now, and has always had, a similar statute, section 2234 of the Compiled Laws of Utah. It is now a matter of occasional legislation in the States which have been created out of this public domain, to permit certain counties, or parts of the State, or the whole of the State, by a vote of the people within such subdivisions, to determine whether cattle shall longer be permitted to run at large and the owners of the soil compelled to rely upon their fences for protection, or whether the cattle-owner shall keep them confined, and in that manner protect his neighbor without the necessity on the part of the latter of relying upon fences which he may make for such protection.

> "Whatever policy may be the result of this current agitation can have no effect upon the present case, as the law of Utah and its customs in this regard remain such as we have described it to be in the general region of the northwest, and the privileges accorded by the United States for grazing upon her public lands are subject alone to their control."

In Light v. United States, 220 U. S.525, 55 L.Ed. 570, the Supreme Court considered the authority of the United States Government over public lands and held that the Federal Government was entitled to injunctive relief against the grazing of the public lands contrary to the regulations promulgated by the Secretary of the Interior. In that case it was contended, among other things, by the adverse party that the United States was subject to the municipal laws of the State of Colorado relating to fences. At page 571 the court defeined the position of the defendant as follows:

> "The defendant appealed and assigned that the decree against him was erroneous; that the public lands are held in trust for the people of the several states, and the proclamation creating reserve without the consent of the state of Colorado is contrary to and in violation of said trust; that the decree is void because it, in effect, holds that the United States is exempt from the municipal laws of the State of Colorado relating to fences; that the statute conferring upon the said Secretary of Agriculture the power to make rules and regulations was an unconstitutional delegation of authority to him,

and the rules and regulations therefore void; and that the rules mentioned in the bill are unreasonable, do not tend to insure the object of forest reservation, and constitute an unconstitutional interference by the government of the United States with fence and other statutes of the state of Colorado, enacted through the exercise of the police power of the state."

At page 573, the court, in holding in favor of the United States, said:

"The defendant was enjoined from pasturing his cattle on the Holy Cross Forest Reserve, because he had refused to comply with the regulations adopted by the Secretary of Agriculture, under the authority conferred by the act of June 4, 1897 (30 Stat. 35, Chap. 2), to make rules and regulations as to the use, occupancy, and preservation of forests. The validity of the rule is attacked on the ground that Congress could not delegate to the Secretary legislative power. We need not discuss that question, in view of the opinion in United States v. Grimaud (just decided), 220. U.S. 506, ante, 563, 31 Sup.Ct.Rep. 480.

"The bill alleged, and there was evidence to support the finding, that the defendant, with the expectation and intention that they would do so, turned his cattle out at a time and place which made it certain that they would leave the open public lands and go at once to the reserve where there was good water and pasturage. When notified to remove the cattle, he declined to do so, and threatened to resist if they should be driven off by a forrest officer.

He justified his position on the ground that the statute of Colorado provided that a land-owner could not recover damages for trespass by animals unless the property was inclosed with a fence of designated size and material. Regardless of any conflict in the testimony, the defendant claims that unless the government put a fence around the reserve, it had no remedy, either at law or in equity, nor could he be required to prevent his cattle straying upon the reserve from the open public land on which he had a right to turn them loose.

"At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those states where there were great plains and vest tracts of uninclosed lands, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent. Buford v. Hout, 133 U. S. 326, 33 L. Ed. 620, 10 Sup. Ct. Rep. 305. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States ofthe power of recalling any implied license under which the land had been used for private purposes. Steele V. United States, 113 U. S. 130, 28 L. Ed. 952, 5 Sup. Ct. Rep. 306; Wilcox v. Jackson, 13 Pet. 513, 10 L. Ed. 271.

"It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the state where it is located; and it is then argued that the act of 1891 (26 Stat. at L. 1103, chap. 561, U. S. Comp. Stat. 1901, p. 1537), providing for the establishment of reservations, was void, so that what is nominally a reserve is, in law, to be treated as open and uninclosed land, as to which there still exists the implied license that it may be used for grazing purposes.

"But 'the nation is an owner, and has made Congress the principal agent to dispose of its property . . . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.' Butte City Water Co. v. Baker, 196 U. S. 126, 49 L. Ed. 412, 25 Sup. Ct. Rep. 211. 'The government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.' Camfield v. United States, 167 U. S. 524, 42 L. Ed. 262, 17 Sup. Ct. Rep. 864. And if it may withhold from sale and settlement, it may also, as an owner, object to its property being used for grazing purposes, for 'the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.' United States v. Beebe, 127 U. S. 342, 32 L. Ed. 123, 8 Sup. Ct. Rep. 1083.

"The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely. Stearns v. Minnesota, 179 U. S. 243, 45 L. Ed. 173, 21 Sup. Ct. Rep. 73. It is true that the 'United States do not and cannot hold property as a monarch may, for private or personal purposes.' VanBocklin v. Anderson (Van Bocklin v. Tennessee), 117 U. S. 158, 29 L. Ed. 847, 6. Sup. Ct. Rep. 670. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, Sect. 3, Art. 4, that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States.' 'The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property.' Kansas v. Colorado, 206 U. S. 89, 51 L. Ed. 971, 27 Sup. Ct. Rep. 655.

"'All the public lands of the nation are held in trust for the people of the whole country.' United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. Ed. 640, 11 Sup. Ct. Rep. 57. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the trust it may disestablish a reserve, and devote the property to some other national

and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Even a private owner would be entitled to protection against wilful trespasses, and statutes providing that damage done by animals can not be recovered, unless the land had been inclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. Lazarus v. Phelps, 152 U. S. 81, 38 L. Ed. 363, 14 Sup. Ct. Rep. 477; Monroe v. Cannon, 24 Mont. 324, 81 Am. St. Rep. 439, 61 Pac. 863; St. Louis Cattle Co. v. Vaught, 1 Tex. Civ. App. 388, 20 S. W. 855; Union P. R. Co. v. Rollins, 5 Kan. 176.

"Fence laws do not authorize wanton and wilful trespass, nor do they afford immunity to those who, in disregard of property rights, turn losse their cattle under circumstances showing that they were intended to graze upon the lands of another.

"This the defendant did, under circumstances equivalent to driving his cattle upon the forest reserve. He could have obtained a permit for reasonable pasturage. He not only declined to apply for such license, but there is evidence that he threatened to resist the efforts to have his cattle removed from the reserve, and in his answer he declares that

> he will continue to turn out his cattle, and contends that if they go upon the reserve the government has no rememdy at law or in equity. This claim answers itself.
>
> "It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the reserve to graze thereon. Under the facts, the court properly granted an injunction."

In Golconda Cattle Co. v. United States, 201 F. 281 (1912), the Court held that the cattle Company had no authority to build a fence enclosing its land along with Government land, so the Government could not be reached by others, and this, notwithstanding, the fence built, was all on the land owned by the Cattle Company. At page 288, the court said:

> "We are not at all unmindful of the general right of an owner of a tract of land to build a fence thereon. It is fundamental that the rights of individual proprietorship which carry with them right to inclose or fence one's own land must be carefully guarded; but at the same time, as was held by the Supreme Court in Camfield v. United States, supra, the rights of the government in its proprietorship of the public domain do not exist by the sufferance of individual owners. It has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. Here the surrounding is in no sense confined to the land of

> the Golconda Company, for, of the total 37,000 acres included, 26,000 acres are public land. That is to say, the Golconda Company, by maintaining miles of fence along only the outside of its own 11,000 acres and connecting such fences with natural or other barriers, has separated one immense tract consisting not only of 11,000 acres belonging to it, but also of 26,000 acres of public land. The serious significance of the act is even more apparent when we realize that within the barriers there is public land more than sufficient to comprise 162 homestead entries."

As the basis for this ruling, the court at page 291 said:

> "It is said that enforcement of the decree of the District Court may be an invasion of the constitutional rights of the appellant, in that it would constitute a taking of private property for public use. But under the doctrine laid down by the Supreme Court in the Camfield case, supra, the United States has a clear right to legislate for the protection of the public lands and to exercise what is called a police power to make the protection effective, even though there may be some inconvenience or slight damage to individual proprietors. There being nothing in the facts of this case to take it out of this rule, we must hold that no rights of appellant have been infringed."

In United States v. Brighton Ranche Co., 26 F. 218, the court held the Federal Government would be entitled to a mandatory injunction to regulate the fence from government land and said that no rights as against the federal government were acquired by those who used the public lands, but that they were merely licensees and said:

"Something was said in the argument in respect to the government tolerating such occupation of its public land, and the answer alleges that it has been the policy of the government to permit occupation similar to that of the defendant. The case of Rector v. Gibson, 111 U. S. 276, is cited in support of this view. Doubtless the government has and does tolerate in a certain sense the occupation of the public lands, and wherever such occupation is either under the homestead or pre-emption act, or other acts, with a view to the purchase of the land, the occupation may be considered rightful. But the answer fails to disclose an occupation with any such intent, and the only occupation disclosed is one, not for the purpose of subsequent purchase, but with the idea of getting the benefit of the land for grazing purposes. Even if the policy of the government heretofore had been to tolerate the occupation and inclosing of tracts of government land for grazing purposes, the fact that an action is now commenced to put an end to such occupation is conclusive that the policy of the government is changed, and no rights are acquired against the government by a hitherto unchallenged occupation. So long as the government does nothing, an individual might, perhaps, not challenge the occupation by defendant; but the right of the government to interfere, to challenge the occupation, and to compel the defendant to desist from it, is not lost by mere delay in enforcing it."

In United States v. Bernard, et al., 202 F. 728, the 9th Circuit Court of Appeals in 1913 held that the Federal Government was entitled to equitable relief and damages for the reasonable value of such public lands as were fenced and used by the defendant, and this, notwithstanding

the Federal Government would not have received any rental or increment from the use of said land if they had not been so used by the defendant, and the court allowed judgment for Six Hundred ($600.00) Dollars actual damages in favor of the United States for such use. At page 731 the court said:

> "Notwithstanding that the acts of the appellee were deliberately done with full knowledge of the statute, and were continued in disregard of numerous notices to abate the inclosure, and that the value of the use of the inclosed public land was the full amount sued for, the appellees contend that no damages are recoverable by the government, for the reason that the public land of the United States has not been injured by their acts, that they have destroyed no government property, that the general public was licensed to pasture on the lands, and that others would have used the pasture on the lands if the appellees had not inclosed them. These reasons are not sufficient. It is true there has been no destruction of government property by the appellees, as in the case of cutting and removing timber, or taking turpentine sap from pine trees on government lands; but the appellees, by their wrongful act, have obtained the sole benefit of that which belonged to the United States, and was of value, the right to the use of which the government might have leased and thereby obtained revenue. It is no answer to the claim of the government for damages to say that the government would not have used the land or derived any pecuniary benefit therefrom, and that the government had licensed the public to use it. The license was a general one, and was for the benefit of all

> the people who were in a situation to avail themselves of it, and it was for the public good, and the fact that the government would have received no money consideration for the use of the pasture lands inclosed by the appellees is no ground for saying that it may not recover damages measured by the actual value of that which belonged to the United States, and which the appellees took without authority of law, and against the prohibition of the law. The fact that a plaintiff in an action for continued trespass would have made no use of the land which the defendant has wrongfully used to his advantage and profit will not prevent the plaintiff from recovering the actual value of that which had been so used and acquired by the defendant. The measure of damages for an appropriation of land by a continuing trespass is the worth of the use of the property."

Omaechevarria v . Idaho, 246 U. S. 343, 62 L. Ed. 763, appears to sustain the validity and effectiveness of a statute of Idaho which prohibits certain classes of stock from being grazed on the public lands owned by the Federal Government. At page 769 the court said:

> "The Idaho statute makes no attempt to grant a right to use public lands. McGinnis v. Friedman, 2 Idaho, 393, 17 Pac. 635. The state, acting in the exercise of its police power, merely excludes sheep from certain ranges under certain circumstances. Like the Forcible Entry and Detainer Act of Washington, which was held in Denee v. Ridpath (decided March 4, 1918) (246 U. S. 208, ante, 669, 38 Sup. Ct. Rep. 226) not to conflict with the Homestead Laws, the Idaho Statute was enacted primarily to prevent breaches of peace.

> The incidental protection which it thereby affords to cattle owners does not purport to secure to any of them, or to cattle owners collectively, 'the exclusive use and occupancy of any part of the public lands.' For every range from which sheep are excluded remains open not only to all cattle, but also to horses, of which there are many in Idaho. This exclusion of sheep owners under certain circumstances does not interfere with any rights of a citizen of the United States. Congress has not conferred upon citizens the right to graze stock upon the public lands. The government has merely suffered the lands to be so used. Buford v. Houtz, 133 U. S. 320, 326, 33 L. Ed. 618, 620, 10 Sup. Ct. Rep. 305. It is because the citizen possesses no such right that it was held by this court that the Secretary of Agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom. United States v. Grimaud, 220 U. S. 506, 55 L. Ed.563, 31 Sup. Ct. Rep. 480; Light v. United States, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485."

The same principle upheld in the Idaho case last above was applied in 1930 by the Circuit Court of Appeals for the 9th district in the case of Lamoreaux v. Kinney, 41 Fed. (2) p. 30, where the court, at page 31, said:

> "There is an implied license that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, when they are left open and unenclosed and no act of the government forbids their use; Buford v. Houtz, 133 U. S. 320, 10 S. Ct. 305, 33 L. Ed. 618; and any unlawful interference with that right is an offense against the United States. McKelvey v. United States, 260 U. S. 353, 43 S. Ct. 132, 67 L. Ed. 301. But the right thus conferred is subject to regulation by the state or territory in which the public land lies."

The statutes referred to in Senate Resolution No. 71 appear to be similar to those of the State of Idaho considered by the Supreme Court of the United States. In the Idaho Case above referred to it will be observed that the statute of Missouri under consideration, (Section 12797, R. S. Mo. 1929,) is directed towards prohibiting a person who owns stock from permitting them to run outside of their own land. The inquiry does not seem to contemplate that the Federal Government would turn its cattle on the public lands owned by the Federal Government, but is rather directed toward the question of whether the Federal Government without erecting a fence around its own lands may prevent the stock owned by other people from grazing on said lands. By the above observations it is indicated that the Federal Constitution places the power in Congress to make all rules and regulations that may be appropriate with reference to the control of the public lands that the Congress may constitutionally delegate to the Secretary of the Interior the power to make such rules. The Federal Government is sovereign with reference to the Government of the lands owned by the Federal Government, and where there may be conflict between the control if attempted to be exercised by the Federal Government and that of the State Government, the authority of the federal government over the federally owned lands, is supreme.

The Federal Government, although having the authority to prevent the grazing by the public of its lands, has not always been fit to exercise that authority. On the contrary, in the earlier days of the Nation, the dispostion of the Federal Government was to encourage the use of the federally owned lands by the public in order that the Federal Government indirectly be benefitted because its citizens raised the cattle that supplied the meat for the Nation. In more recent times the Federal Government, through Congress, has enacted laws by which the grazing of its lands is restricted.

We have not found a case holding that the Congress did not have that authority. On the contrary, the cases appear to hold that the public merely uses or grazes the public federally owned lands under the permission of the Federal Government and acquires no rights thereto. By so doing, the nearest approach to authority of the state laws over the federally owned lands we find is illustrated in the Lamoreaux Case, above referred to, and also the Idaho Case. Those cases do not seek to confer authority on the individuals in opposition to the dominion and government of the lands, by the Federal Government, but they merely hold that insofar as the Federal Government does not exercise its authority to prevent entirely the pasturing of the federally owned lands, the state, within whose borders such lands are situate, may pass laws providing that certain classes of stock privately owned within the state may not be given equal rights with certain other classes of stock and the pasturing thereof on the public lands.

CONCLUSION.

It is our opinion that the Government of the United States may, by the enactment of legislation as if and when it sees fit to do so, deny access of stock to its lands which

are situate in the State of Missouri, and this is true, notwithstanding Federal Government Lands are not inclosed by lawful fences.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

DW/RV