Irrigation Districts —Assessments —Title — Preliminary Surveys.

Land that is included in an irrigation district when title is in the United States is not liable for district assessments for preliminary surveys.

September 18, 1928.

C. A. Nordstrom, Esq.,
County Treasurer,
Red Lodge, Montana.

My dear Mr. Nordstrom:

Your letter addressed to the Montana irrigation commission relative to the creation of the East Side Irrigation District and to the liability for assessments levied for preliminary surveys of land, the title of which was in the United States at the time of the creation of the district, has been referred to this office for reply.

It appears from your statement that the district was created about 1920 and that patent was not issued by the United States until about 1924. The homesteader did not sign for the creation of the district. The question presented is whether the assessments for preliminary expenses should be cancelled.

At the time of the creation of this district, section 7166 R. C. M. 1921 provided:

> "For the purposes of this act, entrymen of public lands of the United States within the district shall be deemed to be holders of evidence of title and shall share all the privileges and obligations of owners of land within the district, subject to the

provisions of the Act of Congress, approved August 11, 1916, entitled 'An Act to Promote the Reclamation of Arid Lands'."

This section was subsequently amended by chapter 157, laws of 1923, and later amended by chapter 112, session laws of 1925. In the last amendment the above provision was omitted.

In the case of the Gem Irrigation District v. Johnson, 109 Pac. 845, the court had under consideration a similar provision to the Idaho statute and held that bonds issued against such lands would be valid and binding to the extent at least of the title, interest or claim of such entryman in and to such lands, whether acquired by him from the state or the general government. As to what liability the bonds would impose upon such lands beyond and in excess of the interest acquired or held by the entryman is another question, said the court.

In the case of Lee v. Osceola and the Little River Road Improvement District, 69 L. Ed. 1132, the supreme court of the United States had before it the question of the validity of an assessment made in a road improvement district where the title to the land was in the United States at the time the lien was created. The court, in discussing this matter, said:

"When the district was originally organized, the lands involved in this suit, which are known as 'lake lands' or 'sunk lands,' were included in it. The benefits accruing from the improvements were then assessed against all the landowners including various persons who were supposed to be the riparian owners of the lake lands. It was subsequently ascertained, before the completion of the improvements, that the United States was the owner of these lake lands. It was recognized, however, that it was not liable to assessment, and no attempt was made to collect from it any part of the assessed benefits. After the improvements had been completed the United States conveyed these lake lands, under the Homestead Act, to the present owners. Thereafter, the board of commissioners of the district caused a re-assessment to be made of the benefits accruing to all the lands within the district, including the lake lands, which had formerly belonged to the United States. This reassessment was made under a section of the Arkansas statute which provided that 'the board of commissioners may not oftener than once a year order a re-assessment of the benefits, which shall be made, advertised, revised and confirmed as in the case of the original assessment with like effect.' Crawford & M. Dig. (Ark.) Sec. 5399. It is the re-assessment of benefits thus made which the district, by this suit, has sought to collect.

"It was settled many years ago that the property of the United States is exempt by the Constitution from taxation under the authority of a state so long as title remains in the United States. Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151, 180, 29 L. Ed. 845, 855, 6 Sup. Ct. Rep. 670.

This is conceded. It is urged, however, that this rule has no application after the title has passed from the United States, and that it may then be taxed for any legitimate purposes. While this is true in reference to general taxes assessed after the United States has parted with its title, we think it clear that it is not the case where the tax is sought to be imposed for benefits accruing to the property from improvements made while it was still owned by the United States. In the Van Brocklin case, supra, p. 168 (29 L. Ed. 851, 6 Supt. Ct. Rep. 670), it was said that the United States has the exclusive right to control and dispose of its public lands, and that 'no state can interfere with this right, or embarrass its exercise.' Obviously, however, the United States will be hindered in the disposal of lands upon which local improvements have been made, if taxes may thereafter be assessed against the purchasers for the benefits resulting from such improvements. Such a liability for the future assessments of taxes would create a serious encumbrance upon the lands, and its subsequent enforcement would accomplish indirectly the collection of a tax against the United States which could not be directly imposed. In Nevada Nat. Bank v. Poso Irrig. Dist. 140 Cal. 344, 347, 73 Pac. 1056, in which it was held that the state could not include lands of the United States in an irrigation district so as to impose an assessment for benefits which would become a liability upon a subsequent purchaser, it was said that 'if the grantee of the United States must take the land burdened with the liability of an irrigation district made to include it without the assent of the government or the purchaser, it attaches a condition to the disposal of the property of the government without its sanction or consent, * * * which must, in such cases, interfere with its disposal'."

It is therefore my opinion that the land in question is not subject to assessment for preliminary surveys and that the assessment should be cancelled.

Very truly yours,

L. A. FOOT,
Attorney General.