IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

Jan 11, 1969

702

MEMORANDUM

To : Director
Associate Director

From : Assistant to the Director

Subject: Cadastral Survey

Here is the Solicitor's Opinion on Surveying.

The 1910 provisions which our surveyors say in their manual "brought to a close the practice of letting contracts for the making of public land surveys" is no longer in force. It passed in 1926 when it didn't appear in the Appropriation Act.

Thus as I see it, we may either contract for surveys or do it ourselves. For in fact, prior to 1910 we could do either as we elected.

The basic law as amended by Reorganization Plan #3, 1946 which places full U. S. land survey authority in the Department of Interior's Bureau of Land Management remains, of course, in effect.

Also, 43 USC 766 which long has permitted subdividing of surveyed lands into lots less than 160 acres to be done by county and local surveyors is also still operative.

At the close of the memo (see bottom of page 5) the Solicitor affirms 43 USC 772 that limits expenditures for resurveys to 20% of our appropriation. This has always been the law.

I have sent a copy of the opinion to Jim Beirne for action regarding the budget with a copy to Jerry O'Callaghan to consider eventual repeal by a bill to go through the Interior Committee.

Robert E Wolff

1-31-69

No action is required by Engineering but I am sure you may want to see what is done by Adm & Legislative with this opinion.

JAN 31 1969

IN REPLY REFER TO:

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JAN 10 1969

Memorandum

To: Director, Bureau of Land Management

From: Assistant Solicitor, Branch of Lands

Subject: Cadastral Survey Authority

In response to your request of October 10, 1968, we have reviewed the provisions relating to survey work of the Interior Department Appropriation Act for the 1911 fiscal year, enacted June 25, 1910 (36 Stat. 703). It is our conclusion that none of those provisions is in force today.

The act provides, inter alia, for "surveys and resurveys to be made by such competent surveyors as the Secretary of the Interior may select. . ." 36 Stat. 741. While the language itself admits of more than one interpretation, the Congressional intent, as evidenced by portions of the debate in the House of Representatives, 45 Cong. Rec., Part 7, 7094, May 28, 1910, is clear that the surveyors were to be regular employees of the Government. The other portions of the appropriations act, setting forth rates to be paid surveyors, limiting expenditures for corner monuments, and providing priorities for certain types of surveys and resurveys, require no specific interpretation.

Similar provisions appeared in each annual appropriations act up to and including that for 1924. Each reiterated the identical phrase requiring that surveyors should be selected by the Secretary of the Interior, and set forth salary requirements, priorities and provisions as to corner monuments and resurveys.

The 1925 Appropriations Act (46 Stat. 1144), however, did not contain the same phrase requiring selection by the Secretary of the Interior, but simply provides for surveys "under the supervision of the Commissioner of the General Land Office and direction of the Secretary of the Interior." Nor are specific salary limitations spelled out in this act. Congressional discussion, however, indicates that it was still intended that surveyors be regular Federal employees, /See Hearing Before Subcommittee of House Committee on Appropriations, Interior Department Appropriations Bill

1925 at p. 123, (H.R. 5078, 68th Cong., 1st Sess.) and for the following year, in which the same provision appeared, see Hearing Before Subcommittee of House Committee on Appropriations, Interior Department Appropriation Bill 1926 at p. 115 (H.R. 10020, 68th Cong., 2nd Sess.)/, notwithstanding the fact that the language is almost identical to provisions in appropriations acts prior to 1911 when contract surveys were generally accepted. /See the 1877 Appropriation Act (19 Stat. 120) and the 1878 Appropriations Act (19 Stat. 348) where the following language appeared: ". . . under the direction of the Commissioner of the General Land Office with the approval of the Secretary of the Interior, . . ."/

Provisions for supervision by the Secretary of the Interior, similar to those in 1925, were carried in each annual appropriation act through the 1930's and into the 1940's. Other specific provisions gradually disappeared, until the 1948 Appropriations Act (61 Stat. 463), which does away altogether with specific provisions and simply states, under the heading of "Bureau of Land Management,"

> "Management, protection, and disposal of public lands: For . . . surveys and resurveys of public lands, including fragmentary surveys and such other surveys and examinations as may be required; . . ."

The above provisions were gradually shortened until the phrase was, as in the current appropriation act, (82 Stat. 425), simply "cadastral surveying," one of several functions listed under "Management of Lands and Resources."

Interpretation of the original provisions in the 1911 appropriations act must be made in light of the fact that these are portions of an annual appropriations act designed to fund a particular agency for one year only. Freund, Legislative Regulation (1932) at 28, classifies an annual appropriation act as special legislation "in the sense that it soon becomes 'functus officio,' and will not find a place in a collection of general statutes." "Functus officio," according to Black's Law Dictionary, is "Having fulfilled the function, discharged the office or accomplished the purpose, and therefore of no further force or authority."

It is a general rule that the provisions of an appropriations act operate only for the stated period of time. Tayloe v. Kjaer, 171 F. 2d 343 (D.C. Cir. 1948); National Labor Relations Board v. Thompson Products, Inc., 141 F. 2d 794 (9th Cir. 1944); Norcross v. United States, 142 Ct. Cl. 763 (1958); II Sutherlin, Statutory Construction § 347; 82 C.J.S., Statutes § 253. While it is true that a special provision contained in an appropriation act may repeal permanently a portion of

a prior statute or provide permanent regulation, there is a presumption that such is not the case. As stated in II Sutherlin, Statutory Construction § 347:

> ". . . in the construction of a temporary appropriation act the presumption is that any special provisions of a general character therein contained are intended to be restricted in their operation to the subject matter of the act, and not permanent regulations, unless the intention of making them so is clearly expressed." (Emphasis added)

And see Freund, Legislative Regulation (1932) at 40, and 82 C.J.S., Statutes § 253, where it is noted;

> "Substantive legislation may be amended by provisions in an appropriation bill, but, unless a purpose to the contrary is clearly evident, the limited period to which the appropriation provision applies suggests that no substantive change was intended." (Emphasis added)

The Court of Claims, in Norcross v. United States, 142 Ct. Cl. 763 (1958), states that a special provision of an appropriations act is limited in operation to one year, unless there is some expression carried in the provision, such as "hereafter," to show a clear intent to make it permanent. And the Ninth Circuit, in considering an alleged substantive amendment contained in an appropriation act, in National Labor Relations Board v. Thompson Products, Inc., 141 F. 2d 794 (9th Cir. 1944), held the provision operative for one year only, annunciating the rule as follows:

> "Although a substantive amendment to a basic act may be incorporated in an appropriation act from year to year, United States v. Dickerson, 310 U.S. 554, 60 S. Ct. 1034, 84 L. Ed. 1356, unless a contrary purpose is clearly evident the limited period to which the provision applies suggests that no substantive change was intended. See United States v. Vulte, 233 U.S. 509, 34 S. Ct. 664, 58 L. Ed. 1071."

The question is exhaustively dealt with in 27 Ops. Atty. Gen. 108 (December 3, 1908), determining a question very similar to this. There was contained, in two consecutive annual appropriations acts, 1906 and 1907, a provision for the fining of railroads for delays in carrying the mails. No such provision appeared in the 1908 appropriation act. Relevant portions of the opinion are as follows:

"The question thus presented is, what effect, if any, shall be given to the omission of Congress to incorporate in the appropriation bill for the current year a clause similar to those above set forth? Or, to put it otherwise, are the provisions with respect to the fining of railroads for delays in carrying the mails, which were made a part of the appropriation acts for the fiscal years ending June 30, 1907, and June 30, 1908, to be regarded as permanent or as temporary legislation?

. . .

"These two provisions being designed to accomplish the same purpose, it follows that Congress would not have incorporated such a clause in the second appropriation bill referred to if it had thought that a similar clause in the first appropriation bill was permanent legislation. So, further, the omission of any provision on the subject in the last appropriation act indicates a conscious purpose thereafter to abandon the requirement altogether.

. . .

"An examination of numerous authorities on the subject confirms the opinion that no clause, phrase, or section of an appropriation act ought to be construed as permanent legislation unless such words are used therein as make the purpose clear. Mr. Justice Story in Minus v. United States, (15 Pet. 423, 445) states the rules as follows:

> 'It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.'" (Emphasis added)

The opinion continues with a discussion of other authorities which arrive at the same conclusion.

There is no specific wording, such as "hereafter" or "permanently," contained in the phrase "surveys and resurveys to be made by such competent surveyors as the Secretary of the Interior may select."

There is nothing in the appropriations provisions which indicate that this phrase or any of the other special provisions of the 1911 appropriations act are intended to be of a permanent nature. This fact along, in light of the rule set out above, leads to the conclusion that the provision requiring regular employed surveyors, as well as the salary provisions, priorities, and limitations, was only effective during the life of the appropriation act itself, i.e. only during the 1911 fiscal year.

This conclusion is strengthened by the fact that Congress included the identical phrase, which it viewed as requiring surveyors to be regular employees of the Government, in the appropriations acts for a number of succeeding years, as well as continued to provide salary ceilings, priorities, and limitations on resurveys and spending for corner monuments. There would have been no necessity for any of these provisions had the initial ones in the 1911 appropriations act been seen as permanent and binding beyond the conclusion of that fiscal year.

Further, the phrase, "under the supervision of the Commissioner of the General Land Office and direction of the Secretary of the Interior," which appeared in the appropriations acts for 1925 and subsequent years until 1948, carries forth, for each year in which it appeared, the requirement that surveys be conducted by Government employees, not by its wording, but in light of the legislative interpretation, since similar wording appeared when contract surveys were the rule rather than the exception. However, no one of these provisions is permanent in nature, but rather is operative for one year only.

There is no statute or law currently effective and in force which requires public land surveys to be conducted only by regularly employed Government surveyors. However, the fact that public land surveys have been conducted exclusively by these regularly employed Government surveyors since 1911 would seem to indicate Congressional approval of this system. Viewing all the authority, there is no statutory requirement that such be the sole method employed, nor is there any statutory ban on any other method of conducting surveys.

We have not considered the question as to whether the Bureau may hire contract surveyors under existing authorities. We would hesitate to proffer any opinion regarding this, absent the presentation of a concrete proposal. If such question should be presented, it might be advisable to seek the advice of the Comptroller General.

You have asked further for information concerning the continued effectiveness of that portion of the Act of March 3, 1909, 35 Stat. 845, as amended, 43 U.S.C. 772 (1964), which reads as follows:

"Provided further, That not to exceed 20 per cent of the total annual appropriation for surveys and resurveys of the public lands shall be for the resurveys and retracements authorized hereby."

We have located no act or statute which repeals or supercedes this provision, and are of the opinion, therefore, that it remains in full force and effect. The fact that Congress has been informed of the recent practice of expending a great deal more than twenty per cent of each years appropriation for this purpose, (See House Hearings, Interior Department Appropriations Bill 1965 at 122, (H.R. 10433, 88th Cong. 2nd Sess.) cannot alone operate to void the effect of the statute absent some positive action, either in the form of an amendment to or repeal of the Act or a special provision in an appropriations act for a specific year to operate in that year only.

Assistant Solicitor
Branch of Lands

cc:
Secy. File
Docket
Branch of Lands
DPL
Mrs. Shylstad

MRS:cjp 1/7/69