



United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

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M-37031

Memorandum

To: Director, Bureau of Indian Affairs
Director, Bureau of Land Management

From: Solicitor

Subject: Legal Status of the Red Lake Band of Chippewa Indians' Restored Lands Assessed for Drainage Works by the State of Minnesota Under the Authority of the Volstead Act of 1908

I. INTRODUCTION

In 1945, the Secretary of the Interior ("Secretary") restored to the Red Lake Band 157,000 acres, more or less, of land ("Red Lake lands") which the Department categorized as eligible for restoration pursuant to section 3 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, codified as amended, 25 U.S.C. §§ 461-479 (2006) ("IRA").¹ The Secretary specifically included "lands which have been assessed for drainage works by the State of Minnesota under authority of the Volstead Act of May 20, 1908....subject to any existing valid rights."² However, publication of the legal descriptions was delayed because of the need to determine what, if any, existing valid rights remained in light of the complex structure of the Volstead Act.³ The Volstead Act liens have historically clouded title⁴ to approximately 60,000 acres of Red Lake lands located in five northern Minnesota counties.

The purpose of this opinion is to resolve Volstead title issues for the Red Lake lands.⁵ I begin my analysis with an overview of the IRA's goals and purposes for land restoration and the specific "relinquishment in trust" for Red Lake lands. Then, I examine the history of the Volstead Act and the 1942 M-Opinion (M-30851) entitled *Status of Public and Indian Ceded*

¹ Notice of Order of Restoration, Red Lake Reservation, Minnesota, 10 Fed. Reg. 2448 (Mar. 2, 1945).

² *Id.* at 2449.

³ In 1999 and 2001, the Department published notices identifying by legal description approximately 124,430.64 acres (89,852.06 acres and 34,578.58 acres, respectively) of Red Lake lands that were restored to tribal ownership under the authority of a 1945 Secretarial Order of Restoration. Status of Red Lake Tribal Indian Lands in Minnesota, 64 Fed. Reg. 5069 (Feb. 2, 1999); Notice Identifying Lands Subject to the Secretarial Order of Restoration of February 22, 1945, 66 Fed. Reg. 57,479 (Nov. 15, 2001).

⁴ Generally, the effect of lien recordation creates a "cloud on title." BLACK'S LAW DICTIONARY 175 (abridged 6th ed. 1991).

⁵ I wish to acknowledge and thank Deputy Solicitor for Indian Affairs, Venus McGhee Prince, along with Twin Cities Field Office attorneys Carrie Prokop and Kara Pfister, for their contribution and assistance in the preparation of this opinion.

Lands Drained by the State of Minnesota Under the Volstead Act of May 20, 1908 (Aug. 12, 1942).⁶ Next, I analyze the 1945 Secretarial Restoration Order and the impact of subsequent federal legislation, along with Department action, on Volstead title issues at Red Lake. Based on this legal review, I conclude that under federal law, Minnesota's inchoate security interests as recorded by Volstead liens do not constitute existing valid rights as to restored Red Lake lands and, therefore, should not constitute a cloud on title to the 60,000 acres of Red Lake lands.

II. INDIAN REORGANIZATION ACT

It is well established that Congress has plenary authority over Indian affairs.⁷ By the 1920s, federal Indian policy began to shift away from Indian land disposition and toward new protections for Indian rights and the support of tribal self-government.⁸ The crowning achievement of this shift in policy came when Congress enacted the IRA. "The IRA was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal domains."⁹ A primary goal of the IRA is "to conserve and develop Indian lands and resources."¹⁰ Relevant here, the IRA stopped the allotment of Indian land, extended the periods of trust and restriction on alienation of Indian lands, and prevented transfers of restricted lands except to Indian tribes.¹¹ "Although there were limited opportunities for acquisition or reacquisition of additional tribal lands, the Act at least slowed and in most instances stopped the loss of tribal lands."¹²

One method for accomplishing this goal was to authorize the Secretary to restore to tribal ownership the remaining surplus lands of any Indian reservations previously opened to disposal.¹³ As noted above, the Secretary restored the Red Lake lands, including the lands subject to this opinion, pursuant to section 3 of the IRA which provides in relevant part:

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of persons to any lands so withdrawn existing on the date of withdrawal shall not be affected by this Act....¹⁴

⁶ FELIX S. COHEN, OFFICE OF THE SOLICITOR, M-30851, STATUS OF PUBLIC AND INDIAN CEDED LANDS DRAINED BY THE STATE OF MINNESOTA UNDER THE VOLSTEAD ACT OF MAY 20, 1908, 58 Interior Dec. 65 (1942).

⁷ See U.S. CONST. art. I, § 8, cl. 3; *United States v. Lara*, 541 U.S. 193, 200 (2004); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.")

⁸ COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05, at 79 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

⁹ *Id.* at 81.

¹⁰ Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934).

¹¹ COHEN'S HANDBOOK § 1.05, at 82.

¹² *Id.* at 83.

¹³ Indian Reorganization Act § 3; 25 U.S.C. § 463.

¹⁴ *Id.* (emphasis in original).

Broadly stated, the purpose of the IRA was to establish a new standard of dealing between the federal government and the Indians.¹⁵ The Bureau of Indian Affairs (“BIA”) and General Land Office (“GLO”) jointly defined the class of surplus Indian lands available for restoration as those surplus Indian lands relinquished in trust.¹⁶

A. Relinquishment in Trust

The surplus lands of the Red Lake Indian Reservation were “relinquished in trust” pursuant to the Nelson Act of 1889.¹⁷ Upon enactment, the United States negotiated agreements with various bands of Chippewa Indians in Minnesota by which the Indians ceded to the United States roughly 4.7 million acres of land. Of that total, roughly 3.2 million acres consisted of Red Lake reservation lands.¹⁸ The Nelson Act created a relinquishment in trust method whereby the United States held the ceded lands in trust for the benefit of the Chippewa Indians until such lands were sold in accordance with the terms of the Nelson Act and the proceeds deposited in the Treasury to the credit of the Chippewa Indians of Minnesota.¹⁹ Hence, the lands relinquished in trust by the Chippewa Indians of Minnesota to the United States which had remained “undisposed of” at the time of the IRA’s enactment in 1934 fell within the category of lands to be considered for restoration to tribal ownership.

B. The Department’s IRA Analysis

Generally, the Department interpreted section 3 of the IRA as requiring that federal lands subject to restoration meet three criteria: (1) the lands must be remaining surplus land; (2) the land must be of an Indian reservation; and (3) the land must have been opened before June 18, 1934 to sale or to any other form of disposal by Presidential proclamation or by the public land laws.²⁰ In prior opinions analyzing the first factor for restoration eligibility, the Solicitor explained:

The Interior Department has taken the position that section 3 is not intended to cover all ceded lands but those ceded lands in which the Indians have retained an interest by reason of the fact that the lands were ceded to the United States to be disposed of by the United States in specified ways, the proceeds of the sale to be held for the benefit of the Indians. This type of ceded land was evidently in the mind of Congress at the time of the passage of the Reorganization Act. The debates on the bill in the Senate show that section 3 was discussed as a provision

¹⁵ S. Rep. No. 73-1080 (1934) (citing letter from President Franklin D. Roosevelt to Sen. Wheeler).

¹⁶ Restoration of Lands Formerly Indian to Tribal Ownership, 54 Interior Dec. 559, at 560-561 (1934) (approving recommended instructions submitted by Commissioners of Indian Affairs and the Gen. Land Office for the temporary withdrawal of vacant and undisposed-of lands on various Indian reservations).

¹⁷ Act of Jan. 14, 1889 (Nelson Act), ch. 24, 25 Stat. 642, as amended by the Act of June 27, 1902, Pub. L. No. 57-175, 32 Stat. 400 (Congress amended the Nelson Act provisions concerning the disposition of pine lands) and Act of Feb. 20, 1904, Pub. L. No. 58-23, 33 Stat. 46 (authorized additional land session).

¹⁸ See H.R. Exec. Doc. No. 51-247, at 27.

¹⁹ See *Minnesota v. Hitchcock*, 185 U.S. 373, 394-95 (1902).

²⁰ FRANK J. BARRY, U.S. DEP’T OF INTERIOR, M-36599, AUTHORITY OF SECRETARY TO RESTORE LANDS IN SAN CARLOS MINERAL STRIP TO TRIBAL OWNERSHIP (1962).

making possible the restoration of the use of the lands to the Indians in place of the proceeds to which they were entitled from any sale.²¹

The Red Lake lands ceded under the Nelson Act and the Act of February 20, 1904, satisfied this factor because they were relinquished in trust. As the Supreme Court described, “the United States has no substantial interest in the [Red Lake] lands; that it holds the legal title under a contract with the Indians and in trust for their benefit.”²² Thus, the Red Lake ceded lands were the type of lands Congress had in mind when passing section 3 of the IRA.

As to the second factor, the Department’s position has been that “to qualify for restoration, land need have been part of a reservation only at the time it was ceded to the United States.”²³ This factor was met here because the lands at issue were part of the Red Lake Indian Reservation at the time of the cession.²⁴

Likewise, the third factor was met because the Red Lake ceded lands were opened to sale and entry beginning in the late 1890s pursuant to the Nelson Act of 1889 and the Act of February 20, 1904.²⁵ Since the Red Lake lands met the criteria outlined above, they were the type of lands the Department treated as eligible for restoration to tribal ownership. Included in the lands considered for restoration were swamp lands that had been “sold or assessed for drainage charges under the act of May 20, 1908.”²⁶ Consistent with legal advice,²⁷ in 1945 the Secretary issued an order restoring these lands to the Band and proclaiming them part of the existing reservation subject to existing valid rights.²⁸ Once the Department restores land, the decision is irrevocable.²⁹ Thus, the question presented is whether the State of Minnesota’s Volstead lien interests recorded against restored, federal Indian lands are enforceable as existing valid rights in light of the changes in federal law.

III. VOLSTEAD ACT

The purpose of the Indian land cessions, both generally and in northern Minnesota, was to open up land for settlers.³⁰ By the time the Volstead Act was being considered in 1908, the prime

²¹ FREDRIC L. KIRGIS, U.S. DEP’T OF INTERIOR, M-29798, RESTORATION TO TRIBAL OWNERSHIP-UTE LANDS (discussing the Senate debates on section 3 of the IRA) (1938) (internal citations omitted); *see also* BARRY, *supra* note 20.

²² *See Minnesota v. Hitchcock*, 185 U.S. 373, 387 (1902).

²³ *See, e.g.,* BARRY, *supra* note 20 (citing KIRGIS, *supra* note 21).

²⁴ *Chippewa Indians of Minnesota v. United States*, 80 Ct. Cl. 410, 415 (1935), *aff’d*, 301 U.S. 358 (1937).

²⁵ Act of Jan. 14, 1889, ch. 24, 25 Stat. 642, 644-45; Act of Feb. 20, 1904, Pub. L. No. 58-23, 33 Stat. 46.

²⁶ Letter from A. Frank, Asst. Comm’r, Gen. Land Office, to John Collier, Comm’r, Bureau of Indian Affairs (July 24, 1936) (on file with the Twin Cities Field Office); *see also* Notice of Order of Restoration, Red Lake Reservation, Minnesota, 10 Fed. Reg. 2448 (Mar. 2, 1945).

²⁷ Memorandum from Harry M. Edelstein, Chief-Public Lands Div., Office of the Solicitor, to Oscar L. Chapman, Asst. Sec’y, Dep’t of Interior (Feb. 22, 1945) (on file with the Twin Cities Field Office).

²⁸ Notice of Order of Restoration, Red Lake Reservation, Minnesota, 10 Fed. Reg. 2448 (Mar. 2, 1945).

²⁹ MASTIN G. WHITE, U.S. DEP’T OF INTERIOR, M-34912, RESTORATION OF LAND TO TRIBAL OWNERSHIP UNDER INDIAN REORGANIZATION ACT (1947).

³⁰ In opening his 1902 negotiations with the Chippewa Indians of the Red Lake Reservation, U.S. Indian Inspector James McLaughlin explained:

The Department who was in charge of Indian affairs, and even the President who is our Chief Executive, are, owing to the pressing demand for homes for new settlers, powerless to prevent the

pieces of the Chippewa Indian lands had been settled.³¹ However, the general swampy character of the federal, undisposed-of, ceded land prevented the development of the lands already settled.³² Drainage of the privately held lands would require canals to be cut across the land belonging to the United States to secure outlets to the Red River of the North or the Rainy River.³³ Thus, the swampy character of the ceded lands posed significant challenges to settlement efforts. The Volstead Act was enacted in 1908 to address this situation.

A. State & Individual Volstead Lien Rights

The Volstead Act is described as “An Act To authorize the drainage of certain lands in the State of Minnesota.”³⁴ Congress defined the federal lands affected as: “all lands in the State of Minnesota, when subject to entry, and all entered lands for which no final certificates have issued...”³⁵ Thus, the Volstead Act was intended to facilitate the disposal of federal ceded lands opened to entry by authorizing drainage works by local and State governments.

The Volstead Act set forth procedures for obtaining a Volstead patent to these federal lands.³⁶ Until there was a Volstead qualified purchaser, the lands remained in federal trust status. The Act authorized the State and its county units to undertake drainage projects on federal lands.³⁷ The counties were authorized to file drainage liens for the project expense.³⁸ The counties were authorized to hold lien sales.³⁹ If a qualified purchaser acquired a drainage lien through a county

opening of the surplus lands of Indian reservations, which the Indians do not actually need and can not make proper use of. Public opinion demands it and popular sentiment can not be overcome, and all that the Department can do in the matter is to protect the Indians by obtaining for them reasonable compensation for their surplus land.

H.R. Doc. No. 57-532, at 9 (1902).

³¹ As explained in the legislative history:

[The lands] were formerly part of what is known as the Red Lake Reservation. . . .

There are thousands of acres now unfit for cultivation because of swamp. There are a few tracts interspersed between them that were fit to be settled upon, and were settled upon by settlers who paid \$1.25 an acre, and some \$4 an acre; but the situation confronting them was that a majority of these lands could not be assessed [for drainage charges] because they are Government lands.

42 Cong. Rec. 4990 (1908) (statement of Rep. Steenerson of Minnesota).

³² H.R. Rep. No. 60-1376, at 1 (1908).

³³ *Id.*

³⁴ Volstead Act, Pub. L. No. 60-125, 35 Stat. 169 (1908) (*repealed by Federal Land Policy and Management Act of 1976*, Pub. L. No. 94-579, § 703(a), 90 Stat. 2743 (codified in relevant part, as amended, in 43 U.S.C. §§ 1021-1034)).

³⁵ See 42 Cong. Rec. 4988 (1908) (reporting the bill with amendment). The Secretary reported to Congress that the bill would apply to approximately 6,400,000 acres of federal land consisting of: “all ceded Indian and other lands in the State of Minnesota, title to which is in the United States.” H.R. Rep. No. 60-1376, at 3 (1908) (setting forth report of Secretary of the Interior dated March 30, 1908). “In as much as ceded Indian lands are expressly mentioned in the bill, it would appear that its provisions were principally intended to apply to them. . . . In all there are about 2,555,000 acres of Red Lake lands subject to the bill. The character of these lands is known to be largely swampy.” *Id.* The Secretary suggested application of the bill should be narrowed to lands subject to entry. *Id.* at 4.

³⁶ Volstead Act §§ 1-7, Pub. L. No. 60-125, 35 Stat. 169 (1908) (*repealed by Federal Land Policy and Management Act of 1976*, Pub. L. No. 94-579, § 703(a), 90 Stat. 2743 (codified in relevant part, as amended, in 43 U.S.C. §§ 1021-1034)).

³⁷ *Id.* § 1.

³⁸ *Id.* § 2.

³⁹ *Id.* § 3.

tax sale, then the purchaser could obtain a federal patent by paying the United States at least the minimum price per acre plus the appropriate federal fees.⁴⁰ If there was no qualified purchaser at the county sale, then the State could bid in for the lien right.⁴¹ The State could not acquire title to the lands encumbered by county drainage charges.⁴² In other words, the State could not meet the requirements of a qualified purchaser. Still, the State could resell its lien right to a qualified individual and thereby recover its financial investment in the land.⁴³ However, if the State found no qualified purchasers for its lien interest, then the land would remain titled in the United States and “nothing in this Act shall be construed as creating any obligation on the United States to pay any of said charges.”⁴⁴

The Volstead Act’s principal purpose was to facilitate disposal of the Red Lake ceded lands in Minnesota without expending federal funds.⁴⁵ To accomplish the benefit of State drainage projects without the expenditure of federal funds and meet the federal obligation to pay the Chippewa, including the Red Lake Band, a minimum price per acre, the bill made lands open for settlement in Minnesota subject to State drainage laws but required a subsequent federal patent procedure. At the time, State drainage laws required: (i) the filing of a petition with the county auditor setting forth the necessity of the drainage project; (ii) a hearing after notice; (iii) a drainage survey; (iv) the construction of drainage works by the county; (v) the assessment of benefits and the award of damages; (vi) interest on the assessment; (vii) the assessment to be a lien upon the land; and (viii) the payment of the drainage lien in 10 annual payments.⁴⁶ As acknowledged prior to passage, the Volstead Act created “a strange mix of sovereignties involved in an idea of a State tax and weighting with State charges [on] Federal property.”⁴⁷

B. Initial Implementation

After passage of the Act, the Department issued a series of instructions on its implementation.⁴⁸ The GLO oversaw public land disposal including disposition of the Volstead lands. In 1912, GLO clarified that the Volstead Act extended State drainage laws to entered lands for which no

⁴⁰ *Id.* § 5.

⁴¹ *Id.*

⁴² *Id.* § 2 and §§ 5 and 6 (purchasers at such sale must have the qualifications of homestead entrymen); *see also* Drainage of Swamp & Overflowed Lands in the State of Minnesota, Act of May 20, 1908, Instructions, 40 Public Lands Dec. 438, 439 (1912) (the law does not provide for issuance of a patent to the State for any lands bid in by the State).

⁴³ *Id.* § 6.

⁴⁴ *See id.* § 2.

⁴⁵ *See* 42 Cong. Rec. 4988-92 (1908) (debating Minnesota drainage bill in the House of Representatives); 42 Cong. Rec. 6104-08 (1908) (debating Minnesota drainage bill in the House of Representatives).

⁴⁶ H.R. Rep. No. 60-1376, at 4 (1908) (setting forth report of Secretary of the Interior dated March 30, 1908).

⁴⁷ 42 Cong. Rec. 4991 (1908) (statement of Rep. Williams).

⁴⁸ Drainage of Swamp and Overflowed Lands in Minnesota - Act of May 20, 1908, 36 Pub. Lands Dec. 477 (1908); Chippewa Agricultural Lands - Acts January 14, 1889, June 27, 1902, May 23, 1908, 37 Pub. Lands Dec. 61 (1908); Red Lake Indian Lands - Extending Time for Payment, 38 Pub. Lands Dec. 547 (1910); Chippewa Agricultural Lands, Minnesota (1910); Red Lake Indian Lands - Act February 16, 1911, 39 Pub. Lands Dec. 540 (1911); Chippewa Agricultural Lands, Minnesota 38 Pub. Lands Dec. 590 (1911); Drainage of Swamp and Overflowed Lands in Minnesota, 40 Pub. Lands Dec. 438 (1912); Drainage of Swamp and Overflowed Lands in Minnesota, 42 Pub. Lands Dec. 104 (1913); Gen. Land Office, Circular No. 636-1/2, Instructions - Sale of Ceded Chippewa Isolated Tracts of Lands in Minnesota (1919); Chippewa Agricultural Lands, Minnesota, 49 Pub. Lands Dec. 640 (1923); *see also* Minnesota Drainage Laws - Act of May 20, 1908, 45 Pub. Lands Dec. 40 (1916).

“final certificates” had issued in addition to lands subject to entry.⁴⁹ Also, GLO clarified that the Free Homestead Act did not affect the price of land under the Volstead Act.⁵⁰ The Department issued several decisions on individual purchasers’ claims.⁵¹ In a 1915 report to the Secretary, GLO reported that the Volstead Act was popular and there had been active demand for the lands offered.⁵²

Yet, there had been much trouble in administering the law because of the diversity of opinion in construing its terms.⁵³ For example, GLO noted that the local counties had assessed lands for the construction of roads in connection with drainage ditches.⁵⁴ GLO approved these entries where the road and ditch assessments were for the same purpose.⁵⁵ Local counties had also levied drainage assessments against certain parcels that had yet to be opened for entry.⁵⁶ In the confusion, these parcels were entered and payments made to secure patent.⁵⁷ In a number of cases, GLO held, and the Department affirmed, that: “the lands were not subject to such prior tax; that, therefore, the sales made under the State drainage laws were illegal, and that the entries, so far as they embraced such lands, were erroneously allowed.”⁵⁸ In 1919, Congress validated and confirmed those erroneously allowed entries.⁵⁹

Another example of confusion in implementation concerned the disposition of excess funds received by the local land offices for some of the parcels.⁶⁰ GLO determined that the excess amount of payments belonged to the United States as the moneys were mostly received for lands ceded by the Chippewa and the funds so received were held in trust for them.⁶¹ Congress amended the Volstead Act so that GLO’s receipt of any excess purchase money arising from the sale of the lands subject to the Volstead Act would be provided to the county in which such land was located for the purpose of maintaining and improving the drainage projects for which the land had been assessed.⁶²

⁴⁹ 40 Pub. Lands Dec. 438.

⁵⁰ *Id.*

⁵¹ *Edward F. Melony*, 45 Pub. Lands Dec. 12 (1916) (regarding disposition of excess payments); *Theodore F. Spreiter*, 45 Pub. Lands Dec. 516 (1916) (noting that where State had sold lands more than once for delinquent Volstead taxes and respective purchasers failed to consummate purchase by entry, subsequent purchasers only required to pay excess bid made by the last preceding purchaser together with other payments required to be made under Volstead Act); *Olof Gustafson*, 46 Pub. Lands Dec. 442 (1918) (noting that Red Lake lands opened to entry by acts of 1904 and 1911 are subject to disposal under Volstead and, separately, second entry not allowed in certain circumstances).

⁵² GEN. LAND OFFICE, 1915 FISCAL YEAR REPORT TO THE SECRETARY (1915).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See H.R. Rep. No. 65-912 (1919).

⁵⁷ *See Id.*

⁵⁸ *See Id.* (citing December 9, 1918 Letter from the Acting Secretary of the Interior to Chairman, Comm. on the Public Lands, House of Representatives).

⁵⁹ Act of Mar. 3, 1919, ch. 113, 40 Stat. 1321.

⁶⁰ GEN. LAND OFFICE, *supra* note 52.

⁶¹ *Id.*

⁶² Act of Sept. 5, 1916, Pub. L. No. 64-253, 39 Stat. 722.

C. The 1942 M-Opinion: “*Status of Public and Indian Ceded Lands Drained by the State of Minnesota Under the Volstead Act of May 20, 1908.*”

Renowned Indian law expert Felix S. Cohen⁶³ ultimately answered questions about the title status of public and Indian ceded lands drained by the State pursuant to the Volstead Act in a 1942 M-Opinion approved by the Assistant Solicitor of Indian Affairs.⁶⁴ In the 1942 opinion, Acting Solicitor Cohen (Cohen) considered the status of both Indian and federal public lands on which county drainage liens had been assessed. The opinion addressed several Volstead title issues: (i) the definition of the interest held by the State as a consequence of the Volstead drainage liens (ii) the applicability of state drainage law and amendments thereto on the title status of lands assessed with Volstead drainage liens; and (iii) the effect of 1934 withdrawal orders on lands assessed with Volstead drainage liens.

1. Definition of the Volstead Lien Interest

Cohen’s 1942 M-Opinion explained that the State of Minnesota held only a security interest on lands assessed with Volstead liens. “The nature of a lien is wholly incompatible with the idea of appropriation, title or ownership in one who holds a lien. All authorities are agreed that the term ‘lien’ never imports more than security.”⁶⁵ Cohen defined the State’s Volstead lien interest as:

[T]he act intends merely to give the State such security as a lien may be worth, not a right in the lands but a mere security mechanism whereby the State may hope to reimburse itself from some future beneficiary of the drainage for moneys paid out therefor.⁶⁶

Cohen analogized the Volstead system as one which “is intended to bring to unentered lands the responsible landholder without whom the State’s inchoate lien must remain a ghost obligation, seen in the law but eluding the grasp.”⁶⁷

2. Applicability of State Drainage Law

Cohen explained that Volstead liens were not implicitly released as a consequence of subsequent Minnesota statutes which provided for the absolute forfeiture to the State of lands with

⁶³ Felix S. Cohen served as an Associate Solicitor and occasionally as an Acting Solicitor for the Department. He also served as the editor of COHEN’S HANDBOOK first published in 1941. Felix S. Cohen is widely acknowledged as an expert on Indian law. *Squire v. Capoman*, 351 U.S. 1, 8-9 (1956). Thus, Acting Solicitor Cohen’s opinion is accorded significant weight.

⁶⁴ FELIX S. COHEN, OFFICE OF THE SOLICITOR, M-30851, STATUS OF PUBLIC AND INDIAN CEDED LANDS DRAINED BY THE STATE OF MINNESOTA UNDER THE VOLSTEAD ACT OF MAY 20, 1908, 58 Interior Dec. 65 (1942) (the 1942 opinion explicitly overruled the 1938 opinion and any previous contrary determination); compare FREDERIC L. KIRGIS, OFFICE OF THE SOLICITOR, M-29791, LAND EXCHANGE–FORFEITURE–MINNESOTA (1938) (1938 Solicitor’s Opinion found that title to the Volstead Act lands was acquired by the State through forfeiture pursuant to State law).

⁶⁵ 58 Interior Dec. at 74.

⁶⁶ *Id.*

⁶⁷ *Id.* at 76 (citing Volstead Act section 6).

delinquent drainage liens.⁶⁸ Cohen found that the Volstead Act adopted only the State law existing at the time of enactment, and no subsequent state legislation altered that adoption.⁶⁹ Similarly, the Volstead Act adopted only such portions of Minnesota law as may have been applicable and as may have given force and effect to its own provisions, and adopted nothing that would have been incompatible with the Volstead Act.⁷⁰ The opinion re-affirmed that the State had no authority to acquire Volstead lands directly from the United States.⁷¹ Title to all lands subject to a Volstead Act lien remained with the United States until the federal statutory conditions were met by a qualified purchaser.⁷²

3. Effect of the 1934 Withdrawal Orders on Indian Lands Assessed with Volstead Liens

In 1934, the Department withdrew Indian lands, which would have included Red Land lands, to consider whether it was in the public interest to have surplus Indian lands restored to tribal ownership.⁷³ Cohen explained that Congress, by passing the IRA, freed the Executive Branch from the Nelson Act process for disposition of Chippewa lands: “the hands of Congress were not tied by the so-called express trust of the Nelson Act and that the Congress retained power to depart from the plan envisaged therein and to authorize restoration of the ceded lands to tribal ownership.”⁷⁴ Cohen held that the Department’s withdrawal orders were lawful and valid as they related to Chippewa lands which would have included the Red Lake lands.⁷⁵

Consequently, in the 1942 M-Opinion, Cohen determined that “there is no legal barrier whatever to prevent withdrawal of any of these Volstead lands, either public or Indian, from homestead entry.”⁷⁶ The State’s right to Volstead disposition did not bar the federal withdrawal from homestead entry or any other form of disposition under the public land laws.⁷⁷ Yet, Cohen recognized that an existing qualified purchaser’s right to Volstead entry and the State’s right to Volstead disposition survived the 1934 withdrawal orders.⁷⁸

⁶⁸ 58 Interior Dec. 71-72; *cf.* Letter from William S. Ervin, Att’y Gen., Minn., to W. B. Sherwood, County Att’y, Lake of the Woods (Jan. 13, 1938) (suggesting that federal lands encumbered with county drainage liens may be sold under State law with certain limitations), and Letter from William S. Ervin, Att’y Gen., Minn., to Herman G. Wenzel, Comm’r of Conservation, Minn. (Jan. 26, 1938) (“Unentered public and ceded Indian lands, bid in for the State on sales for delinquent drainage charges not classified as agricultural lands within the Red Lake Game Preserve, are not required to be sold by the State to homestead entrymen.”). Both opinions of the Minnesota Attorney General are subsequently marked: “Solicitor’s Opinion dated August 12, 1942 holds this opinion erroneous.”

⁶⁹ 58 Interior Dec. at 72-73.

⁷⁰ *Id.*

⁷¹ *Id.* at 71-72.

⁷² *Id.* at 73-74.

⁷³ Restoration of Lands Formerly Indian to Tribal Ownership, 54 Interior Dec. 559, 560 (1934).

⁷⁴ 58 Interior Dec. at 79.

⁷⁵ *Id.* at 80.

⁷⁶ *Id.* at 73.

⁷⁷ *Id.* at 77.

⁷⁸ *Id.* at 80.

D. The Department Requests State Corrective Action Subsequent to the 1942 M-Opinion

Following issuance of the 1942 M-Opinion, the Department's Assistant Secretary of Indian Affairs wrote to the Minnesota Governor and requested assistance in correcting the county title records to accurately reflect the Volstead liens and to correct entries that purported to represent forfeitures of land to the State for non-payment of the Volstead liens.⁷⁹ The Assistant Secretary explained that numerous applications for homestead entry awaited Agency adjudication.⁸⁰ "[A]pplicants for homestead entry must now be advised that the lands are open only to Volstead disposition and Volstead cash entry, upon payment of the requisite sums, including all drainage charges and interest due to the State; and must be referred to the county auditor for the total amount due to the State."⁸¹ Despite requests in 1942 and 1943, it is unclear whether State action was taken to correct the county records.⁸² However, preliminary review of abstracts for these Volstead lands revealed inconsistent treatment of the liens within and by the various county units including sometimes reflecting, erroneously, forfeitures of Red Lake tracts of land to the State.

IV. THE 1945 RESTORATION ORDER

On February 22, 1945, the Department made its decision to restore lands to the Red Lake Band.⁸³ The restored lands were added to the existing Red Lake Reservation but were made subject to any existing valid rights.⁸⁴ Specifically in the Order, the Department restored:

[Lands consisting of] 157,000 acres, more or less, which have been opened to settlement and sale and which now are or hereafter may be classified as undisposed of, for which the Indians have not been paid, and which are of little or no value for the original purpose of settlement but which will prove of value to said Indians of the Red Lake Reservation if restored to tribal ownership, said acreage including lands which have been assessed for drainage works by the State of Minnesota under authority of the Volstead Act of May 20, 1908 (35 Stat. 169, 43 U.S.C. secs. 1021-1028)....

....

...I hereby find that it will be in the public interest to restore to tribal ownership all of those lands of the Red Lake Indian Reservation ...which now are or hereafter may be classified as undisposed of; and I hereby restore said lands to tribal ownership for the use and benefit of the Red Lake and Pembina Bands of Chippewa Indians belonging on the Red Lake Reservation in the State of

⁷⁹ Letter from Oscar L. Chapman, Asst. Sec'y of Indian Affairs, U.S. Dep't of Interior, to Harold Stassen, Governor, Minn. (Nov. 6, 1942) (on file with the Twin Cities Field Office).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*; see also Letter from Oscar L. Chapman, Asst. Sec'y of Indian Affairs, U.S. Dep't of Interior, to Harold Stassen, Governor, Minn. (Jan. 14, 1943) (on file with the Twin Cities Field Office); Memorandum from Harry M. Edelstein, Assistant Solicitor, Office of the Solicitor, to Oscar L. Chapman, Asst. Sec'y, Dep't of Interior (Feb. 22, 1945) (on file with the Twin Cities Field Office).

⁸³ Notice of Order of Restoration, Red Lake Reservation, Minnesota, 10 Fed. Reg. 2448 (Mar. 2, 1945).

⁸⁴ *Id.* at 2449.

Minnesota, adding them to and making them part of the existing reservation, subject to any existing valid rights.⁸⁵

By restoring Red Lake lands, the Secretary made clear that such lands were to be for the use and benefit of the Band in furtherance of one of the broader purposes of the IRA which is to “rehabilitate the Indian’s economic life” and “give the Indians control of their own affairs and of their own property.”⁸⁶

As indicated, the restoration of these lands was subject to any existing valid rights. The 1945 Restoration Order’s language is consistent with the IRA’s language which provided protection for persons who had valid rights or claims to lands which were to be withdrawn for purposes of tribal restoration.⁸⁷ Questions remained as to what, if any, valid rights existed on Volstead lands.

At this time, the Volstead drainage liens, including annual interest and penalties, had “swollen to figures out of all proportion to the value of the lands and interpose an ever mounting barrier to settlement of the State’s claims in the manner contemplated by the [Volstead] act.”⁸⁸ In other words, the only way for the State to perfect its security interest was through a qualified purchaser who satisfied the Volstead patent process, and it was fiscally improbable that there were existing qualified individuals to seek a Volstead patent.⁸⁹

A. A Case Study of the Volstead Lien Interest

The administrative decision known as *Raymond L. Palm*, 59 I.D. 69 (June 30, 1945) describes the rights retained by the State and qualified purchasers to demand issuance of a Volstead patent. Assistant Secretary Oscar Chapman issued this administrative decision which arose from an informal appeal of a GLO decision. The *Palm* appeal is a factually complex case which stems from Raymond Palm’s applications to obtain a patent for land.

As background, GLO had rejected Mr. Palm’s application for a second homestead entry.⁹⁰ The GLO decision noted that these lands were ceded Red Lake lands withdrawn from entry on September 19, 1934 pending their permanent restoration to tribal ownership under the IRA and “subject, however, to existing valid rights.”⁹¹ Earlier, these lands had been “sold” by the State of Minnesota for Volstead drainage charges in 1919.⁹² Over many years, Mr. Palm made several attempts to obtain patent to these lands beginning with an attempted entry in May of 1934, prior to the withdrawal orders.⁹³ In 1942, Mr. Palm made a final application for patent after obtaining

⁸⁵ *Id.* (emphasis added).

⁸⁶ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6 (1934), and 78 Cong. Rec. 11125 (1934) (statement of Sen. Wheeler)).

⁸⁷ *Compare* 25 U.S.C. § 463 with Notice of Order of Restoration, Red Lake Reservation, Minnesota, 10 Fed. Reg. 2448 (Mar. 2, 1945).

⁸⁸ Memorandum from Harry M. Edelstein, Chief-Public Lands Div., Office of the Solicitor, to Oscar L. Chapman, Asst. Sec’y, Dep’t of Interior (Feb. 22, 1945) (on file with the Twin Cities Field Office).

⁸⁹ *Id.*

⁹⁰ *Raymond L. Palm*, 59 Interior Dec. 69, 70 (1945).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 75-77.

from the County a “Certificate Releasing Ditch Liens.”⁹⁴ Disregarding the County’s Certificate, GLO determined the Volstead liens remained and held that the lands were withdrawn from homestead entry in 1934, pending permanent restoration to tribal ownership.⁹⁵ GLO provided no alternative analysis for purposes of Volstead entry.⁹⁶

In reviewing this matter, the Assistant Secretary considered Mr. Palm’s homestead entry applications under both the authority of the homestead laws and the Volstead Act.⁹⁷ The *Palm* decision re-emphasizes the State’s Volstead lien interest is an inchoate security interest that does not mature until there is a Volstead entry.⁹⁸

Under *Palm*, the Assistant Secretary acknowledged the right of an individual to demand Volstead patent when the individual satisfied the drainage liens and satisfied the Volstead Act’s statutory conditions.⁹⁹ Further, the State of Minnesota had an interest in issuance of the Volstead patent to the purchaser of its security interest, “in order that it [the State] might finally secure those tax-paying owners whom the Volstead Act was designed to find.”¹⁰⁰ However, until a qualified purchaser satisfied the Volstead statutory conditions, the State’s security interest remained inchoate, the State lacked a right to demand Volstead patent, and title remained in the United States.¹⁰¹

Again, the Assistant Secretary distinguished a right to Volstead entry and patent from a right to homestead entry and patent explaining that a Volstead entry was excepted from the 1934 withdrawal.¹⁰² A Volstead entry occurs when an individual “performs the conditions of the Volstead Act, showing settlement of liens and paying the whole purchase price.”¹⁰³ With the federal land withdrawal, the State’s saving right is to the Volstead procedure not to the homestead entry procedure.¹⁰⁴ Moreover, in reference to the 1942 M-Opinion, Cohen had explained:

[T]he Volstead system although serving the individual was designed primarily in the interest of the State, and the State’s interest is as much bound up in the demand right of the Volstead applicant to the issuance of United States patent as in its own privilege right to conduct a drainage operation, impose a lien, or hold a tax sale unhindered by the United States Government. Accordingly, to the State as well as to the Volstead applicant, the Act gives a right to expect United States disposition of the lands by Volstead patent when the statutory conditions are met.¹⁰⁵

⁹⁴ See *Palm* at 71 and 79.

⁹⁵ *Id.* at 76.

⁹⁶ *Id.* at 72.

⁹⁷ See, generally, *Palm*, 59 Interior Dec. 69 (1945).

⁹⁸ *Id.*

⁹⁹ *Id.* at 74.

¹⁰⁰ *Id.* at 78-79.

¹⁰¹ *Id.* at 74-75.

¹⁰² *Id.*

¹⁰³ *Id.* at 78.

¹⁰⁴ *Id.* at 74.

¹⁰⁵ *Id.* at 78.

Applying the Volstead Act procedure to this case, the Assistant Secretary explained that Mr. Palm had negotiated with the county to pay an adjustment for the cost of the Volstead liens.¹⁰⁶ The county had issued a “Certificate Releasing Ditch Liens.”¹⁰⁷ As required, Mr. Palm had also offered the United States the whole purchase price due which would include payment for a separate, federal drainage survey charge.¹⁰⁸ Thus, the Assistant Secretary held that Mr. Palm met the statutory conditions for Volstead patent.¹⁰⁹ The *Palm* decision explained “that the State’s Volstead right has matured with Palm’s, and that the Government is obligated to issue United States patent to Palm upon his payment of the total purchase money due and the drainage survey charge of 3 cents per acre required by section 8 of the Volstead Act.”¹¹⁰

I note Mr. Raymond Palm met the Volstead statutory conditions in 1942, prior to issuance of the Restoration Order.¹¹¹ In 1953, the Bureau of Land Management (“BLM”), the successor agency to the GLO, considered a separate Volstead application by Mr. Clifford Palm.¹¹² In discussing this application, Departmental correspondence suggests that the right of Volstead entry may have been foreclosed after issuance of the Restoration Order.¹¹³ Yet no such determination appears to have been made and confusion continued as to what the existing valid rights may have been after the Restoration Order. Resolution of this issue is unnecessary in light of subsequent federal legislation.

B. Any Existing Valid Rights

In considering what existing valid rights may exist, if any, I return to the language of the Volstead Act itself. Any existing valid rights surviving the 1945 Restoration Order would stem from the terms and conditions set by Congress and subsequent Secretarial interpretation of that legislation. The term “existing valid rights” in the IRA and the Restoration Order is similar to the term “valid existing rights.” Congress has used the term “valid existing rights” or “VER” on many occasions and courts have found it to be intentionally ambiguous.¹¹⁴ As noted by one court: “The major source of VER’s ambiguity is the word ‘rights.’ ... The word ‘right,’ instead of answering a question, unhelpfully asks another one: To what is a person legally entitled?”¹¹⁵ VER interpretation is done on a case by case basis.

¹⁰⁶ *Id.* at 79.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 79-80.

¹⁰⁹ *Id.* at 79.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 76-77.

¹¹² Letter from [name is illegible], U.S. Dep’t Interior, Bureau of Land Management to Clifford Palm (1953) (on file with the Twin Cities Field Office) (advising that land at issue is subject to cash entry under the Volstead Act).

¹¹³ *See, generally*, Letter from Owen D. Morken, Dir. Minneapolis Area, U.S. Dep’t of Interior-Bureau of Indian Affairs to Leigh W. Freeman, Chief-Lands Adjudication Section, U.S. Dep’t of Interior-Bureau of Land Management (June 17, 1970) (on file with the Twin Cities Field Office); Letter from Leigh W. Freeman, Chief-Lands Adjudication Section, U.S. Dep’t of Interior-Bureau of Land Management to Mr. Robert Schoeve, Minneapolis Area, U.S. Dep’t of Interior-Bureau of Indian Affairs (June 15, 1970) (on file with the Twin Cities Field Office); Letter from [name is illegible], U.S. Dep’t Interior, Bureau of Land Management to Clifford Palm (1953), *supra* note 112.

¹¹⁴ *See, e.g., National Mining Association v. Kempthorne*, 512 F.3d 702, 705 (D.C. Cir. 2008) (acknowledging spectrum of agency interpretations in the context of the Surface Mining Control and Reclamation Act).

¹¹⁵ *National Mining Association* at 708.

The Secretary's interpretation of VER is given deference by the courts.¹¹⁶ "If VER operates as a 'term of art,' ... it is as a tool by which Congress delegates policymaking authority through ambiguity."¹¹⁷ The Secretary has opined on what constitutes VER on various occasions.¹¹⁸ In an unrelated matter, a prior Solicitor opined that the term refers to an interest having an intermediate status between "vested rights," which term entails the transfer of legal or equitable title, and "applications" or "proposals," which are mere expectancies to be granted at the Secretary's discretion.¹¹⁹ A valid existing right may be created by statute, if a statute prescribes a series of requirements that create a right *sua sponte* when satisfied, without an intervening discretionary act.¹²⁰ A valid existing right may also be created by an exercise of Secretarial discretion, as by the grant of a right-of-way.¹²¹

As originally designed, a Volstead patent was to be a mandatory federal action only at the time the Volstead statutory conditions were met.¹²² The statute created a multi-step process for an individual to obtain a Volstead patent. Among them, the individual must have proved to the United States that he or she had satisfied the drainage liens.¹²³ Further, the individual must have made to the United States full cash payment for the lands.¹²⁴ Once the various steps were completed, a qualified individual would have had a right, with the State, to demand issuance of a Volstead patent.¹²⁵ There is little evidence that the State of Minnesota could find purchasers for the remaining undisposed tracts of land encumbered with Volstead liens at the time of withdrawal and restoration - for it was generally recognized that the drainage projects had not been fully successful.¹²⁶ Absent a qualified Volstead purchaser who had satisfied the statutory conditions, the State's inchoate security interest did not rise to the level of an existing valid right.

This conclusion is consistent with the Secretary's explicit inclusion of the Volstead lands as lands to be restored pursuant to the 1945 Restoration Order. In doing so, the Secretary fulfilled the purposes of the IRA to prevent further disposition of the Red Lake Indian lands and to restore the lands for the "use and benefit" of the Red Lake Band.

¹¹⁶ See, e.g., *National Mining Association* at 704 (concluding that a court must defer to the Secretary's reasonable interpretation of valid existing rights in the context of promulgating regulations pursuant to the Surface Mining Control and Reclamation Act).

¹¹⁷ *National Mining Association* at 709.

¹¹⁸ See, e.g., *Seldovia Native Association v. Lujan*, 904 F.2d 1335, 1345 (9th Cir. 1990) (outlining multiple Interior decisions including Solicitor's M-Opinions construing the term "valid existing rights"); Thomas L. Sansonetti, U.S. Dep't of the Interior, Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers, M-36975, 1993 DEP SO LEXIS 11, note 277 (1993) (noting BIA's view of valid existing rights under ANCSA [the Alaska Native Claims Settlement Act]).

¹¹⁹ William H. Coldiron, U.S. Dep't of Interior, BLM Wilderness Review and Valid Existing Rights, M-36910, 88 Interior Dec. 909, 911-912 (1981).

¹²⁰ Solicitor's M-Opinion 36910, 88 Interior Dec. at 912.

¹²¹ *Id.*

¹²² Volstead Act, Pub. L. No. 60-125, 35 Stat. 169 (1908).

¹²³ *Id.*

¹²⁴ *Id.* §§ 5, 6 and 8.

¹²⁵ *Id.* §§ 5 and 6.

¹²⁶ See *Palm*, 59 Interior Dec. 69.

V. ACT OF MAY 1, 1958

Subsequent Congressional action further reinforces the interpretation that any State interests in the Volstead liens were not VER. On May 1, 1958, Congress enacted legislation: “To provide for the transfer of certain lands to the State of Minnesota.”¹²⁷ The legislative history of the bill illuminates its purpose:

This bill will make possible the settlement of claims of the State of Minnesota and of the Federal Government with reference to titles to certain lands in Minnesota.

. . . .A great confusion has arisen about the title to such lands.

The purpose of this bill is to remove all this confusion and to resolve all questions of title to the lands whether the lands are acquired by the State or remain in Federal ownership and to give a marketable title to purchasers from the State or Federal Governments.¹²⁸

This legislation was intended to serve as a viable substitute for the original Volstead disposition process and allow the State to recoup its financial interest via land conveyance because Congress recognized that the value of the liens plus the interest far exceeded the actual value of the land.¹²⁹ The Department recognized that the restored lands were still subject to valid rights “under patents under the Volstead Act existing in the State of Minnesota and its qualified tax sale purchasers, or those subrogated to their rights.”¹³⁰ In other words, the State needed a Volstead purchaser who had satisfied the Volstead statutory conditions before any right to a Volstead patent would come into existence. As referenced earlier, meeting the statutory conditions included obtaining a “Certificate of Lien Release” and submitting it to BLM.¹³¹ Yet, the legislative history also reveals that “the State is making none of those certifications.”¹³² If the State had a valid existing right there would have been no need for Congress to set up this special mechanism for the State to recoup its financial investment. The 1958 Act explicitly foreclosed the State’s rights under the Volstead Act to impose future drainage liens on federal public or

¹²⁷ Act of May 1, 1958, Pub. L. No. 85-387, 72 Stat. 99.

¹²⁸ 103 Cong. Rec. 15440 (1957) (statement of Sen. Thye explaining history and purpose of this bill).

¹²⁹ See *Hearing Before the S. Subcomm. on Public Lands, Comm. on Interior and Insular Affairs*, 85th Cong. 71-72 (1957) [1957 Hearings] (statement of Sen. Mead replying to questions about the Volstead lien: “We don’t recognize it [the Volstead lien amount] as a claim against the United States, but it has been a block in disposing of those lands because in many instances the liens plus the interest, the value of the liens plus the interest far exceed the actual value of the land.”); see also S. Rep. No. 85-295 (1957) (setting forth letter from the Acting Sec’y of Interior of April 3, 1957, recommending enactment of Senate Bill 864 with amendments as suggested and noting that: “If interest [on the Volstead lien] up to the present is allowed, it would aggregate about twice the assessments.”).

¹³⁰ S. Rep. No. 85-295 (1957) (setting forth letter from the Acting Sec’y of Interior of April 3, 1957).

¹³¹ See *Palm*, 59 Interior Dec. at 79.

¹³² See *Transfer of Certain Lands to the State of Minnesota, Hearing on S. 864, Before the H. Subcomm. on Indian Affairs, Comm. on Interior and Insular Affairs*, 85th Cong. 11 (1958) (statement of BLM Lands Staff Officer Harold R. Hochmuth).

Indian lands.¹³³ Thus, Minnesota counties could no longer impose drainage liens against the federal public lands or Indian lands.¹³⁴

For the first and only time, this legislation provided the State with a limited opportunity to acquire public and Indian lands with Volstead liens. To accomplish acquisition, the State was required to file with the Secretary of the Interior a schedule of tracts indicating the amount of each Volstead drainage lien on the tract along with interest charges.¹³⁵ The interest charges were generally restricted to those which had accrued prior to 1931.¹³⁶ The State's term for filing such a schedule was limited to three years from enactment (*i.e.*, May 1, 1961).¹³⁷ As to acquisition of Indian lands, the 1958 Act provided:

(a) With respect to ceded or other Indian lands, the Secretary may exercise the authority granted in the first section and section 2 of this Act only with the consent of the Indian owner or owners. The consent of the individuals owning two-thirds of the beneficial interest shall be sufficient in the case of undivided heirship lands. The consent of the Minnesota Chippewa Tribe and of the Red Lake Band of Chippewas, in the case of tribal lands, shall be evidenced by resolution of the recognized governing body of the tribe or band.

(b) Nothing in this Act shall be construed to prejudice Indian title to any lands subject to lien, nor to preclude the right of the Indian owner, or owners, to clear title to their lands by payment of the lien claimed by the State.

(c) Payments made by the State under this Act for the purchase of tribally owned Indian lands shall be deposited in the Treasury of the United States to the credit of the tribe owning such lands, and payments made for the purchase of individually owned Indian lands shall be deposited with the officer in charge of the Indian agency having jurisdiction over such lands to the credit of the Indian owners thereof.¹³⁸

In summary, Indian consent and State payment for the Indian lands was required before the State could acquire title. Nothing was found in the legislative history that would shed light on the purpose of the provision found in section 5(b) of the 1958 Act.¹³⁹ It is unclear how or whether section 5(b) was to apply to the Red Lake lands restored to tribal ownership because the use of the term "any lands" is ambiguous. One plausible interpretation is that it applied to other areas that were not subject to restoration. The ambiguity of "any lands" in section 5(b) is heightened by the reference in section 5(c) directing the deposit of payments based on whether the land is tribally owned or individually owned Indian lands. Statutes pertaining to Indian rights and privileges are to be construed liberally in favor of Indians, with any ambiguities to be resolved in

¹³³ § 4, 72 Stat. at 100.

¹³⁴ *Id.*

¹³⁵ § 1, 72 Stat. 99.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ § 5, 72 Stat. at 100.

¹³⁹ The Department submitted a report to Congress on the 1958 legislation. In it, the Department recognized that the Act may also apply to other Chippewa Indian lands. S. Rep. No. 85-295 (1957) (setting forth letter from the Acting Sec'y of Interior of April 3, 1957).

their favor.¹⁴⁰ Given the ambiguity, I find nothing in the 1958 Act alters the action by the Secretary restoring the lands to the Red Lake Band for its use and benefit.

Under the Act, after the State filed its schedule, the Secretary of the Interior would have discretionary authority to approve the land transfer applications.¹⁴¹ Upon approval, the Secretary would appraise the tracts to determine fair market value.¹⁴² If the fair market value of the tracts listed in the application exceeded the drainage lien and restricted interest amounts, then the State would have two years to make payment to the United States for the lands listed in the application.¹⁴³ Upon payment, the Secretary would issue patents to the State for the lands listed in the application.¹⁴⁴ On the other hand, if the drainage lien and restricted interest amounts for tracts listed in an application exceeded the fair market value for those tracts (which was far more likely),¹⁴⁵ then the Secretary had authority to issue to the State patents for the tracts without requiring State payment – except for payment of \$1.25 per acre for the Indian lands.¹⁴⁶

While the inchoate security interest of the State did not create a financial obligation required to be paid by the United States,¹⁴⁷ the State, by filing an application to acquire the lands, could apply to offset the value of its drainage liens and the restricted interest amount against the fair market value of the federal lands encumbered with Volstead charges.¹⁴⁸ Lastly, the patents to the State were to contain those provisions and reservations that were inserted in patents for public lands entered under the homestead laws.¹⁴⁹

After passage, BLM outlined how the State was to file its schedule and application for Volstead drainage lands.¹⁵⁰ The instructions requested that the State's schedule of lands be in two parts – one listing the federal public lands and the other listing the Indian lands.¹⁵¹ The schedule of Indian lands was to be forwarded to the Commissioner of Indian Affairs who, among other actions, would seek tribal consent and determine fair market value for the tracts owned by the tribe.¹⁵²

As to the public lands, the State of Minnesota applied for patent to approximately 33,000 acres of the federal public lands under the 1958 Act.¹⁵³ Ultimately, on December 20, 1962, the United

¹⁴⁰ See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 783 (D.S.D. 2006) (outlining the principles of liberality in construction of statutes affecting Indians).

¹⁴¹ § 1(b), 72 Stat. at 99.

¹⁴² *Id.*

¹⁴³ § 2(a), 72 Stat. at 100.

¹⁴⁴ *Id.*

¹⁴⁵ See *1957 Hearings*, *supra* note 129.

¹⁴⁶ § 2, 72 Stat. at 100.

¹⁴⁷ § 2, 35 Stat. at 169-170.

¹⁴⁸ §§ 1 and 2, 72 Stat. 99.

¹⁴⁹ § 2(c), 72 Stat. at 100.

¹⁵⁰ Memorandum from [name is illegible], Dir., Bureau of Land Mgmt., to [name is illegible], E. States Supervisor, Bureau of Land Mgmt. (May 23, 1958) (on file with the Twin Cities Field Office).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Act of May 1, 1958, [BLM file 5.21:ESCF, serial number 049146] (Dec. 19, 1960) memorandum referring to the decision (on file with Twin Cities Field Office) (granting State of Minnesota's patent application under the

States approved for patent to the State 33,208.97 acres of land.¹⁵⁴ As to the Indian lands, the BIA record lacks evidence that Indian consent was obtained or even that the State sought Indian lands encumbered with Volstead drainage liens.¹⁵⁵ If the State had sought to recoup its financial interest in the Volstead Indian lands, then the State had the opportunity to apply for conveyance of the Indian lands. Based on the available record, the State did not obtain Indian lands within the statutory timeframe, which would have allowed the State to recoup its financial interest. Hence, the Red Lake Indian lands retained their status as restored lands reserved for the “use and benefit” of the Band.

The 1958 Act’s intent was to give the State one last opportunity to recover its financial interest in Volstead lands. In 1963, the Department revoked its regulations implementing the Volstead disposition process as no longer necessary citing the 1958 Act and the restoration of the ceded lands.¹⁵⁶ Agencies are tasked with promulgating regulations to implement and interpret legislation. The Department revoked the Volstead regulations because it was the Department’s position that the Volstead Act was obsolete.

Confusion resurfaced as to the status of Indian lands with Volstead drainage liens. In the 1970s, the Commissioner of Indian Affairs requested resolution of the Volstead lien issue: “It is, therefore, requested that you [BIA’s Area Office in Minneapolis] resurrect the matter and inform us, what, if anything, has been done to clear the clouded titles, and what action is proposed to complete the title clearance work.”¹⁵⁷ In reply, the BIA Minneapolis Area noted: “The problem of curative action has existed for many years, and efforts at resolving the issue have not been successful.”¹⁵⁸ Thus, the Area Director recommended federal legislative action for relief of the drainage lien charges or settlement with the State of Minnesota.¹⁵⁹

Act of May 1, 1958 to purchase 33,220.97 acres of vacant public domain lands against which the State assessed Volstead drainage liens).

¹⁵⁴ Act of May 1, 1958, [BLM serial number 049146] (Dec. 20, 1962) certificate (on file with the Twin Cities Field Office) (approving patent to State of Minnesota to 33, 208.97 acres as patent no. 1230209, posted Jan. 9, 1963).

¹⁵⁵ As explained by the Commissioner of Indian Affairs:

A search of the correspondence files and records available to us fails to disclose any evidence of a resolution being adopted by the Red Lake Tribal Council approving any sale of Red Lake ceded lands to the State of Minnesota as provided by section 5 of the 1958 act or any evidence of payment having been made to the Red Lake Band. Field personnel of this Bureau also have been unable to locate any correspondence or documents disclosing approval by the Indians or payment of moneys.

See, e.g., Memorandum from Comm’r, Bureau of Indian Affairs, to Associate Solicitor-Div. of Indian Affairs, Office of the Solicitor (Dec. 29, 1964) (on file with the Twin Cities Field Office).

¹⁵⁶ U.S. Department of the Interior, Circular 2108, Minnesota Drainage Revocation, 28 Fed. Reg. 5300 (May 29, 1963).

¹⁵⁷ Memorandum from Comm’r, Bureau of Indian Affairs to Dir. Minneapolis Area, Bureau of Indian Affairs (Oct. 7, 1970) (on file with the Twin Cities Field Office) (dated on final page at conclusion of the “cc” list); *see also* Memorandum from Owen D. Morken, Dir. Minneapolis Area, Bureau of Indian Affairs to Comm’r, Bureau of Indian Affairs (Nov. 9, 1970) (on file with the Twin Cities Field Office) (referencing the Comm’r of Indian Affairs memorandum of November 3, 1970).

¹⁵⁸ Memorandum from Owen D. Morken, Dir. Minneapolis Area, Bureau of Indian Affairs to Comm’r, Bureau of Indian Affairs (Nov. 9, 1970) (on file with the Twin Cities Field Office) (referencing the Comm’r of Indian Affairs memorandum of November 3, 1970).

¹⁵⁹ *Id.*

VI. FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976

During the same period in the 1970s, Congress was considering legislation to revise the public land laws.¹⁶⁰ The legislation that ultimately passed is known as the Federal Land Policy and Management Act of 1976 (“FLPMA”).¹⁶¹ The legislative history of FLPMA includes several lengthy Congressional reports explaining the purpose of the many provisions to be included in it.¹⁶² Overarching goals of the proposed legislation were to provide for long-term management of the national lands, to recognize the necessity of periodic review and inventory of the national resource lands with coordinated land use planning, and to acknowledge that the national interest was best served by retaining national resource lands in federal ownership with limited exception.¹⁶³ The purpose of the bill was “to provide the first comprehensive, statutory statement of purposes, goals, and authority for the use and management of about 448 million acres of federally-owned lands administered by the Secretary of the Interior through the Bureau of Land Management [formerly the GLO].”¹⁶⁴

In 1975, the initial Senate report summarized the major provisions of the bill as consisting of four titles setting forth the tools to implement the proposed federal land management policies and with Title V repealing “a number of the 3,000 public land laws which either are obsolete or conflict with the provisions of S. 507, as ordered reported [the proposed legislation].”¹⁶⁵ As to Title V, the Senate Report noted: “Many of these laws have long since outlived their usefulness.”¹⁶⁶ At the time, Title V was divided into five sections, with section 503 repealing the laws relating to disposal of national resource lands.¹⁶⁷ It was in Title V, section 503, that the provisions of the Volstead Act were to be explicitly repealed.¹⁶⁸ Ultimately, Title V of the bill was renumbered as Title VII of FLPMA. Specifically, section 703(a) of FLPMA provides in relevant part:

Repeal of Laws Related to Disposal

Sec. 703. (a) Effective on and after the tenth anniversary of the date of approval of this Act, the statutes and parts of statutes listed below as “Alaska Settlement

¹⁶⁰ See S. Rep. No. 94-583 (1975).

¹⁶¹ Federal Land Policy and Mgmt. Act of 1976, 43 U.S.C. §§ 1701-1784 and in other parts of Title 43 U.S.C. (1976).

¹⁶² See S. Rep. No. 94-583 (1975); H. Rep. No. 94-1163 (1976); and H. Rep. No. 94-1724 (1976).

¹⁶³ S. Rep. No. 94-583, 2-3 (1975).

¹⁶⁴ *Id.* at 24.

¹⁶⁵ *Id.* at 25.

¹⁶⁶ *Id.* at 77.

¹⁶⁷ *Id.* at 77-79.

¹⁶⁸ As explained in the Senate Report pertaining to section 503, Repeal of Laws Relating to Disposal of National Resource Lands:

4. Drainage Under State Law

These laws make public lands in Minnesota (43 U.S.C. 1021-1027) and Arkansas (43 U.S.C. 1041-1048) subject to State drainage laws. . . . The Act of May 1, 1958 (72 Stat. 99, 43 U.S.C. 1029-1034) had the effect of terminating the applicability of 43 U.S.C. 1021-1027, pertaining to public lands in Minnesota. The Act of May 1, 1958, would also be repealed by S. 507, as ordered and reported.

S. Rep. No. 94-583 at 77 and 79 (1975).

Laws”, and effective on and after the date of approval of this Act, the remainder of the following statutes and parts of statutes are hereby repealed:

Act of	Chapter	Section	Statute at Large	43 U.S. Code
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.....
 3. Drainage Under State Laws:

May 20, 1908.....	181.....	1-7.....	35:171.....	1021—1027,
Mar. 3, 1919.....	113.....	40:1321.....	1028,
May 1, 1958.....	. P.L. 85-387.....	72:99.....	1029—1034. ¹⁶⁹

The three acts listed above pertain to the Volstead Act and its procedures for obtaining patent to all lands in the State of Minnesota, when subject to entry, and all entered lands for which no final certificates have issued.¹⁷⁰ FLPMA repeals sections 1 through 7 of the Volstead Act which provided disposition procedures for the federal lands assessed with Volstead drainage liens.¹⁷¹ Likewise, FLPMA repeals the Act of March 3, 1919, which had validated and confirmed certain, prior, erroneously allowed entries which had been assessed under the State drainage laws on Chippewa Indian lands in Minnesota ceded under the Nelson Act.¹⁷² FLPMA also repeals the 1958 Act which was to provide one final opportunity for the State to recoup its financial interest in the Volstead liens.¹⁷³ This repeal conclusively demonstrates the Congress did not reserve with the State any valid existing right in the restored Red Lake lands.

VII. CONCLUSION

As originally designed, a Volstead patent was to be a mandatory federal action only at the time the Volstead statutory conditions were met.¹⁷⁴ The statute created a multi-step process for an individual to obtain a Volstead patent. Among them, the individual must have proved to the

¹⁶⁹ Federal Land Policy & Management Act of 1976, Pub. L. No. 94-579, § 703 (a), 90 Stat. at 2789-90 (repealing 43 U.S.C. §§ 1021-1034, which included: the Volstead Act; the Act of March 3, 1919, which confirmed prior erroneous entries under the Volstead process; and the Act of May 1, 1958, which had the effect of terminating the applicability of the Volstead Act pertaining to public lands in Minnesota).

¹⁷⁰ The table inaccurately cites the first page of the Volstead Act. The Volstead Act is found in Volume 35 of the U.S. Statutes at Large beginning on page 169 and concluding on page 171 yet the table references page 171. Page 171 recites the provisions found in sections 7 and 8. In addition, the table only cites sections 1 through 7 of the Act and omits section 8. Sections 1 through 7 of the Volstead Act addressed the Volstead patent procedures while section 8 contained a provision restoring to homestead entry withdrawn lands and assessing a federal survey fee on such lands. Section 8 was neither incorporated in Compiled Statutes of the United States nor included in the later codification of the United States Code. 2 Compiled Statutes of the United States, Revised Statutes §§ 4970-4976 (1913); 43 U.S.C. §§ 1021-1027 (1925-1926). However, reference to section 8 was included in the Department’s regulations promulgated pursuant to the Volstead Act. *See, e.g.*, 43 C.F.R. § 118.32 (1938). Notwithstanding the separate treatment of section 8, FLPMA repealed sections 1 through 7 of the Volstead Act which provided patent procedures for the federal lands assessed with Volstead drainage liens. FLPMA § 703(a), 90 Stat. 2789-90.

¹⁷¹ FLPMA § 703(a), 90 Stat. 2789-90.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Volstead Act, Pub. L. No. 60-125, 35 Stat. 169 (1908).

United States that he or she had satisfied the drainage liens.¹⁷⁵ Further, the individual must have made to the United States full cash payment for the lands.¹⁷⁶ Once the various steps were completed, a qualified individual would have had a right, with the State, to demand issuance of a Volstead patent.¹⁷⁷ However, after passage of the IRA and issuance of the Restoration Order, the purposes of the land changed to be exclusively for the “use and benefit” of the Red Lake Band. The State’s right to Volstead patent was “bound up” in the individual’s right to seek it.¹⁷⁸ Any remaining right for an individual to initiate Volstead entry was foreclosed by Congressional action. Congress gave the State one final opportunity to recover its financial interest through passage of the 1958 legislation. Following the three-year time period for the State to seek title to all Volstead lien-burdened land, the Department revoked the regulations implementing individual Volstead disposition as “no longer necessary.”¹⁷⁹ After the 1958 legislation and the regulatory revocations, an individual’s ability to demand Volstead patent was a legal impossibility. Necessarily, the State’s right to demand issuance of a Volstead patent was a legal impossibility as well. Subsequently, FLPMA formally repealed all Volstead legislation as obsolete.

Moreover, the State did not possess a valid existing right. The State’s security interest does not constitute an independent right to Volstead patent or to any federal payment because of the Volstead lien’s inchoate nature. The State’s interest under the Volstead Act could not vest it with title. The State’s interest was, at most, a mere expectancy. “Accordingly, when United States lands are bid in by the State and held in the hope of assignment to some subsequent purchaser at private sale, their title does not go to the State but continues in the United States regardless of the length of time during which the State may have to hold the lands before a purchaser appears.”¹⁸⁰ As explained in the 1942 M-Opinion: “In permitting the State to impose a lien on these lands, the act intends merely to give the State such security as a lien may be worth, not a right in the lands but a mere security mechanism whereby the State may hope to reimburse itself from some future beneficiary of the drainage for monies paid out therefore.”¹⁸¹ Given the developments in federal law, there could be no expectation on the State’s part for payment of the security interest or the survival of any right in the restored Red Lake lands. Nothing in the record indicates that a qualified purchaser submitted an application for Volstead patent in the nearly half-century since Messrs. Palm submitted their applications for Volstead patent to the Department.

For all of the considerations set forth above, I conclude that title to the Red Lake lands encumbered with Volstead liens, or title to Red Lake lands erroneously recorded as forfeited to the State as a result of such liens, should not be considered defective. Therefore, there is no legal impediment to publication of the legal descriptions for lands that have been assessed for drainage works by the State of Minnesota under the authority of the Volstead Act. Without further delay, these lands should be published as among the lands restored to the Red Lake Band pursuant to the Secretarial Order of Restoration of February 22, 1945. My office stands ready to continue to

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* §§ 5, 6 and 8.

¹⁷⁷ *Id.* §§ 5 and 6.

¹⁷⁸ *Palm*, 59 Interior Dec. at 78-79.

¹⁷⁹ 28 Fed. Reg. 5300 (May 29, 1963).

¹⁸⁰ *Raymond L. Palm*, 59 Interior Dec. 69, 73 (1945).

¹⁸¹ Solicitor’s M-Opinion 30851, 58 Interior Dec. 65 at 74.

assist you as you develop the *Federal Register* notice identifying by legal description these lands that were restored to tribal ownership at the Red Lake Reservation by the 1945 Secretarial Restoration Order.



Hilary C. Tompkins