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Solicitor's Opinion
M-36184

February 15, 1954

PATENTS IN FEE

Indian Lands--Allotted and Heirship Lands--Issuance of Patents in Fee-Necessity for Applications--Discretion of Secretary of the Interior--Effects of Issuance of Patents in Fee--Termination of Indian Trusteeship--Civil and Criminal Jurisdiction over patent in Fee Indians

The statutes authorizing the Secretary of the Interior to issue patents in fee to Indian allottees or to the heirs of such allottees do not permit him to issue such patents unless the allottee or his heirs have made an application for the issuance of such patents. As the issuance of a patent in fee abrogates the tax exemption of the land covered by the patent, the requirement of an application by the allottee or his heirs must be implied.

The issuance of patents in fee to Indian allottees or their heirs do not result in extinguishing Indian guardianship or trusteeship, since the restrictions on the alienation of allotted lands are in the nature of covenants running with the land, and are not personal to the allottee. As long as a patent-in-fee Indian maintains his tribal relations, he is entitled to the same consideration and services as other members of his tribe.

Under the statutes authorizing the Secretary of the Interior to issue patents in fee to Indian allottees or their heirs, he has a wide area of discretion, and the issuance of such patents may not be compelled by mandamus even if a showing of competency can be made, for the Secretary may legitimately consider other factors than competency, such as the effect of the issuance of a patent in fee upon the consolidation of Indian lands.

When an Indian to whom a trust patent has been issued under the General Allotment Act receives a patent in fee for the whole of his allotment, he becomes subject to the laws, both civil and criminal, of the State of his residence, nothwithstanding the fact that he may subsequently come into the possession of other trust lands by inheritance, or devise, or further allotment of surplus lands, subject to the qualification, however, that he does not become amendable to State jurisdiction by Federal statutes.

The death of an Indian allottee does not in itself terminate the trust to which the allotment is subject, and while the Secretary of the Interior may issue patents in fee to his heirs, he is not compelled to do so, and may not do so unless the competent heirs have applied for the same.

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

M-36184 February 15, 1954

Memorandum

To: Assistant Secretary Lewis

From: The Solicitor

Subject: Letter from Paul L. Fickinger relating to issuance of patents in fee

This responds to your memorandum of September 8 relating to a letter dated September 17, 1952, from Mr. Paul L. Fickinger, Area Director of the Billings Area Office of the Bureau of Indian Affairs, to Mr. Dillon S. Myer, who was then Commissioner of Indian Affairs.

This office has been advised that while no response was ever formally made to the letter, the questions raised therein were informally discussed with Mr. Fickinger when he came to Washington shortly after the letter was received, and it was explained to him that his impression that Indian trusteeship could be extinguished by exercising the powers conferred upon the Secretary of the Interior by existing legislation was not well founded. I believe that the explanation so given him was correct.

Mr. Fickinger in his letter called attention to two statutes which, he believed, would make it possible to issue patents in fee to competent Indians, whether or not they made application for the issuance of such patents. He refers to the acts of May 8, 1906 (34 Stat. 182, 25 U.S.C., 1946 ed.,sec.349), amending section 6 of the General Allotment Act of February 8, 1887 (24 Stat. 390), which provided that the Secretary of the Interior "may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent

and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple * * *," and to the act of May 29, 1908 (35 Stat. 444, 25 U.S.C., 1946 ed., sec. 404), which provided that the Secretary of the Interior "shall ascertain the legal heirs" of deceased allottees, and "if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple" for their lands.

It is true that neither the act of May 8, 1906, nor the act of May 29, 1908, in terms requires that an application for a patent in fee must be made by the allottee or heirs of an allottee, but the courts have nevertheless held that a patent in fee may not properly be issued by the Secretary of the Interior under authority of the cited acts without the application or consent of the allottee. It had previously been held in Choate v. Trapp, 224, U.S. 665 (1912), that the tax exemption of allotted lands was a vested right of the allottees, and could not constitutionally be abrogated even by Congress. As the issuance of a patent in fee would abrogate the tax exemption, the courts held that a requirement of an application by the allottee must be implied.1/ Most of the court contests were an outgrowth of the issuance by the Department of thousands of fee patents in 1918 and the following years without the application or consent of the allottees in an effort to hasten their emancipation2/ After the courts had held that the issuance of the forced fee patents was not authorized, Congressional recognition of that principle was given in legislation authorizing their cancellation by the Secretary of the Interior in cases in which the lands had not been mortgaged or sold.3/

The act of May 8, 1906, in so far as it applies to the issuance of patents in fee to the heirs of deceased allottees, was virtually superseded, moreover, by the act of May 29, 1908,4/ which in turn was practically superseded by sections 1 and 2 of the act of June 25, 1910 (36 Stat. 855, 856), as

amended by the act of February 14, 1913 (25 U.S.C., 1946 ed., secs. 372 and 373). This act authorized the Secretary of the Interior to determine the heirs

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1/ See United States v. Chehalis County, 217 Fed. 28 (D.C. Wash., 1914); Morrow V. United States, 243 Fed. 854 (C.C.A. 8th, 1917); United States v. Benewah County, 290 Fed. 628 (C.C.A. 9th, 1923); United States v. Dewey County, 14 F. (2d) 784 (D.C.S.D., 1926); United States v. Comanche County, 6 Fed. Supp. 401 (D.C. Okla., 1934); Board of Commissioners of Caddo County v. United States, 87 F. (2d) 55 (C.C.A. 10th, 1936); United States v. Board of Commissioner of Pawnee County, 13 Fed. Supp. 641 (D.C. Okla., 1936); United States v. Ferry County, 24 Fed. Supp. 399 (D.C. Wash., 1938); United States v. Nez Perce County, 95 F. (2d) 232 (C.C.A. 9th, 1938); United States v. Lewis County, 95 F. (2d) 236 (C.C.A. 9th, 1938); Glacier County v. United States, 99 F. (2d) 733 (C.C.A. 9th, 1938); Board of Commissioners of Jackson County v. United States, 100 F. (2d) 929 C.C.A.10th, 1938).

2/ For a history of this episode, see H. Rep. No. 669, 76th Cong. 1st Sess.

3/ Act of February 26, 1927 (44 Stat. 1247), as amended by the act of February 21, 1931 (46 Stat. 1205); United States v. Nez Perce County, Idaho 95 F. (2d) 232, 236 (C.C.A. 9th, 1938).

4/ See case of Joseph Black Bear, 38 L. D. 422 at 424.

of deceased allottees, and permitted allottees to make wills disposing of their allotments with the approval of the Secretary of the Interior; and also authorized the Secretary to issue patents in fee to competent heirs or devisees, or to cause their lands to be sold or partitioned under certain circumstances.5/ Although the 1910 act, like the preceding legislation, was silent on the question whether a patent in fee could be issued to the heirs of a deceased allottee without their application or consent, it has been held that a patent in fee could not be issued to an heir of an allottee unless he had made application for the same.6/

Moreover, even if patents in fee could be issued to allottees or the heirs of allottees without their application or consent, such action would not result in extinguishing Indian guardianship, or trusteeship. A patent in fee Indian, who maintains his tribal relations, is entitled to the same consideration and services as other members of his tribe. The reason for this is that the

restrictions on the alienation of allotted lands are in the nature of covenants running with the land, and are not personal to the allottee. Thus, the issuance of a patent in fee to an Indian does not betoken complete emancipation but merely enables the patentee freely to alienate the particular tract of land covered by the patent. If he inherits other land, he cannot alienate such land,

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5/ Under section 1 of the 1910 act, the Secretary could cause the lands to be sold if he found one or more of the heirs to be incompetent.

6/ See United States v. Ferry County, 39 F. Supp. 1007 (D.C. Wash., 1941) and United States v. Nez Perce County, Idaho, 95 F (2d) 232 (C. C. A 9th, 1938).

unless another patent in fee is issued to him. 7/

On the basis of Mr. Fickinger's letter, you have formulated three particular legal questions relating to the issuance of patents in fee and their effect.

The first of these questions is whether under existing law the Secretary of the Interior has the power to issue patents in fee to the heirs of an allottee, and whether he must do this in the event that he ascertains that an heir has the ability to manage his own affairs. This question has already been partly answered; the Secretary does have the power under existing law, namely, the act of June 25, 1910, as amended, 8/ to issue patents in fee to the heirs of an allottee, provided that they have made application for the issuance of such patents, and are found to be competent to manage their own affairs. As to the further question whether the patents in fee must be issued by the Secretary to such heirs as he finds to be competent, it may be said that the Secretary has under the act of June 25, 1910, as amended, a wide area of discretion, notwithstanding the language of the statute which is that if "the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent." In the context of the whole statute, the purpose of which

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7/ See Johnson v. United States, 283 Fed. 954 (C.C.A. 8th, 1922); United States v. Kilgore, 111 F. (2d) 665, (C.C.A. 10th, 1940).

8/ In Sol. Op. M-36003, dated June 7, 1950, the Department held that the Secretary also has the power to issue patents in fee under the act of May 14, 1948 (62 Stat. 236, 25 U.S.C., 1946 ed., sec. 483). This statute expressly provides that the patent in fee may be issued "upon application of the Indian owner."

appears to be to confer large discretionary powers on the Secretary it is clear that the word "shall" is not mandatory. In law, the words "shall" and "may" are often convertible terms, and the almost identical language of the act of May 8, 1906, has been construed by the Department and by the courts as permissive rather than mandatory. 9/ Since the Secretary must be "satisfied" of the competency of an applicant for a patent in fee, it is apparent that he has discretion. Indeed, there are other factors than competency that may legitimately be considered, and have been considered, by the Secretary in deciding whether to issue a patent in fee. Thus, it has been established policy to consider whether the issuance of the patent would adversely affect the consolidation of Indian lands. 25 CFR sec. 241.2 (a) expressly declares that "the issuance of a patent in fee to any Indian holding land under a trust patent is discretionary," and subdivision (c) of the same section of the regulations provides that a patent in fee may be denied "when the land applied for lies within an area largely occupied and used by Indians whose lands are held in trust or restricted status."

Your second specific question is whether an Indian, having received a patent in fee to his allotment becomes subject to laws, both civil and criminal, of the State in which he resides, notwithstanding the fact that he may later come into the possession of other trust lands. The answer to this question would seem to depend upon how section 6 of the General Allotment Act of February 8, 1887, as amended by the act of May 8, 1906, is read in the light of various circumstances under which

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9/ See cases of Joseph Black Bear, 38 L. D. 422 at 424, and Ex Parte Pero, 99F (2d) 28, 34 (C.C.A. 7th, 1938).

the question might arise. Section 6, as amended, declares that at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee "then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside***." In the first place, the allotment for which the patent in fee has been issued must have been made pursuant to the General Allotment Act, or some other allotment act which embodies its provisions by reference. 10/ There are, however, many allotments which have not been so made. In the second place, the patent in fee must have been issued to the original allottee rather than to an heir of the allottee. The Department has held that an Indian who holds an allotment by inheritance or devise does not become subject to the criminal laws of the State of his residence when a patent in fee has been issued to him, 11/ and the same conclusion would seem to hold with respect to the civil laws of the State of his residence. 12/ In the third place, it would seem logical to hold that as long as part of an original allotment is still held in trust by the United States for an allottee, he is not subject to the civil or criminal laws of the State of his residence even though a patent in fee has been issued to him for the remainder of his allotment. 12/ In the fourth place, the allottee to whom a patent in fee has been issued for the whole of his original allotment may subsequently receive another allotment in trust by neither inheritance nor devise but by virtue of the enactment of a statute providing for additional allotments from the surplus lands of the tribe. In State v. Munroe, 274

10/ See Clestine v. United States, 215 U. S. 278 (1909), and Eugene Sol Louie v. United States, 274 Fed. 47 (C.C.A. 9th, 1921).

11/ See 58 I. D. 455.

12/ A contrary conclusion was reached in People v. Pratt, 80 P. (2d) 87 (Cal.). However, the court based its decision on the provisions of the General Allotment Act is amended, relating to the issuance of patents in fee to "allottees." The Act of 1910, as amended, which authorizes the issuance of patents in fee to heirs, and which contains no declaration that the issueance of the patent shall subject the patentee to the laws of the State, was neither mentioned nor discussed.

Pac. 840 (Sup. Ct. Mont. 1929), the court held that a Blackfeet Indian who had been allotted under the act of March 1, 1907 (34 Stat. 1035), and received a patent in fee for this allotment, was subject to State criminal jurisdiction, notwithstanding the fact that he had subsequently received a trust allotment of surplus lands under the act of June 30, 1919 (41 Stat. 16).

While, on the basis of the decided case, it is my conclusion that when an Indian to whom a trust patent has been issued under the General Allotment Act receives a patent in fee for the whole of his allotment he becomes subject to the laws, both civil and criminal, of the State of his residence, notwithstanding the fact that he may subsequently come in the possession of other trust lands by inheritance, devise, or further allotment of surplus lands an important qualification must be attached to this conclusion, namely that he would not be subject to State jurisdiction with respect to those matters which are reserved to Federal jurisdiction by Federal statutes. For example, if such Indian inherited an interest in a trust allotment, the interest would still be subject to probate by the Secretary of the Interior under the act of June 25, 1910, supra. Moreover, such an Indian, if he committed in the Indian country against the person or property of another Indian, or other person, one of the crimes specified in the so-called Major Crimes Act (now 18 U.S.C., sec. 1153), would be subject to prosecution in the Federal courts. 14/

Such complexities and distinctions as these have rendered the grant of State jurisdiction over Indians comtemplated by the General Allotment Act largely ineffective. The sponsors of that legislation assumed that the allotment of the Indians in severalty, would be but the prelude to the termination of their tribal relations and the liquidation of Federal supervision over them. When that program failed to be carried out, and the Indians, despite the fact that they were now citizens, continued to maintain their tribal relations and the Government continued its guardianship over them, the subjection of the Indians to the jurisdiction of the States ceased to have much reality. State law enforcement officers could not, after all, go around with tract

books in their pockets, and being unable to distinguish a patent in fee Indian from a ward Indian, they did not commonly concern themselves with law violations by Indians, 15/ and the theoretical jurisdiction of the States thus fell into innocuous desuetude. Thus, when it has been desired to confer on particular States criminal or civil jurisdiction over Indians, it has been accomplished by general statutes conferring such jurisdiction irrespective of the tenurs by which Indians held their lands.16/

Your final question is whether an Indian who, after he has obtained a patent in fee to his allotment, receives other trust lands must be given those lands in trust, or whether the Secretary of the Interior may or must convey such other lands to hi without restriction. It is assumed that the patent-in-fee Indian would receive the trust lands by inheritance or devise. Such being the case, it is apparent

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13/ There appear, however, to be neither departmental nor judicial decisions on this point, possibly because the issuance of appatent in fee for part of an allotment has not been too frequent.

14/ Prior to the revision of the Federal criminal code by the act of June 25, 1948 (62 Stat. 757), the governing provision on major crimes by Indians was 18 U.S.C., sec. 548, which was not entirely clear on the question whether an Indian who committed one of the major crimes against the person or property of another Indian on fee patented lands within the exterior boundaries of an Indian reservation was subject to prosecution in the Federal rather than the State courts. Federal jurisdiction was denied in the cases of Eugene Sol Louie v. United States, supra, and State v. Johnson, 249 N. W. 284 (Wis., 1933), and upheld in United States v. Frank Black Spotted Horse, 282 Fed. 349 (D.C.S.D., 1922). The department, in a letter dated November 20, 1942, to the Attorney General of the United States, espoused Federal jurisdiction. Whatever doubt existed seems to have been removed in the revision of the criminal code, which provides for Federal jurisdiction in such cases. 18 U.S.C., sec. 1151, defines the term "Indian country" as including all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent * * *." See State ex rel. Irvine v. District Court, 239 P. (2d) 272 (Sup. Ct. Mont., 1951).

that the question has already been answered in the comments which have been made on the acts of June 25, 1910, and February 14, 1913, which are the foundation of the probate jurisdiction of the Secretary of the Interior. The death of the owner of the

lands does not in itself terminate the trust under the 1910 act, and the 1913 act expressly declares that "the death of the testator shall not operate to terminate the trust or restrictive period * * *". Of course, the Secretary may under these statutes issue patents in fee to the heirs for these trust interests but the mere fact that a patent in fee has already been issued to one of the heirs for other lands would not oblige the Secretary to issue a patent in fee for the inherited lands, or otherwise terminate the restrictions. This follows from what has already been said concerning the effect of the issuance of a patent in fee, the discretionary nature of the Secretary's power, and the necessity for an application for a patent in fee by an heir or devisee.

It is apparent from the foregoing that Indian trusteeship cannot be terminated by invoking the powers available under existing law, and that if this objective is to be accomplished, additional legislation will be necessary.

15/ This at least is the impression gathered from the reported cases. There are relatively few cases in which Indians have been subjected to State jurisdiction for the violation of State criminal laws because they were patent in fee Indians. See, in addition to the cases already mentioned, In re Now-ge-zhuck, 76 Pac. 877 (Kans. 1904), involving a breach of the peace; Kitto v. State, 152 N. W. 380 (Nebr., 1915), involving assault; State v. Big Sheep, 243 Pac. 1067 (Mont., 1926), involving unlawful possession of petote; State v. Bush, 263 N. W. 300 (Minn., 1935), involving trapping muskrat in closed season; People v. Pratt, 80 P. (2d) 87 (Cal., 1938), involving illegal possession of metal knuckles; United States ex rel. Marks, V. Brooks, 32 F. Supp. 422 (D.C.N.D., Ind., 1940), involving unlawful possession of racoon.

16/ See the acts of June 8, 1940 (54 Stat. 249), applicable to Kansas; May 31, 1946 (60 Stat. 229), applicable to the Devils Lake Reservation, North Dakota; June 30, 1948 (62 Stat 1161), applicable to the Sac and Fox Reservation in Iowa; July 21, 1948 (62 Stat 1224), applicable to New York; October 5, 1949 (63 Stat. 705), applicable to the Agua Caliente Reservation, California; and finally the act of August 15, 1953 (Public Law 280, 83d Cong.), applicable to California as a whole, Minnesota (except Red Lake), Nebraska, Oregon (except Warm Springs), and Wisconson (Except Menominee). The last-mentioned statute also contains a general provision giving the consent of the United States to the assumption by any other State of the Union of civil and criminal jurisdiction over Indians.

(Sgd) William J. Burke
Acting Solicitor

Interior--Duplicating Section, Washington, D.C.