

DECISIONS  
OF THE DEPARTMENT OF THE INTERIOR  
IN  
CASES RELATING TO  
THE PUBLIC LANDS

EDITED BY GEORGE J. HESSELMAN

VOLUME 40  
APRIL 1, 1911-APRIL 30, 1912

WASHINGTON  
1912



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CHARLES W. COBB,<sup>1</sup> *Assistant Attorney-General.*

F. H. BARCLAY.

E. F. BEST.

E. B. CARRIER.

W. L. CHITTY.

F. W. CLEMENTS.

E. L. CULVER.

E. M. DAWSON.

E. C. FINNEY.

G. B. GARDNER.

C. J. GROSECLOSE.

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O. W. LANGE.

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EDSON PHILLIPS.

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JOSEPH TYSSOWSKI.

G. A. WARREN.

J. R. WEBSTER.

S. W. WILLIAMS.

C. E. WRIGHT.

---

<sup>1</sup> Appointed May 15, 1911, *vice* Oscar Lawler, resigned.

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DECISIONS  
RELATING TO  
THE PUBLIC LANDS.

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CAMP BOWIE ABANDONED MILITARY RESERVATION—SALE OF  
LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, April 4, 1911.*

REGISTER AND RECEIVER,  
*Phoenix, Arizona.*

SIRS: I inclose herewith a new notice of the sale of lands in the Camp Bowie abandoned military reservation, Arizona. The lands will be sold in accordance with instructions given under date of July 19, 1910 (39 L. D., 124), except in the following particulars:

1. The sale will commence on June 20, 1911, and will continue from day to day until completed. The sale will take place at Phoenix, Arizona, instead of on the reservation as provided in the previous instructions.

2. Each purchaser will be required to pay all of the purchase money within ten days from the date of purchase. See rule 7 of the previous instructions.

3. Each purchaser will be required to furnish a non-mineral affidavit, which need not be filed at the time of purchase, but must be filed before the issuance of the certificate. Rule 8 of the rules adopted July 19, 1910, is modified accordingly.

4. Inasmuch as the sale is to take place at Phoenix, rules 14 and 15 of the regulations of July 19, 1910, are inapplicable.

5. Notice of the offering has been sent to the newspapers described in rule 16 of said instructions of July 19, 1910, with authority for publication of same. You will post a copy of the notice in your office.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*First Assistant Secretary.*

**FOREST WITHDRAWALS—HOMESTEAD ENTRIES—RIGHTS OF CONTESTANTS—ACT OF MARCH 3, 1911.**

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, April 6, 1911.*

REGISTERS AND RECEIVERS, *United States Land Offices.*

GENTLEMEN: Your attention is directed to the act of Congress approved March 3, 1911 (Public—No. 469), entitled "An act providing for the validation of certain homestead entries," which reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all homestead entries which have been canceled or relinquished, or are invalid solely because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, may be reinstated or allowed to remain intact, but in the case of entries heretofore canceled applications for reinstatement must be filed in the proper local land office prior to July first, nineteen hundred and twelve.*

SEC. 2. That in all cases where contests were initiated under the provisions of the act of May fourteenth, eighteen hundred and eighty, prior to the withdrawal of the land for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this act.

1. Applications for the reinstatement of entries coming within the provisions of section 1 of the act must be filed in the proper local land office prior to July 1, 1912. Promptly upon the filing of such applications, you will forward the same to this office by SPECIAL LETTER, making such recommendation in the premises as the facts may warrant, and a statement as to the status of the land involved. Each application should be accounted for on your appropriate schedule of serial numbers for the month in which the same was forwarded, showing the date of transmittal.

2. Section 2 has reference only to contests initiated prior to March 3, 1911, and prior to the withdrawal for national forest purposes of the lands involved. You will require applicants under said section to show their qualifications at the time their applications are presented.

3. You will notify the proper forest officer of all action taken by you under this act.

Very respectfully,

FRED DENNETT,  
*Commissioner.*



**BERGMAN ET AL. v. CLARKE.**

*Decided April 7, 1911.*

**FOREST LIEU SELECTION—CONTEST—OCCUPIED LAND.**

The requirement that a forest lieu selection shall be made of unoccupied land is for protection of such legal rights as the occupant himself may have, and he only is entitled to question the selection on the ground that the land was occupied at the time selection thereof was made.

**FOREST LIEU SELECTION—CONTEST—CHARGE—OCCUPIED LAND.**

The charge in an affidavit of contest against a forest lieu selection that the selected land was occupied at the date of selection is not sufficient in the absence of a further charge that such occupancy was adverse to the selector.

**PIERCE, *First Assistant Secretary:***

Charles J. Bergman and James Mowat separately appealed from decision of the Commissioner of the General Land Office of November 2, 1910, rejecting their contest affidavits against selection by C. W. Clarke, No. 1904, under act of June 4, 1897 (30 Stat., 36), for lands described as S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 10, sought to be contested by Bergman, also N.  $\frac{1}{2}$  of S.  $\frac{1}{2}$ , Sec. 34, sought to be contested by Mowat, all in T. 15 N., R. 6 W., W. M., Olympia, Washington.

July 24, 1899, Clarke made selection. September 26, and September 28, 1910, respectively Bergman and Mowat filed separate affidavits seeking to contest the selection as to the lands above mentioned. The affidavits were similar in form, alleging that when Clarke made his selection the land was settled upon and improved, and that the non-occupancy affidavit filed with the selection was untrue. Neither Bergman nor Mowat alleged any prior right to the land in themselves, nor do their affidavits disclose who were occupants of the land at the time of selection.

The case is in all material respects like that of James McAllister *v. Clarke* (unreported), decided by the Department October 8, 1910, wherein it was held:

So long as Bale makes no complaint against the selection and McAllister alleges no prior interest in himself, the existence of improvements is a matter of no concern to the United States.

It was held in *Mudgett v. Gosslyn* (32 L. D., 282), that the averment of a prior interest is necessary to protect the land department and persons dealing with it from interference, annoyance and delay to public business by meddlesome, mischievous or malicious and irresponsible persons. . . .

The selection of occupied land is not a fraud against the United States *per se*. It is of no concern to the United States so long as the land is non-mineral or otherwise not reserved for public use. The requirement that it shall be unoccupied is for the protection merely of such legal rights as the occupant may have, and he only can avail himself of the fact that it was occupied at the time of the selection.

For another reason, the affidavit does not state a cause of action. It does not state that the occupant at time of selection was holding adversely to the selector. For all that appears, the occupant may have caused or invited the selection to be made in his own interest and for his own benefit and protection. In *James Gentry v. Pacific Live Stock Company*, October 27, 1902 (unreported), the Department held:

In the case of *Myrick v. Thompson* (99 U. S., 291, 296), the Supreme Court had under consideration the act of July 17, 1854 (10 Stat., 304), which, among other things, authorized the location of Sioux half-breed scrip upon "unoccupied lands." It was there held:

"The provision authorizing the scrip to be located upon 'unoccupied lands' was evidently framed for the benefit and protection of occupants of the land, and that if the occupant saw fit, as the plaintiff did in this case, to locate the scrip upon land occupied by himself, there could be no objection to the location, as the occupant might waive his right to object and abandon his occupancy, and that if he did, the effect would be to restore the premises to the condition of unoccupied land."

What the occupant might lawfully do himself in such a case, he might lawfully permit, authorize, or procure another to do. So, in this case, the Pacific Live Stock Company might procure the selections to be made by Hyde in its interest, or might waive its right to select and permit him to make the selections in his own interest.

In the case of *Myrick v. Thompson* therein referred to and made authority for said decision, the court had under consideration a case arising under act of July 17, 1854 (10 Stat., 304), which inhibited selection of occupied land by location of Sioux half-breed scrip. Such scrip was permitted to be located only on unoccupied land and the locator was required to show and prove that the land he sought to select or locate was unoccupied. This was a statute expressly excluding occupied land, and is controlling in this case, where the statute merely requires selection "of vacant land open to settlement." As the affidavit does not negative the fact that the occupant was the person who procured and induced the selection, it states no cause of action or ground for hearing.

#### CHARLES TACKETT.

*Decided April 7, 1911.*

#### SIoux INDIAN ALLOTMENT—RIGHTS OF HEIRS.

An allotment selection filed with the agent in charge during the lifetime and on behalf of a minor entitled to allotment under the acts of Congress providing for allotments of Sioux Indian lands, although not scheduled or approved prior to allottee's death, saves the allotment right for the benefit of allottee's heirs.

PIERCE, *First Assistant Secretary*:

Appeal has been filed by Charles Tackett from your decision of August 24, 1909, denying his application for an allotment on the

Rosebud Indian Reservation, South Dakota, as sole heir of his minor daughter, Ella Tackett, deceased.

Ella Tackett was born October 5, 1876, and died August 19, 1891. It appears that some time prior to her death Charles Tackett, natural guardian, filed for her a selection of land with the United States Indian Agent in charge of the Rosebud Agency under the act of March 2, 1889 (25 Stat., 888), but the same was never entered upon the schedule of allotments by the special allotting agent. She was duly enrolled as a Rosebud Sioux Indian and carried on the rolls until the date of her death.

Authority for the division of the Great Sioux Reservation into separate reservations and for allotments to the members of the various tribes or bands of Sioux Indians is found in the following acts of Congress:

Act of March 2, 1889 (25 Stat., 888), which in section 8 thereof authorized allotments to heads of families, single persons over eighteen years of age, orphan children under eighteen years of age, and "to each other person under eighteen years of age *now living*, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation." The President's order directing allotments under said act is dated June 22, 1893. It was provided in section 9—

that all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child . . . *Provided*, That if any one entitled to allotment shall fail to make a selection within five years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians.

The act further provided in section 10 that allotments thereunder should be made—

by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe.

Act of March 3, 1899 (30 Stat., 1364), which ratified the agreement of March 10, 1898, with Indians on the Rosebud Reservation, and authorized allotments in severalty on said reservation "to all children born prior to the date of the ratification of this agreement, *then living*," in manner and quantity as provided in section 8 of the act of March 2, 1889. The act further provided that "where any Indians to whom allotments in severalty have been made in the field, have since died, such allotments shall be duly completed and approved, and the lands shall descend to the heirs of such decedents"

in accordance with the provisions of section 11 of the act of March 2, 1889.

Act of March 1, 1907 (34 Stat., 1015, 1048), which made an appropriation for the allotment of lands in the Sioux Reservation under the act of March 2, 1889—

*Provided*, That hereafter the President shall cause allotments to be made under the provisions of said act to any *living* children of Indians affected thereby who have not heretofore been allotted.

Act of March 2, 1907 (34 Stat., 1230), which authorized the sale and disposition of a portion of the surplus or unallotted lands in the Rosebud Reservation, and directed that allotment be made prior to the President's proclamation opening said lands to settlement and entry—

to each child of Indian parentage whose father or mother is or was, in case of death, a duly enrolled member of the Sioux tribe of Indians belonging on the Rosebud Reservation who is *living* at the time of the passage and approval of this act and who has not heretofore received an allotment.

Act of May 29, 1908 (35 Stat., 444), in section 17 thereof, authorized allotments to be made under the provisions of the act of March 2, 1889—

to any *living* children of the Sioux tribe of Indians belonging on the Rosebud Reservation affected thereby, and who have not heretofore been allotted, so long as that tribe is in possession of any tribal or reservation lands.

It is shown that Ella Tackett was alive at the date of the act of March 2, 1889, authorizing allotments to persons under eighteen years of age then living. It is also shown that an allotment selection was made for her prior to her death, although never scheduled nor approved. This selection was filed with the agent in charge. The act of March 2, 1889, provides that allotments shall be made "by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made." The law differs in this respect from that referred to in the case of Willie Dole (30 L. D., 532), cited in instructions of December 8, 1908 (Circular No. 258), which law only provides that allotments shall be made by special agents appointed by the President for such purpose. It is therefore clear that Ella Tackett was entitled to an allotment, and that selection thereof was made for her prior to her death. Instructions (14 L. D., 463); Florence May Ree (17 L. D., 142); and Opinion of the Assistant Attorney-General (35 L. D., 145). Her right was therefore a descendible one and consequently her heirs are entitled to the allotment the decedent herself would or should have received had she continued to live.

Your decision herein of August 24, 1909, is accordingly reversed.

## ROY McDONALD ET AL.

Decided April 7, 1911.

## MINING CLAIM—SLATE DEPOSITS—PLACER.

Deposits of slate, which do not carry deposits of any other valuable mineral, when found in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, are subject to appropriation under the placer mining laws.

PIERCE, *First Assistant Secretary*:

May 4, 1905, Roy McDonald located surveyor-general's scrip No. 461 A, on the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 5, T. 3 S., R. 22 W., 6th P. M., Camden, Arkansas, the register's certificate, No. 350, issuing the same day. A special agent having made an adverse report, the Commissioner, July 6, 1909, directed proceedings upon the following charge:

The lands are most valuable for the mineral thereon, and were known to be mineral in character at the time the location was made.

A hearing was had on the charge, the testimony being taken November 29, 1909, from which the Commissioner, by his decision of November 4, 1910, affirming that of the register and receiver, found:

It does not appear from the testimony that the land or any portion thereof is valuable for slate, or that there was any valid subsisting location in conflict therewith. It is not shown from the testimony that the locations made upon the slate deposits, have been worked or developed to any great extent. From the testimony submitted this office is of the opinion that the land is not valuable for any deposits of slate which is known to exist on the land.

May 4, 1905, McDonald also located surveyor-general's scrip No. 1003 A, upon the NW.  $\frac{1}{4}$  of the same section. Peter Henen having filed a protest, that he was the owner of a portion of said tract under a mining location upon which a valuable mine was situated, a hearing was held, the testimony being taken October 2 and 3, 1907. The Commissioner, March 25, 1908, held that the protest was sustained, finding, *inter alia*:

It is not material that the land was claimed under the location, as a lode claim. While deposits of slate may be regarded as placer deposits, the designation of same as a lode does not operate to negative its mineral character. The fact that the land is proven to contain slate, establishes its mineral character and the mining laws are applicable thereto, to the exclusion of all other laws.

The scrip location will, therefore, have to be canceled to the extent of its conflict with the said mining claim, and a survey will be required to show the portion of any fractional subdivision remaining in the said location after such cancellation.

Upon motion for review, the Commissioner, May 7, 1908, adhered to his prior decision, and incidentally said:

The claim was located as a lode claim without regard to the lines of the public survey, though the mineral claimed is in the form of a placer deposit.

Upon appeal, the decision of the Commissioner was affirmed by the Department, February 25, 1909. The scrip claimant thereupon made a segregation survey, the plat being approved by the Commissioner November 13, 1909, and showing the so-called lode location of Henen, designated as "Fairview Lode No. 2," conflicting in part with the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and to the extent of 12 or 13 acres in the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ . Scrip location No. 1003 A, excluding the portion of the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  so in conflict, was patented October 3, 1910.

December 30, 1910, the Commissioner, as to No. 461 A, modified his decision of November 4, 1910, and held it for cancellation as to that portion of the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  in conflict with the Henen claim as shown by the segregation plat, and from that action an appeal has been duly taken.

The Department concurs in the findings below, that the deposits of slate on the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  are valueless, and do not prohibit a non-mineral acquisition thereof. If the Henen claim were a valid lode location, whose boundaries had been properly marked, the same being prior to the scrip location, the Commissioner's action would be correct, even if the vein had not been disclosed within the limits of the nonmineral entry. (*Horn Silver Mining Company v. Florence L. Jones*, Waterville 0584 and 05620, decided by the Department March 29, 1911.) However, if the deposit of slate is not a lode, but a placer, the location should have been made by legal subdivisions, nothing appearing in the record which would render the same impracticable, and the nonmineral portion thereof may be excluded therefrom and included within a nonmineral entry.

Slate is undoubtedly a mineral within the meaning of the mining laws:

Marble and slate are mineral substances, and as such their existence on land in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, makes such land mineral land within the meaning of the mineral laws. . . .

[*Schrimpf et al. v. Northern Pacific R. R. Co. et al.*, 29 L. D., 327, at p. 328.]

As early as 1874, a valuable deposit of slate was permitted to be patented under the placer law by the General Land Office (*Sickel's Mining Laws and Decisions*, 1881, p. 487); and in the present case the Commissioner has likewise held the deposit to be placer. The distinction between a lode and a placer deposit was exhaustively considered by the Department in the case of *Henderson et al. v. Fulton* (35 L. D., 652), the material under consideration being marble; and much of what was said there is applicable to the present question. At page 683 the Department said:

a vein or lode to be locatable and patentable under the mining laws, must possess the elements of rock in place bearing one or more of the minerals

specified in the statute [gold, silver, cinnabar, lead, tin and copper], or some other mineral that would be embraced within the added words "other valuable deposits."

And at page 664:

the Department is clearly of opinion that the deposits of marble in the claims in question are not vein or lode deposits within the meaning of the statute, and that the lands embraced in the entry are therefore not subject to location and patent under the provisions applicable to vein or lode claims. This is not because the deposits are not "in vein or lode formation," as stated in your office decision, but rather, or at least primarily, because the deposits are not of the kind, or character, contemplated by sections 2320 and 2322. The marble involved is not mineral-bearing rock in the sense of the statute. There is no claim or contention that it contains even a trace of any of the minerals named in the statute, or of any other mineral substance, distinct from the rock itself.

So here there is no claim or proof that the slate deposit carries any other mineral, and the Department is satisfied that the deposit is placer and not lode. It follows that the action of the Commissioner in segregating the Henen claim as a lode was erroneous, and the exclusion of the mineral land in the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  from agricultural entry should have been by the appropriate legal subdivisions.

The decision in the case of *Henen v. McDonald* was limited to the land there in controversy, and was in no sense an adjudication of the character of the land in the remainder of the so-called lode location, and this having been now found to be nonmineral, the scrip location for the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  should be allowed in its entirety. However, as Henen is not a party to the present proceedings, notice hereof should be given him and opportunity afforded to make a showing as to the mineral character of that portion of the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  claimed by him, and if this is *prima facie* sufficient, a further hearing should then be held.

The decision of the Commissioner is accordingly reversed, and the matter remanded for further proceedings in harmony with the above.

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### DALLAS SHAW.

*Decided April 7, 1911.*

#### SIoux INDIAN ALLOTMENT—RIGHTS OF HEIRS.

The various acts of Congress authorizing allotments of Sioux Indian lands contemplate allotments only to living persons; and where one entitled to allotment dies without allotment having been made or selection therefor filed by him or in his behalf, the right perishes with him and his heirs are not entitled to allotment based upon his right.

PIERCE, *First Assistant Secretary:*

Appeal has been filed by Dallas Shaw from your decision of September 29, 1910, denying his application for an allotment on the

Rosebud Indian Reservation, South Dakota, as sole heir of his minor son, Levi Shaw, deceased.

Levi Shaw was born May 1, 1888, and died August 17, 1889. It is alleged that he was enrolled at the Rosebud Agency, but no allotment was ever made to him, nor was any selection ever filed in his behalf.

Authority for the division of the Great Sioux Reservation into separate reservations and for allotments to the members of the various tribes or bands of Sioux Indians is found in the following acts of Congress:

Act of March 2, 1889 (25 Stat., 888), which in section 8 thereof authorized allotments to heads of families, single persons over eighteen years of age, orphan children under eighteen years of age, and "to each other person under eighteen years of age *now living*, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation." The President's order directing allotments under said act is dated June 22, 1893. It was provided in section 9—

that all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child . . . *Provided*, That if any one entitled to allotment shall fail to make a selection within five years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians.

The act further provided, in section 10, that allotments thereunder should be made—

by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe.

Act of March 3, 1899 (30 Stat., 1364), which ratified the agreement of March 10, 1898, with Indians on the Rosebud Reservation, and authorized allotments in severalty on said reservation "to all children born prior to the date of the ratification of this agreement, *then living*," in manner and quantity as provided in section 8 of the act of March 2, 1889. The act further provided that "where any Indians to whom allotments in severalty have been made in the field, have since died, such allotments shall be duly completed and approved, and the lands shall descend to the heirs of such decedents" in accordance with the provisions of section 11 of the act of March 2, 1889.



Act of March 1, 1907 (34 Stat., 1015, 1048), which made an appropriation for the allotment of lands in the Sioux Reservation under the act of March 2, 1889—

*Provided*, That hereafter the President shall cause allotments to be made under the provisions of said act to any *living* children of Indians affected thereby who have not heretofore been allotted.

Act of March 2, 1907 (34 Stat., 1230), which authorized the sale and disposition of a portion of the surplus or unallotted lands in the Rosebud Reservation, and directed that allotment be made prior to the President's proclamation opening said lands to settlement and entry—

to each child of Indian parentage whose father or mother is or was, in case of death, a duly enrolled member of the Sioux tribe of Indians belonging on the Rosebud Reservation who is *living* at the time of the passage and approval of this act and who has not heretofore received an allotment.

Act of May 29, 1908 (35 Stat., 444), in section 17 thereof, authorized allotments to be made under the provisions of the act of March 2, 1889—

to any *living* children of the Sioux tribe of Indians belonging on the Rosebud Reservation affected thereby, and who have not heretofore been allotted, so long as that tribe is in possession of any tribal or reservation lands.

Levi Shaw was living at date of the passage of the act of March 2, 1889, as contemplated in section 8 of said act authorizing allotment "to each other person under eighteen years of age now *living*." But no selection was ever filed for him, nor allotment made prior to his death, either by a special agent appointed by the President for such purpose, or the agent in charge of the Rosebud Agency. The provisions of sections 8 and 9 of the act of March 2, 1889, relating to allotments on the Sioux Reservations, are practically the same as those in sections 1 and 2 of the general allotment act of February 8, 1887 (24 Stat., 388). In letter of August 21, 1889, to your office, the opinion was expressed that it was not the intention of the act of 1887 to authorize allotments to members of any class not in being at the time allotments are actually made. The question there arose upon a letter to your office from the special agent engaged in allotting lands to the Yankton Indians, in which he stated that he was allotting to all who were living at the date of the act of February 8, 1887, or who were born before the date of the order of the President directing allotments, whether they had since died or not. Subsequently, your office requested to be advised as to whether allotments should be made to Sioux Indians who died after complying with the provisions of section 13 of the Sioux act of March 2, 1889, as to election and filing their applications in the local land office. The Department's attention was called to the opinion expressed in its letter of August 21, 1889, relative to the general allotment act of 1887. In reply to

the request there was transmitted to your office an opinion by the Assistant Attorney-General, wherein, after holding that allotments should be made in the instance cited, it was said:

Nor is this view in conflict with the departmental decision referred to relative to allotments under the act of 1887. In that case, there had been no selections made, and no applications filed in the local office as required by law, and the Acting Commissioner in his letter of August 20, 1889, says: "Heads of families and single persons over eighteen are required to select for themselves, and to do this must be alive. No provision is made for the selections of persons not alive, and I see nothing in the act which contemplates such selections." In the case presented selections have been made, and it only remains for the Department to carry out the wishes of those authorized to make the same to secure to the heirs of the applicants the use of the lands so selected.

I am therefore of opinion, and so advise you, that where selections of land have been received in the local land office under the provisions of said section thirteen of the act of 1889, and there are no prior valid claims thereto, the same should be duly allotted, and in case of the death of the allottees prior to such approval, patents should issue as required in said section eight.

Instructions were given to the special allotting agent, Rosebud Agency, October 10, 1908, in which, after referring to the various acts for allotments on the Sioux reservations, the regulations thereunder, and departmental decisions bearing on the subject, it was said:

From this and other decisions cited herein, it appears that where an Indian otherwise entitled to an allotment dies prior to the time application for an allotment is made by him or in his behalf to a special allotting agent or some other officer of the Indian service, directed by the Secretary of the Interior to make allotments, or selection is made for him by such officer, the right the decedent would have had to an allotment had he continued to live, ceases; that such right is not descendible, and consequently his heirs are not entitled to the allotment the decedent himself would have received had he continued to live.

\* \* \* \* \*

It appears from the decisions referred to that if application is made by an Indian entitled to an allotment or by some one in his behalf, or selection is made for him by the allotting officer as outlined herein, and such Indian dies after such application or such selection, his heirs are entitled to have confirmed to them the allotment which the Indian himself would have received had he continued to live.

\* \* \* \* \*

Under the provisions of the act of May 29, 1908, it is believed that allotments are to be made to any living children of the Rosebud tribe so long as that tribe is possessed of any unallotted tribal land; the words "any living children" to be construed to mean only those children by or for whom selections have been made during their lifetime and properly filed with the officer in charge of the reservation, or the allotting agent. Such application may be made at any time during the lifetime of the child to the agent or other officer in charge of the reservation to which the applicant belongs.

December 8, 1908, instructions (Circular No. 258) similar to the above were issued to special allotting agents generally, and for the information of the allotting agents engaged in work on any of the diminished reservations into which the former Great Sioux Nation

was divided by the act of March 2, 1889, the last paragraph above was quoted in said circular.

As showing the construction placed upon allotment acts prior to that of March 2, 1889, and subsequent Sioux acts, reference is here made to the act of March 3, 1885 (23 Stat., 340), providing for allotment of lands in severalty to the Indians of the Umatilla Reservation in Oregon. There was no limitation in said act as to persons "now living," "then living," etc. Yet in the instructions issued to the allotting agents under said act, the question arose as to "whether or not a person living at the time of making the agreement and who has since died is entitled through his or her heirs to receive an allotment of land." It was said in the instructions: "All persons now *living* whose names appear on the census rolls of 1887, are entitled to and will be given allotments;" and further on therein it was stated:

The inspector states that he informed the Indians that in his opinion deceased parties had no right and that allotments were only to be given to those living at the time of making the allotments. Upon this subject I have to say that allotments will be made only to those who are living when the allotments come to be made. The heirs of an Indian who was living at the date of the acceptance of the act of 1885 by the Indians and who has since died cannot have the allotments to which the deceased party would have been entitled had he lived.

The various acts relating to allotments to members of the Sioux tribe refer to *living* children. The act of 1889, after providing for allotments to heads of families, single persons over eighteen years of age, and to orphan children under eighteen years of age, "located" on the reservation, authorized an allotment to be made "to each other person under eighteen years of age now living, or who may be born prior to the date of the order of the President directing an allotment." The act further provided all allotments should be selected by the Indians, "heads of families selecting for their minor children, and the agents shall select for each orphan child," with the proviso that if any Indian should fail to make a selection within five years after the President's order, then the Secretary of the Interior might direct the tribal agent or special agent appointed for the purpose to make a selection for such Indian. Clearly, under the requirement to select for themselves, the Indians must be alive. No provision is made in any of the acts authorizing parents to make selection on account of their deceased children. Furthermore the act of 1889 provides that upon the approval of allotments, the Secretary of the Interior "shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs," again indicating that allotments

are to be made only to living persons, and that heirs become beneficiaries only after allotment selections have been made. The same thing is also clearly indicated by the language employed in the acts of March 3, 1889, and March 1, 1907, the latter providing for allotments to any *living* children.

The rule has become well settled, and every intendment of the various Sioux acts is to the effect that allotments are only authorized to children in being at the time the same are made: that is, that selection can only be made for or in behalf of living persons. It follows that, if selection has regularly been made by or for a person in being, so that nothing remains but the scheduling and approval of such selection, then a right is initiated and secured which can be confirmed for the benefit of the heirs. Florence May Ree (14 L. D.; 142); Opinion, Assistant Attorney-General (35 L. D., 145) in what is known as the Kiowa, Comanche, and Apache children case.

The opinions expressed in what is known as the Bush Otter case (12 Opinions, Assistant Attorney-General, 133) under date of April 11, 1896, have not been followed by the Department as being applicable to allotments to deceased minor children on the Rosebud Reservation.

Your decision herein denying the application of Dallas Shaw, for allotment as heir of Levi Shaw, is hereby affirmed, it appearing that he was not living at the time such application was made and no selection was made for him prior to his death.

### FRANCES CAJUNE.

*Decided April 8, 1911.*

#### INDIAN ALLOTMENT ON PUBLIC DOMAIN—ACT OF MARCH 3, 1909.

The act of March 3, 1909, authorizing allotments to Indians on the public domain, was repealed by section 17 of the act of June 25, 1910, without a saving clause as to previously filed applications, and the Department is therefore without authority to allow applications for allotment under that act subsequent to the repeal, notwithstanding they may have been filed prior to and were pending on that date.

PIERCE, *First Assistant Secretary*:

Frank Cajune, on behalf of his minor daughter Frances Cajune, has appealed from decision of the General Land Office dated July 20, 1910, rejecting Indian allotment application No. 04800, filed June 20, 1910, for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 9, T. 159 N., R. 28 W., Cass Lake, Minnesota, under the act of March 3, 1909 (35 Stat., 781, 782), which provides:

That the Secretary of the Interior be, and he hereby is, authorized, under the direction of the President, to allot any Indian on the public domain who has not heretofore received an allotment, in such areas as he may deem proper,

not to exceed, however, eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian, such allotment to be made and patent therefor issued in accordance with the provisions of the act of February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, three hundred and eighty-eight).

The act of March 3, 1909, was repealed by section 17 of the act of June 25, 1910 (36 Stat., 855, 859), without a saving clause as to previously filed applications, and sections 1 and 4 of the act of February 28, 1891, were amended. August 3, 1910, the Department approved a holding of the General Land Office that applications filed under the act of March 3, 1909, and not approved, should be rejected. The holding was on the ground that such applications being still inchoate at the date of the act repealing the provisions of law under which they were made, and in the absence of a saving clause in the repealing act, authority no longer existed to allow such applications, and applicants were required to stand on their rights, if any, under the general allotment act.

The action taken in this class of cases is in accordance with well known canons of statutory construction:

The general rule is that when an act of the legislature is repealed without a saving clause, it is considered, except as to transactions past and closed, as though it had never existed. Rights depending on a statute and still inchoate, not perfected by final judgment or reduced to possession, are lost by repeal or expiration of the statute. Powers derived wholly from a statute are extinguished by its repeal. Acts done under a statute whilst it was in force are good; and if a proceeding is in progress, *in fieri*, when the statute is repealed, and the powers it confers cease, it fails, for it can not be pursued. [Lewis's Sutherland Statutory Construction, Vol. 1, Secs. 282, 283, and 285.]

The decision of the General Land Office herein is affirmed.

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## COLLECTION OF RECLAMATION WATER-RIGHT CHARGES BY SPECIAL FISCAL AGENTS.

### REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington, April 8, 1911.*

TO PROJECT ENGINEERS, CHIEF CLERKS,  
AND SPECIAL FISCAL AGENTS.

The following instructions are supplementary to the circulars of May 27, 1908, and July 8, 1908 (37 L. D., 13, 16), in so far as they prescribe the method of transmitting to receivers of local land offices the money collected by special fiscal agents.

1. Where remittances can be made by bank draft more advantageously than by postal money order, the following procedure may be adopted.

2. Arrangements should be made by the special fiscal agent with a bank (preferably a national bank) from whom drafts are to be purchased each day covering the amount collected. The drafts should be drawn in the name of the special fiscal agent as agent for the water users, in the following form: "John Doe, Agent." The draft should contain no reference to his official title.

3. The draft should be indorsed by the special fiscal agent, as agent, namely, "John Doe, Agent," and transmitted together with duplicate copies of all receipts (Form 7-459) to a bank, preferably the U. S. Depository in the city where the office of the receiver of the local land office is located. A copy of the letter of transmittal should be sent to the receiver.

4. Arrangement should have been previously made with the bank to which draft is sent, for the immediate conversion of the draft into lawful money, namely, gold and silver coin, Treasury notes, United States notes, or notes of national banks, and for the immediate delivery of such money, together with the copies of all receipts (Form 7-459), to the receiver of the local land office.

5. Special fiscal agents shall collect from the water users, in addition to the amount of water right charges, sufficient to cover the actual cost of the draft. Drafts are usually issued at a charge of 10¢ per hundred dollars.

6. In order to protect the special fiscal agent and the water users against loss in transit, he should secure from the bank issuing the drafts a bond of sufficient amount, running to the special fiscal agent as agent of the water users interested in the funds with which the drafts are obtained.

FRANK PIERCE,  
*Acting Secretary.*

## GROS VENTRE AND OTHER INDIAN LANDS—ACT MARCH 3, 1911.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, April 8, 1911.*

REGISTERS AND RECEIVERS,  
*United States Land Offices,  
Great Falls, Glasgow and Havre, Montana.*

GENTLEMEN: Your attention is directed to the act of Congress approved March 3, 1911 (Public No. 462), entitled—

An act to amend section three of the act of Congress of May first eighteen hundred and eighty-eight and extend the provisions of section twenty-three hundred and one of the Revised Statutes of the United States to certain lands

in the State of Montana embraced within the provisions of said act, and for other purposes.

Said section 3 of the act of May 1, 1888 (which ratified and confirmed an agreement with the various tribes or bands of Indians residing upon the Gros Ventre, Piegan, Blood, Blackfeet and River Crow Reservations), as amended, reads as follows:

That lands to which the right of the Indians is extinguished under the foregoing agreement are a part of the public domain of the United States and are open to the operation of laws regulating the entry, sale or disposal of the same: *Provided*, That no patent shall be denied to entries heretofore made in good faith under any of the laws regulating entry, sale or disposal of public lands, if said entries are in other respects regular and the laws relating thereto have been complied with.

The above legislation affects all that territory which became subject to entry under the act of May 1, 1888 (25 Stat., 113), including the lands south and east of the Missouri River and north of the township line between townships twenty-two and twenty-three, north, which was detached from the Miles City land district and made a part of the Glasgow district by Executive Orders of February 15 and 21, 1908.

In disposing of the lands above referred to you will bear in mind that the said section 3, as amended, does not permit commutation of entries made under the enlarged homestead act of February 19, 1909 (35 Stat., 639), or under the act of June 22, 1910 (36 Stat., 583).

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

FRANK PIERCE,  
*Acting Secretary.*

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WILLIAM DAWSON.

*Decided April 11, 1911.*

#### MINING CLAIMS—TUNNEL—EXPENDITURES.

Expenditures on a tunnel located under section 2323, Revised Statutes, may be credited toward meeting the requirements of the statute with respect to expenditures as to all existing claims in fact benefited thereby where the prerequisite conditions of contiguity and community of interest are present.

#### PATENT PROCEEDINGS—NONCONTIGUITY.

Where a number of valid lode locations, forming upon the ground a contiguous group, are embraced in a single application for patent, upon which due publication and posting of notice has been had, and the application is rejected as to one of the claims because of insufficient patent improvements, the remainder of the claims, although not in themselves contiguous, may be retained and embraced in a single entry and patent.

PIERCE, *First Assistant Secretary*:

October 21, 1907, William Dawson filed at Vancouver, Washington, an application for patent No. 02429, for a group of five lode locations, known as Kangaroo Nos. 1, 2, 3, 4, and 5, survey No. 801. After due proceedings final receipt issued February 20, 1908, the same being indorsed "registered certificate not yet issued," a protest by the Forest Service having been filed. This protest was withdrawn February 3, 1910.

The improvements as returned by the deputy mineral surveyor were as follows, all of them being accredited by him as common to the entire group: Kangaroo No. 1, a tunnel 5' x 6' x 100', \$1,400; log cabin, used as a house for laborers working upon the land, \$50; Kangaroo No. 4, an open cut 10' x 16' x 5' deep, \$200; Kangaroo No. 5, a tunnel 5' x 6' x 35', \$490; a cabin, used as a house for laborers on the land, \$50, also the last 40 feet of a tunnel 5' x 6' x 70' on the "Kangaroo tunnel claim," \$560, which it was stated would intersect the Kangaroo lode upon which the locations were made at a depth of 900 feet, from which depth all the locations could be worked, the plan of future development being to drive this tunnel for the working tunnel of all the claims. The portal of this tunnel is distant about 2,000 feet in an easterly direction from the east side line of the Kangaroo No. 3.

March 23, 1910, the Commissioner held that inasmuch as the application appeared to be for a group of mining claims, and as reliance was had upon a common improvement, the claimant would be required to furnish a further showing as to the total number of locations embraced in the group, their ownership, their relative situations properly delineated upon an authenticated plat or diagram, the extent and value of the work done in the tunnel succeeding the date of each location or the date when common ownership took place and prior to the expiration of the period of publication of notice of application for patent, and why all of the tunnel should not be accredited for the benefit of the lodes embraced in the application, citing the cases of James Carretto and Other Lode Claims (35 L. D., 361), and Aldebaran Mining Co. (36 L. D., 551).

In response thereto the claimant submitted a statement to the Commissioner, as follows:

I beg leave to state that I am the owner of the above-named lode mining claims, for which application for patent is now pending before your office, and that I am also the owner of the Meta lode mining claim, and the Kangaroo tunnel claim, and that I was the owner of all of said claims at the time I filed application for patent for the Kangaroo group of claims above described, and also at all of the times during which the work was being done upon the tunnel as described in your letter of March 23, 1910. The 70 feet of tunnel work referred to in your said letter, was done in prosecuting the work upon the tunnel upon said tunnel claim which was run for the purpose of developing



the said Kangaroo group of claims, and also the said Meta claim, for which application for patent has not yet been made. The portal of said tunnel is upon the said Meta lode claim, and the said tunnel was driven along the line of the said Kangaroo Tunnel Claim, for the purpose of crosscutting, at a considerable depth, the lode of said Kangaroo group, and also any lodes upon the said Meta lode claim. It was considered by the U. S. Deputy Mineral Surveyor that only 40 feet of the said 70 foot tunnel would be required to make proof upon the said Kangaroo group, and that the remaining 30 feet of said tunnel might be applied upon the said Meta lode claim. However, if in your opinion all of the labor performed upon said 70 foot tunnel is required upon said Kangaroo group, I am willing to consent that all of the same be accredited to said group of claims. I am not the owner of any other mining claims in the vicinity of the Kangaroo group, than hereinbefore named.

None of the labor performed upon said 70 foot tunnel was performed at the date of the location of any of the mining claims hereinbefore mentioned, and all of said work upon said tunnel was performed prior to the expiration of the period of publication of notice of application for patent for said Kangaroo group, and after I became the owner of all of said mining claims herein mentioned.

Hereunto I have attached a blue print map showing the relative location of the said Kangaroo group of claims, the Meta lode claim, and also the said 70 foot tunnel.

The blueprint shows the 70-foot tunnel to be located within the boundaries of the Meta lode claim. The line of the tunnel location has been surveyed and apparently marked at intervals on the ground, according to the regulations, and runs in a southwesterly direction, crossing, as projected, the Kangaroo No. 2 near its north end line.

October 12, 1910, the Commissioner held the application for rejection, finding that no portion of the 70-foot tunnel could be accredited to the Meta lode or the lodes embraced in survey No. 801 as a common improvement because of noncontiguity, citing the case of the Copper Glance Lode (29 L. D., 542). From that action the claimant has prosecuted an appeal.

The claims here in question form a contiguous group joined end to end and running in a southeasterly and northwesterly direction, as follows: beginning at the south, the Kangaroo No. 5, No. 4, No. 1, No. 2, No. 3. According to the record they are located upon a ledge, bearing gold, silver, and lead, which dips in an easterly direction at an average angle of about 75 degrees. From the south end of the Kangaroo No. 5 to the line of the tunnel as projected there is an ascent of 800 feet and to the north end of the Kangaroo No. 3 of about 1,200 feet. Nos. 1 and 2 were originally located December 5, 1902, Nos. 4 and 5 April 2, 1903, and No. 3 September 14, 1904. Nos. 1, 2, 4, and 5 came into the ownership of Dawson August 31, 1903. September 14, 1904, Dawson located the "Kangaroo tunnel" claim, stating the purpose of the tunnel to be "discovering and working veins, lodes, or deposits on the line thereof, cutting the Kangaroo lode, and working the Kangaroo lode."

August 1, 1905, he executed an amended notice thereof, stating it to be "for the purpose of developing the Kangaroo group of lode claims and also for the purpose of discovering any mines or mineral lodes along the course thereof." The record does not show when the Meta claim was located, but it is apparent that it had passed into the ownership of Dawson by September 14, 1904.

The basis of the Commissioner's holding is that the Meta and the claims embraced in the application for patent being noncontiguous, the 70-foot tunnel could not be considered as a common improvement, and therefore no part of it could be accredited as a patent expenditure. The apportionment of any part of the tunnel to the Meta claim appears to have been due to an erroneous construction of the law by the deputy surveyor, and the claimant in his showing to the Commissioner distinctly stated that he was willing to have all the tunnel accredited to the Kangaroo group. The case therefore is not one of an improvement common to the Meta claim and the Kangaroo group, but one of a tunnel located outside of a contiguous group of mining claims held in common ownership, for whose development it is being driven and which, therefore, leaving out of consideration for the moment that it is the basis of a tunnel site, can properly be accredited to such group. See case of Copper Glance Lode, *supra*.

The tunnel location or site was evidently made under section 2323, Revised Statutes, which provides:

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

The act of February 11, 1875 (18 Stat., 315), provides that—  
where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes.

Under the latter act it would seem clear that a tunnel driven under the provisions of section 2323, Revised Statutes, for the development of lodes can be accredited as an improvement common thereto, whether the purpose is to claim any blind veins discovered on the line of the tunnel or not.

A tunnel site located under section twenty-three hundred and twenty-three of the Revised Statutes may be utilized for development purposes. One may lose the right to the tunnel site (as a means of discovery) by failure to prose-

cute the work with reasonable diligence. Yet the work thereon may be credited on assessment work on claims which are in fact benefited by it, the prerequisite conditions of contiguity and community of interest being present.—Lindley on Mines, Second Edition, Volume 2, page 1172, and the case of Fissure M. Company v. Old Susan M. Company, 22 Utah, 438, 63 Pacific, 587, there cited.

The 70-foot tunnel therefore may be properly accredited to the Kangaroo group, one-fifth of its value being apportioned to each claim. (See case of James Carretto and Other Lodes, *supra*.)

On the basis of its value as returned by the deputy surveyor, the tunnel represents an expenditure of \$900, or \$196 for each of the five claims. The question therefore remains whether, applying this, there is a sufficient proper expenditure to pass the group or a contiguous part thereof to final certificate and patent.

All of the improvements were accredited by the deputy surveyor as common to the entire group, but as stated by the Department in the Carretto case, *supra*, at page 364—

The entire body of claims held in common, the group as it is ordinarily denominated, not the individual claims separately considered, is the beneficiary on the one hand, while on the other the common improvement in its entirety is the means or agency effecting the common development or the community benefit. Such benefit accrues and attaches to, and becomes available for, the claims as a body, not individually, by the very reason of the construction of the common improvement and as soon as the construction takes place. The physical act of sinking a shaft, or driving a tunnel, which is a common improvement, makes this so; not the certificate of the surveyor-general to that effect.

There are no improvements within the surface lines of the Kangaroo Nos. 2 and 3. The log cabins, as far as here shown, can not be considered as development work. (See case of Crowned King Mining Company, Tough Nut No. 2 and Other Lodes, June 13, 1906, unreported.)

The open cut on Kangaroo No. 4 is situated near its south end line on the west side of the lode line at right angles to the strike. While this may be properly accredited to the Kangaroo No. 4, it is in no sense a common improvement. The tunnel on Kangaroo No. 5 is situated near its north end line and is run in a westerly direction on the west side of the lode line at right angles to the strike. This tunnel does not tend to develop the remaining claims and can not therefore be applied as a common improvement. The tunnel on the Kangaroo No. 1, its portal being higher in elevation, does not in any way tend to develop Kangaroo Nos. 4 and 5, but may, if no other objection appear, be properly accredited to Kangaroo Nos. 1, 2, and 3. Applying the above observations to the different claims, the following is the result:

Kangaroo No. 4, one-fifth interest in tunnel.....	\$196.00
Cut 10' x 15' x 5'.....	200.00
Total .....	\$396.00

Kangaroo No. 5, one-fifth interest in tunnel.....	\$196.00
Tunnel 5' x 16' x 35'.....	490.00
Total.....	\$686.00
Kangaroo Nos. 1, 2, and 3 (each), one fifth interest in tunnel.....	\$196.00
One-third interest in tunnel on Kangaroo No. 1.....	466.66 $\frac{2}{3}$
Total.....	\$662.66 $\frac{2}{3}$

It is therefore apparent that the application as to Kangaroo No. 4 must be rejected, and the decision of the Commissioner to that extent is affirmed. The rejection thereof leaves the Kangaroo No. 5 non-contiguous, as far as the *entered* area is concerned, to Nos. 1, 2, and 3, and the question arises, whether they may nevertheless be so embraced in one entry and patent, since they form part of a group of valid lode locations contiguous upon the ground and embraced in a single application for patent, upon which due postings of notice and publication have been had. Notwithstanding that the practice in such cases has commonly been to impose a further cancellation of one or the other of the so-detached claims or groups, the conditions disclosed by this record are deemed to invite further and particular consideration of that question.

In the case of Champion Mining Company (4 L. D., 362) the Department, following the decision of the Supreme Court in the case of Smelting Company *v.* Kemp (104 U. S., 636), held that an application for the survey of a claim embracing several contiguous lode locations should be granted, reversing the previous practice obtaining under the circular of July 6, 1883 (10 C. L. O., 191). In the case of Smelting Company *v.* Kemp, the Supreme Court considered a placer patent, issued March 29, 1879, for 164.61 acres, to one Thomas Starr, the patent embracing 12 or 15 locations, all included in one application for patent and the proceedings subsequent thereto. The lower court held the patent to be void, on the ground (among others) that it was necessary to make application for each location and prosecute separate patent proceedings thereunder and that, therefore, the officers of the land department had no authority to proceed in any other manner. The Supreme Court held this position to be untenable, stating at page 653 of its opinion:

The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered. The object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country. Requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land-officers from an increase of their fees. The public would derive no advantage from

it, and the owner would be subjected to onerous and often ruinous burdens. The services of an attorney are usually retained when a patent is sought, and the expenses attendant upon the proceeding are in many instances very great. To lessen these as much as possible the practice has been common for miners to consolidate, by conveyance to a single person or an association or company, many contiguous claims into one, for which only one application is made and of which only one survey is had. Long before patents were allowed—indeed, from the earliest period in which mining for gold and silver was pursued as a business—miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one, for convenience and economy in working them. It was, therefore, very natural, when patents were allowed, that the practice of presenting a single application with one survey of the whole tract should prevail. It was at the outset, and has ever since been, approved by the Department, and its propriety has never before been questioned.

The rule so laid down was again announced by the Department in the case of *S. F. Mackie* (5 L. D., 199).

In the case of *Zephyr and Other Lode Mining Claims* (30 L. D., 510) it was held that where the same person or company owns several contiguous mining claims, capable of being advantageously worked together, and adopts one general system for the purpose of developing them all, it is not necessary that all of such claims be embraced in the same proceedings for patent, but that they may be applied for and entered singly or otherwise at different times. This rule was reiterated in *Mountain Chief No. 8 and Mountain Chief No. 9 Lode Mining Claims* (36 L. D., 100), wherein it was held (paragraph 1 of the syllabus) :

The owner of a group of contiguous mining claims and of an improvement constructed for their common development and effective to that end, and of sufficient value for patent purposes as to the entire group, may, instead of embracing all the claims in one application for patent, apply for and obtain patent to a portion of such claims, based upon their due share or interest in the common improvement; and a subsequent break in the common ownership by a sale or other disposition of one or more of the patented claims, or of any interest therein, would constitute no bar to later patent proceedings for the remaining claims of the group based upon their due share or interest in the same common improvement.

From the above it is apparent that it is the contiguity of the claims upon the ground, their common ownership, and the availability and value of the common improvement (where such an improvement is relied upon), the law having been complied with in all other respects, which permits the claimant to apply for patent for all the claims together or in smaller groups or individually; and, consistently with that view, it would follow that *Dawson* could at once secure patent to the *Kangaroo No. 5*, should the pending entry be canceled as to it also, by filing a new application and making entry therefor, which would result in imposing upon him additional expense and delay, with "no benefit beyond that accruing to the land officers from an

increase of their fees." Such a burden should not be imposed upon him unless the mining statutes make it imperative.

In the case of Hidden Treasure Consolidated Quartz Mine (35 L. D., 485) the Department held (syllabus) :

An application for patent and an entry under the mining laws may embrace two or more lode claims held in common only where such claims are contiguous within the meaning of the public-land laws; and claims which merely corner on one another are not so contiguous.

The application and entry there embraced six lode locations, comprising upon the ground two groups of three contiguous claims each, the two groups, however, having simply a common corner, which was held not to establish contiguity. The reasons for the above rule were derived by the Department from the provisions of section 2325 of the Revised Statutes (pages 486 and 487), as follows:

The mining claim for which patent may be obtained is spoken of as "a piece of land" and in the same connection as "the claim or claims in common." Provision is made for one survey and one plat of the claim or claims, for posting one notice on the land embraced in the plat, and for the publication of one notice in one newspaper. The notice of the application for patent and the plat of survey are required to be posted together "in a conspicuous place on the land embraced in the plat," and the notice is to be published in a newspaper published "nearest to such claim." From the language used the purpose and intent of Congress seems clear. The land to be embraced in the plat of the survey, and for which "an application for a patent" may in accordance with the law be filed, may consist of a single mining location or many such locations held in common; and, whether the owner purchased adjoining locations and added them to his own, or made all the locations himself, all become his "claim." *Smelting Co. v. Kemp* (104 U. S., 636, 649). It is manifest that the statute does not contemplate that a number of mining locations, though held in common, if situate separate and apart from one another on the ground, may constitute the composite claim, or group, for which patent may be obtained in one proceeding. The provisions of the statute in that behalf are clearly inapplicable to detached locations, which can not in the nature of things form the piece or body of land to which the requisites to the obtaining of a patent are made to relate.

It is the location or consolidation of contiguous or adjoining claims, where more than one is involved, that is recognized in the statute as constituting the subject of a single patent proceeding.

It should be noted that the Department was there dealing with a group of locations not contiguous in fact. In the present case the locations upon the ground form one contiguous group, each of which from the record appears to be *bona fide* and valid as a location, and all the provisions of section 2325, Revised Statutes, for one survey and one plat, for posting one notice on the land embraced in the plat, for the publication of one notice in a newspaper nearest to the claim, for the posting together of the notice of application for patent and the plat of survey in a conspicuous place on the land embraced in the plat, have been met.

The application for patent and the proceedings thereunder were therefore in all respects regular and embraced a contiguous group of locations, the sole ground of the rejection of the Kangaroo No. 4 being the finding that the improvements for its benefit were in fact insufficient, although erroneously returned as sufficient by the mineral surveyor. The Department therefore finds no provisions of the law which prevents the inclusion of Kangaroo No. 5 and Kangaroo Nos. 1, 2, and 3 in the same entry and patent.

However, a further showing should be required as to the value of the work done in the tunnel on Kangaroo No. 1 succeeding the date of location of Kangaroo No. 3, in order that it may be ascertained whether Kangaroo No. 3 may share in the value of the tunnel within the rule laid down in the case of Aldebaran Mining Company, *supra*. If such showing be insufficient, the application will also be rejected as to No. 3, but entry in that event may be allowed for Nos. 1, 2, and 5.

The decision of the Commissioner is accordingly modified and the matter remanded for further proceedings in harmony with the above.

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### LOUIS ZUCKMAN.

*Decided April 12, 1911.*

#### WITHDRAWN COAL LANDS—HOMESTEAD ENTRY—SURFACE RIGHTS.

Rights under a homestead entry of lands withdrawn and classified as coal, based upon an application received at the local office prior to but suspended until after the act of June 22, 1910, because not accompanied by evidence of applicant's naturalization, relate back to the date the application was received, where applicant was at that date a naturalized citizen or had declared his intention to become a citizen, and except the entry from the operation of that act; but patent upon the entry must be in accordance with the provisions of the act of March 3, 1909.

#### PIERCE, *First Assistant Secretary*:

Louis Zuckman has appealed from a decision of the General Land Office requiring him to amend his application to make homestead entry of the SE.  $\frac{1}{4}$ , Sec. 8, T. 20, R. 6 E., Lemmon, South Dakota, to conform to the act of June 22, 1910 (36 Stat., 583), said land having been withdrawn and classified as coal land by executive order of July 7, 1910.

Said act provides that any person desiring to make homestead entry of lands classified as coal lands "shall state in the application for entry . . . that the same is made in accordance with and subject to the provisions and reservations of this act."

Appellant subscribed and took oath to his application May 10, 1910, before the clerk of the district court at Bowman, North Dakota, which was received at the local office May 19, 1910, but the entry was not allowed of record until July 12, 1910.

Appellant states in his appeal that he presented his naturalization papers to the officers at Bowman before whom he took oath to his application, who read the same and gave them back to him saying he did not need them; that he was afterwards told that his entry was kept under suspension by want of naturalization papers, and they were then sent to the local office.

The application received at the local office May 19, 1910, was a complete application, showing upon its face that applicant had declared his intention to become a citizen of the United States and was therefore entitled to make homestead entry of the land which was then subject to such entry.

The failure of the officer before whom the application was taken and verified to receive the naturalization papers and forward them to the local officers with the application, as he should have done, can not prejudice the right of the entryman.

Suspension of action by the local officers upon the application and the withholding of the entry from record until the receipt of the certificate of declaration of intention to become a citizen of the United States was proper, but when the entry was allowed upon that application, the right thereunder related back to the date it was received in the local office as if it had been allowed of that date.

This entry does not therefore come within the general provisions of the said act of June 22, 1910, but rather is excepted from that act by the proviso to section 1, the entry having been initiated prior to the passage of that act. However, it is clearly within the provisions of the act of March 3, 1909 (35 Stat., 844), which provides for the issuance of surface patents for lands containing valuable coal deposits, and thus the interest of the Government in the coal deposit is fully protected. See circular of March 6, 1911 (39 L. D., 544), and Gunn, assignee of Waid (39 L. D., 561).

The decision of the General Land Office is reversed.

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### JOHN WESLEY McCLINTON.

*Decided April 12, 1911.*

#### WITHDRAWN COAL LANDS—HOMESTEAD ENTRY—SETTLEMENT—SURFACE RIGHTS.

Rights under a homestead entry allowed subsequent to the act of June 22, 1910, for lands withdrawn under the act of June 25, 1910, based upon an application filed at the local office prior to the act of June 22, but suspended for proof of citizenship, relate back to the filing of the application, where the applicant was at that date a naturalized citizen or had declared his intention to become a citizen, and except the entry from the operation of that act; and where the entryman settled upon the land prior to said act his entry is for that reason also not subject to the restrictions thereof, but is properly judicable under the provisions of the act of March 3, 1909.



PIERCE, *First Assistant Secretary*:

Appeal is filed by John Wesley McClinton from decision of the Commissioner of the General Land Office of November 23, 1910, requiring him to amend his application to make homestead entry for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 22, T. 20 N., R. 3 E., B. H. M., Lemmon, South Dakota, land district, by filing his consent in writing, duly witnessed, to have inserted in said application a clause specifying same is made in accordance with and subject to the provisions of the act of June 22, 1910 (36 Stat., 583).

This application was filed April 30, 1910, and was suspended for proof of citizenship. The entry was allowed July 12, 1910. By executive order of July 7, 1910, promulgated July 21, 1910, coal-land withdrawal, including these lands, was made under the act of June 25, 1910 (36 Stat., 847).

It is contended in the appeal that this application to make entry is not subject to the amendment required because it was filed prior to said act of June 22, 1910, and because no opportunity was given the applicant to prove his acquirement prior thereto of any settlement rights; and the entryman's attorney states, in argument supporting said appeal, that—

Appellant, if opportunity is offered, can show that on June 9, 1910, he settled upon the land described in his homestead application, and immediately begun the erection of a house thereon, and took up his residence and that of his family therein.

Said act of June 25, 1910, under which coal withdrawal was made in this case, expressly excepts from the force and effect of such withdrawals—

All lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law.

It is provided also in section 1 of said act of June 22, 1910, providing for agricultural entries on coal lands—

That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in said act.

If, as thus expressly provided in the latter act, initiation of a non-mineral entry prior to the passage of that act upon lands withdrawn or classified as coal lands excepts such entryman from the restrictions of that act, *a fortiori* initiation of such an entry prior thereto on lands not withdrawn or classified as coal lands excepts such entryman also from such restrictions.

By force and effect likewise of the act of May 14, 1880 (21 Stat., 140), a homestead entryman's rights relate to and date from his initial settlement on the land. This principle of the homestead law is expressly recognized in said withdrawal act of June 25, 1910, and impliedly in said act of June 22, 1910.

This principle, which is a fundamental one in the homestead law, is constructively applicable also to the act of March 3, 1909 (35 Stat., 844), providing for cases where—

Any person who has in good faith located, selected or entered under the non-mineral laws of the United States any lands which subsequently are classified, claimed or reported as being valuable for coal—

and allowing such locators, selectors and entrymen to elect to receive a surface patent for such land; and an entry made subsequent to such classification, claim or report but based upon settlement prior thereto is properly within the operation of said act.

Irrespective of the question as to this entryman's pending application, therefore, if he, as stated, settled upon this land June 9, 1910, his entry is properly judicable under said act of March 3, 1909, and is not subject to the restrictions of said act of June 22, 1910.

The right under this entry also related back to the filing of the application; the applicant being at that date, in fact, a naturalized citizen or having declared his intention to become a citizen.

The decision appealed from is reversed, and action should be taken in accordance herewith. See decision this day rendered in matter of appeal by Louis Zuckman.

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### CLEMENT IRONSHIELDS.

*Decided April 12, 1911.*

#### RIGHT OF WAY—RESERVATION IN PATENT—INDIAN ALLOTMENT.

All public lands west of the 100th meridian taken up under allotment, sale, homestead, or other form of disposition, subsequent to the act of August 30, 1890, as to which there is no claim by reason of settlement, occupancy, or otherwise, prior to that date, are subject to the reservation provided by that act, to be expressed in the patent, for right of way for ditches or canals constructed by authority of the United States.

*PIERCE, First Assistant Secretary:*

On January 9, last, the sale of the lands embraced in Standing Rock allotment No. 2703, made by Clement Ironshields, now deceased, was approved with the direction that the issuance of the patent to the purchaser should contain a reservation of right of way for ditches and canals, under the act of August 30, 1890 (26 Stat., 391).

Your letter of February 6th, last, invites further departmental consideration to the matter of the proposed reservation to be inserted in the patent, calling particular attention to the fact that the allotment in question was not made from the public lands but under a special act of Congress with regard to the disposal of the Sioux reservation.

The question presented involves consideration of that provision found in the act of August 30, 1890, *supra*, which reads as follows:

That in all patents for lands hereafter taken up under any of the land laws of the United States, or on entries or claims validated by this act, west of the 100th meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States.

The evident purpose of this legislation was to reserve to the United States such lands as might be needed in the prosecution and furtherance of the plan of reclamation as subsequently outlined by the legislation of Congress. To accomplish this purpose, it was necessary that any proposed schemes of reclamation should be embarrassed as little as possible and there was as much reason, therefore, to insert a reservation in patents under one form of disposal as another. The only question, therefore, is as to the power of Congress, as the language contained in the act above quoted seems to be as broad and general as it is possible to make it. There can be no real question as to the right and power of Congress to condition the disposal of lands reserved for Indian occupancy and use the same as any other part of the public domain, the fee in all such lands being in the United States subject only to the Indian right of occupancy.

It will be noted that the reservation was to be inserted "in all patents for lands hereafter taken up under any of the land laws of the United States." The question as to whether any particular lands had been, prior to the passage of the act of 1890, or were at that date, in a reservation, is in nowise material. If the actual disposition occurred after the passage of the act, the land was undoubtedly "taken up" within the meaning of those words as used in the act of 1890, and this would be so whether the disposition occurred through allotment, sale, homestead, or other manner of disposition.

There is no room for doubt as to whether the particular lands were technically "public lands" of the United States, for patents of the United States would only issue for public lands, and it was only with respect to tracts for which the patent of the United States was thereafter to issue that the act has any relation.

In this connection it is deemed advisable, for fear of possible misunderstanding, to call attention to the fact that in certain reservations set apart for Indian occupancy, particular tracts may have been set apart, actually occupied, or improved under some usage or cus-

tom, with a view to ultimate allotment to an Indian prior to the passage of the act of 1890. With respect to such a condition, the tract being afterwards allotted, I am inclined to the opinion that such tracts must be considered as having been "taken up" prior to the passage of the act; but where there was no claim by reason of settlement, occupancy, or otherwise prior to the passage of the act, and where the disposition occurred thereafter, as before stated I am of opinion that there is no room for distinction, nor is there any reason for it, whether the tract was "taken up" under an allotment, sale, homestead or other form of disposition.

It may not be inappropriate in this connection to call attention to the fact that the legislation in question was subsequent in date to both the general allotment act of February 8, 1887 (24 Stat., 388), and the act of March 2, 1889 (25 Stat., 888), providing for the disposition of the lands formerly embraced in the Great Sioux Indian Reservation, within the limits of which this tract was found. Under ordinary rules of construction this latter legislation would control even in matter of conflict.

For the reasons given the direction contained in the approval heretofore given, on January 9, 1911, in the matter of the approval of the sale of the tract in question, is adhered to. Any previous regulation or decision in anywise in conflict with the holding herein made will no longer be followed.

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## RIGHTS OF WAY—ELECTRICAL POWER, TELEGRAPH AND TELEPHONE LINES.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, *April 14, 1911.*

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Your attention is called to that part of the act of March 4, 1911 (Public, No. 478), which reads as follows:

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any

national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute.

It will be observed that this act, which authorizes the granting of easements for electrical power transmission, and telephone and telegraph lines for stated periods not to exceed 50 years, follows, as closely as is possible in the accomplishment of its purposes, the language of the act of February 15, 1901 (31 Stat., 790), which authorizes mere revocable permits or licenses for such lines, and for other purposes. This act, therefore, merely authorizes additional or larger grants and does not modify or repeal the act of 1901, and should be construed and applied in harmony with it.

It is not believed that it would be either advisable or feasible to definitely fix at this time the periods for which the authorized easements should be granted, since it will be wiser and more practical to leave that question to be determined in each particular case from its attendant facts and circumstances at the time the application is presented. Where the application involves transmission and distribution of electrical power a detailed statement of the power plant with which the transmission lines are connected should accompany the application; also a statement as to whether the power plant is located on public or private land, and whether any part of the system affects lands in reservations other than those under the jurisdiction of the Secretary of the Interior.

The regulations issued under the act of February 15, 1901, in so far as they are applicable, will control in the presentation, consideration, and granting of applications for easements under this act.

Very respectfully,

WALTER L. FISHER, *Secretary*.

## RECLAMATION—WILLISTON PROJECT—WATER SUPPLY—PAYMENTS.

### ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, April 14, 1911.*

1. On March 9, 1911, an order was issued for the Williston Project, North Dakota, providing for a stay of proceedings looking to the

cancellation of entries and water right applications under certain conditions. The said order is hereby modified so as to read as follows:

2. Water right applicants who, on or before May 10, 1911, comply with the provisions of existing public notices, by making the payments required thereunder on or before that date, shall be permitted to continue under the terms of the former public notices; and water right applications may be filed on or before May 10, 1911, under the provisions of the public notices heretofore issued, if accompanied by the payments required thereunder, and shall be entitled to continue under the terms thereof.

3. Those who do not avail themselves of the provisions hereinabove stated, whether or not they have filed water right applications, may receive water for the coming irrigation season by payment of the sum of \$1.50 per acre for operation and maintenance charge, of which 50 cents per acre must be paid on or before May 10, 1911, and the balance, \$1.00 per acre, on or before December 1, 1911; and conditioned also upon the payment on or before December 1, 1911, of \$1.00 per acre-foot for all water delivered in 1911. Those who take advantage of these conditions are to be subject to the terms of a public notice to be hereafter published providing for an increased building charge, the amount of which can not be stated at this time.

4. The pumping barge will not be launched in 1911 until the aggregate payments made for operation and maintenance for 1911 at 50 cents per acre shall have amounted to at least \$1,000 for 2,000 acres. The operation of the pumps will be planned with a view to an approximately uniform rate of delivery of water and for adequate irrigation in the shortest practicable operating period, namely, for an irrigation season of 80 days beginning not earlier than June 1 and not later than June 15 and closing not earlier than August 19 and not later than August 30 of each year, and a water supply during each season of 2 acre-feet of water for each acre of land irrigated and cultivated or so much thereof as the water users may require.

5. For the years 1912 and 1913 the terms hereinabove stated will apply to all uncanceled entries of water right applications; provided however, that the barge will not be launched in 1912 until payment has been made at 50 cents per acre for operation and maintenance for 3,000 acres and all other amounts due hereunder for the year 1911; and it will not be launched in 1913 until said payment of 50 cents per acre has been made for 4,000 acres, and all other amounts due hereunder for 1912.

6. Upon failure to make payment as herein required on or before May 10, 1911, the entry or water right application or both, as the case may be, which would otherwise be subject to cancellation will be promptly cancelled without further notice; and the forfeiture provided for in the Reclamation Act for failure to pay installments

when due will be enforced as to future failure to pay under existing public notices in every case where the provisions of this order are not complied with.

WALTER L. FISHER,  
*Secretary of the Interior.*

**RECLAMATION—TIETON UNIT, YAKIMA PROJECT—WATER RIGHTS.**

**ORDER.**

DEPARTMENT OF THE INTERIOR,  
*Washington, April 14, 1911.*

The public notice of November 7, 1910, for the Tieton Unit, Yakima Project, Washington, is hereby amended by substituting for paragraph 5 thereof the following:

5. Water right applications may be accepted from the owners of private lands and for lands entered prior to November 7, 1910 (except for tracts rendered vacant by the conformation of any prior entries to the farm unit) for an irrigable acreage not in excess of 160 acres for each landowner.

WALTER L. FISHER,  
*Secretary of the Interior.*

**CHRIS D. MILLER.**

*Decided April 17, 1911.*

**COAL LANDS—WITHDRAWAL—CLASSIFICATION—SURFACE PATENT.**

The act of June 25, 1910, in so far as it authorizes withdrawal of public lands for classification as to coal deposits, must be construed as *in pari materia* with the act of March 3, 1909, providing for the issuance of restricted patents to agricultural entrymen of lands subsequently classified, claimed, or reported as valuable for coal, and with the act of June 22, 1910, providing for agricultural entries of coal lands; and so construed, a nonmineral application initiated in good faith prior to the passage of the act of June 22, 1910, is not avoided by a subsequent withdrawal made under the act of June 25, 1910, but the entryman must take a restricted patent.

**SOLDIERS' ADDITIONAL RIGHT—LOSS OR DESTRUCTION OF CERTIFICATE.**

The issuance of a certificate of soldiers' additional right will not prevent the sale of the right upon satisfactory showing of the loss or destruction of the certificate; and where every reasonable means to prove nonexistence of the certificate has been exhausted, sufficient to show that it in all probability has been lost or destroyed, one holding under valid assignments from the only persons to whom such previous ownership has been traced, may be recognized as entitled to the right.

PIERCE, *First Assistant Secretary*:

By decision of February 14, 1911, the General Land Office rejected the application of Chris D. Miller, assignee of Franz Lungershausen, to enter the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 34, T. 31 N., R. 20 E., M. M., formerly in the Havre land district but now in the Glasgow land district, Montana, under soldiers' additional right based upon military service during the war of the rebellion by said Franz Lungershausen in Company C, 11th Regiment, Michigan Infantry, and original homestead entry of eighty acres made September 8, 1870.

Said application was rejected upon the ground that all of said T. 31 N., R. 20 E., was withdrawn July 9, 1910, under authority of the act of June 25, 1910 (36 Stat., 847), excepting from the force and effect of said withdrawal all lands "which are on the date of such withdrawal embraced in any lawful homestead or desert land entry heretofore made, or upon which any valid settlement has been made, and is, on said date, being maintained and perfected pursuant to law." It was held by the General Land Office that this application is not such an "entry" or appropriation of the land as would except it from the operation of the withdrawal.

This application was filed May 24, 1910. The township in question had been withdrawn October 15, 1906, from coal entry or coal filing. On November 7, 1906, the order of withdrawal was made from all forms of entry, but this withdrawal was modified December 17, 1906, to apply to coal entries merely. At the time the application under consideration was presented, nonmineral entries were allowed of lands having a status similar to that under consideration upon the usual *ex parte* showing as to the nonmineral character of the lands applied for. It must be held, therefore, that if the selection or location in question was made in good faith, the claim was thereby lawfully initiated.

The act of June 22, 1910 (36 Stat., 583), provides for the allowance of certain classes of agricultural entries of lands which have been withdrawn or classified as coal lands, and section 1 of said act contains the following provisions:

That those who have initiated nonmineral entries, selections, or locations in good faith, prior to passage of this act, on lands withdrawn or classified as coal lands, may perfect the same under the provisions of the laws under which said entries were made, and shall receive the limited patent provided for in this act.

The action had with respect to this tract seems to bring it within the class of lands withdrawn as coal lands. But be that as it may, it is clearly within the class of claims intended to be protected by the proviso above quoted. It is true that the act of June 25, 1910 (36 Stat., 847), authorized the withdrawal of lands for classification;



but this act, in so far as it relates to withdrawal of lands for classification as coal lands, must be construed *in pari materia* with the act of March 3, 1909 (35 Stat., 844), and the act of June 22, 1910, *supra*, as part of a uniform system for the classification of coal lands and the disposal of surface rights with the reservation to the United States of the right to prospect for, mine, and remove the coal found therein. They were so construed in the case of Gunn, assignee of Waid (39 L. D., 561), and under such construction a nonmineral application initiated in good faith prior to the passage of the act of June 22, 1910, is not avoided by a subsequent withdrawal made under authority of the act of June 25, 1910, but the entryman must take a limited patent.

An additional reason assigned by the General Land Office for the rejection of this application is that the ownership of the additional right in applicant does not sufficiently appear. That ruling is predicated merely upon the fact that a certificate of the additional right of Lungershausen was issued in his favor July 26, 1877, and said certificate appears to be still outstanding and unsatisfied as no sufficient proof of its loss or destruction was submitted.

The certificate of the additional right of Lungershausen appears to have been issued upon the application of A. P. S. Stuart, of Lincoln, Nebraska, as attorney in fact of Franz Lungershausen and was mailed to said Stuart on the day of issue.

No further action appears to have been taken with reference to the said right until April 20, 1908, when application was filed in behalf of the W. E. Moses Land and Realty Company for recertification of said right of which it claimed ownership by transfer from the heirs and legal representatives of the said Lungershausen. The application for recertification was rejected for want of sufficient proof of ownership by applicant.

The evidence of ownership submitted with that application consisted of an assignment of said right by Mrs. John Gaskin, the widow of Franz Lungershausen who had remarried, and her four children, all of whom were of age; also a decision by the court of probate of Saunders County, Nebraska, which was obtained upon the petition of Mrs. John Gaskin, showing that her former husband died intestate in said county September 25, 1878, leaving as sole heirs and beneficiaries his said widow and the said four children, whereupon it was decreed that the parties whose names were set forth in said petition are the sole heirs of said Franz Lungershausen, all of whom were then of age.

The General Land Office, by its decision of November 30, 1908, citing as authority departmental decisions of January 24, 1908, in the

cases of Clark, assignee of Gaskin, and Clark, assignee of Burt, held that A. P. S. Stuart, to whom the certificate was delivered, or the persons whom he may have represented, or to whom he may have sold the right are the owners of the certificate and not the heirs of Franz Lungershausen.

Since then a transfer and assignment of said right has been secured from the executors of the estate of Martha E Stuart, widow of A. P. S. Stuart, and proofs have been submitted showing that A. P. S. Stuart died intestate September 14, 1899, leaving surviving his widow as sole legatee under his will. There were also submitted affidavits showing that said paper can not be found among the personal effects of the estate of A. P. S. Stuart, or the estate of Martha E. Stuart, his widow, and also a statement of Mrs. John Gaskin that said certificate did not reach the hands of the original beneficiary during his lifetime and had not come to the hands of his legal representatives since his death.

The showing of the loss or destruction of said certificate and of the transfer of all the right the widow, heirs, and legal representatives of Lungershausen had in such right and of all right that remained in Stuart at the time of his death is complete so far as it can be ascertained from those sources.

The only ground for the rejection of the application is the mere fact that Stuart during his lifetime, or Lungershausen, could have assigned and transferred said certificate of right and that it may be still outstanding.

This application is controlled by the rule announced in the decision of the Department in the case of Herman C. Ilfeld (34 L. D., 685), so far as it holds that the issuance of a certificate of right will not prevent a sale of the right upon satisfactory showing of the loss or destruction of the certificate.

Applicant appears to have exhausted every reasonable means at his command to show the nonexistence of said certificate. It is possible that it may have been transferred and is still outstanding but the probability is that it has been lost or destroyed. The evidence is not conclusive, but applicant has made such reasonable showing of its loss or destruction as to entitle his claim of ownership to recognition, especially as no notice of any claim has been made by anyone holding under it, and he holds under valid assignments from the only parties to whom such previous ownership has been traced.

The decision of the General Land Office is reversed.

## HAMPTON D. EWING.

*Decided April 19, 1911.*

## RAILROAD SETTLER—LIEU SELECTION—ACT OF MARCH 4, 1907.

A selection in lieu of lands within the limits of a railroad grant in Alabama relinquished under the act of March 4, 1907, for a less quantity than the base relinquished, the deficiency not being the result of any mischance or misprision on the part of the local officers, is a waiver of the excess of base.

PIERCE, *First Assistant Secretary*:

Hampton D. Ewing, William S. Frary, attorney in fact, appealed from decision of the Commissioner of the General Land Office of January 16, 1911, rejecting his application to make supplemental selection, under act of March 4, 1907 (34 Stat., 1408), for lot 4, Sec. 31, T. 21 N., R. 1 W., Greatfalls, Montana, 24.65 acres.

Ewing relinquished to the United States the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 27, T. 11 N., R. 23 E., Alabama, containing 80.18 acres. Prior to this selection, he had made at Greatfalls selection for lot 4, Sec. 6, T. 31 N., R. 1 E., and for lot 4, Sec. 31, T. 32 N., R. 1 E., M. M., aggregating 67.89 acres, leaving an excess of base relinquished amounting to 12.29 acres. The prior selection mentioned had been carried to patent December 6, 1910. He then applied for the land last above described, assigning the residue of the base and tendering to pay cash for the excess. The Commissioner of the General Land Office held that no right existed to make supplemental selection, and presumably the base was exhausted by the selection first made, and also that more than three years had passed since passage of the act and the time to make selections had elapsed before this selection was presented. The appeal cites this ruling for error, but admits that no decision under the act of March 4, 1907, is found, and insists that in all fairness the supplemental selection should be allowed.

The act of March 4, 1907, *supra*, permitted selection of "an equal quantity of nontimbered, nonmineral, and unappropriated surveyed public lands subject to homestead entry within three years after the passage of this act." Under the similar act of June 4, 1897 (30 Stat., 36), one holding land in a forest reserve relinquished to the United States was authorized to select an equal area of vacant land subject to settlement. Under that act, the Department held in Robert Leslie (34 L. D., 578), that where a selection was made for a less quantity than the base relinquished, the deficiency not being the result of any mischance or misprision on part of the local officers is a waiver of the excess of base. The same rule is applicable in the present case. There seems to have been no mistake on part of the local officers, and the selection made, though it did not fully exhaust the base, presumed a waiver of the excess. The acts are in

all substantial respects similar, except the limitation on time to make selection, and the rule and reasoning therein in case of Robert Leslie are applicable to the present case.

The second point of the Commissioner's decision is also well founded. The act by its terms limited the right of selection to the period of three years from time of relinquishment. That had fully passed in the present case, the selection having been made more than three years after passage of the act. For both reasons, the decision is affirmed.

### SILETZ LANDS—HOMESTEAD ENTRIES—ACT MARCH 4, 1911.

#### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., April 19, 1911.

REGISTER AND RECEIVER,  
PORTLAND, OREGON.

GENTLEMEN: Your attention is called to the act of March 4, 1911 (Public—No. 512), which reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all pending homestead entries heretofore made within the former Siletz Indian Reservation in Oregon upon which proofs were made prior to December thirty-first, nineteen hundred and six, shall be passed to patent in all cases where it shall appear to the satisfaction of the Secretary of the Interior that the entry was made for the exclusive use and benefit of the entryman, and that the entryman built a house on the land entered and otherwise improved the same, and actually entered into the occupation thereof and cultivated a portion of said land for the period required by law, and that no part of the land entered has been sold or conveyed, or contracted to be sold or conveyed, by the entryman, and where no contest or other adverse proceeding was commenced against the entry and notice thereof served upon the entryman prior to the date of submission of proof thereon, or within two years thereafter, and where any such entry has heretofore been canceled the same may be reinstated upon application filed within six months from the passage of this act where at the date of the filing of such application for reinstatement no other entry is of record covering such land: *Provided*, That nothing herein contained shall prevent or forestall any adverse proceedings against any entry upon any charge of fraud: *And provided further*, That any entryman who may make application for patent under the provisions of this act shall, as an additional condition precedent to the issuance of such patent, be required to pay to the United States the sum of two dollars and fifty cents per acre for the land so applied for; and the Secretary of the Interior is hereby authorized to issue such regulations as may be necessary for carrying this act into effect.*

2. You are directed to notify all entrymen named in the accompanying list of uncanceled entries that they may, within sixty days from such notice, present applications for patents under this act.

3. In all cases where bona fide entries, under which proofs were made prior to December 31, 1906, have been canceled solely because such proofs failed to show the residence, cultivation, and improvements required by the laws under which such entries were made, the entryman may, at any time before September 5, 1911, present their applications for the reinstatement of their entries and patents thereunder under this act.

4. Affidavits and showings must accompany and be filed with all applications for patents under uncanceled entries and with all applications for reinstatement of and patents under canceled entries, as follows:

The affidavit of the applicants that their entries were made for their own exclusive use and benefit, and that no part of the lands entered by them has been sold or conveyed, or contracted to be sold or conveyed, and by the affidavits of the entrymen, corroborated by the oaths of two other persons, specifically showing:

(a) The size, character, and value of the house or houses built by them on the land, and the dates at which they were built.

(b) The period, character, and extent of the applicants' occupation of the land.

(c) The extent, character, and period of the applicants' cultivation of the land and the area cultivated during each year.

5. Upon receipt of the applications under this act, you will forward them, with your report and recommendation thereon, to the Chief of Field Division, who, after such investigation as he may deem necessary, will forward the applications to this office with his report and recommendations.

6. The payment of \$2.50 per acre required by this act will not be demanded until after favorable action has been taken by this office, due notice of which will be given the entrymen through your office.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

WALTER L. FISHER,  
*Secretary.*

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### SUGGESTIONS TO HOMESTEADERS AND PERSONS DESIRING TO MAKE HOMESTEAD ENTRIES.

#### CIRCULAR.

The circular of suggestions to homesteaders approved September 24, 1910 (39 L. D., 232), was reapproved by Secretary Fisher for reprinting in pamphlet form April 20, 1911, with paragraphs 9, 13,

21, 22, 25, 26, 27, 31, 32, 36, 37, 39, 47, 53, and 54 amended to read as follows:

9. *If an entryman deserts his minor children* and abandons his entry after the death of his wife, the children have the same right to make proof on the entry as the wife could have exercised had she been deserted during her lifetime.

13. *Second homestead entries* may be made by the following classes of persons, if they are otherwise qualified to make entry:

(a) By a former entryman who commuted his entry prior to June 5, 1900.

(b) By a homestead entryman who, prior to May 17, 1900, paid for lands to which he would have been afterwards entitled to receive patent without payment, under the "free-homes act." (Appendix No. 3.)

(c) By any person whose former entry was made prior to February 3, 1911, which entry has been subsequently lost, forfeited or abandoned for any cause, provided the former entry was not canceled for fraud or relinquished or abandoned for a valuable consideration in excess of the filing fees paid on said former entry. If an entryman receives for relinquishing or abandoning his entry an amount in excess of the fees and commissions paid to the United States at time of making said entry, or if he sells his improvements for a sum in excess of such filing fees and relinquishes his entry in connection therewith he can not make a second entry.

(d) By persons whose original entries have failed because of the discovery subsequent to entry of obstacles which could not have been foreseen and which render it impracticable to cultivate the land, or because, subsequent to entry, the land becomes useless for agricultural purposes through no fault of the entryman. There is no specific statute authorizing the making of second entries in these classes of cases, and such entries are allowed under the general equitable power of the land department to grant relief in cases of accident and mistake.

(e) Any person who has already made final proof for less than 160 acres under the homestead laws may, if he is otherwise qualified, make a second or additional entry for such an amount of public land as will, when added to the amount for which he has already made proof, not exceed in the aggregate 160 acres. See, however, instructions under the enlarged homestead act (par. 52).

(f) Any person desiring to make a second entry must first select and inspect the lands he intends to enter and then make application therefor on blanks furnished by the Register and Receiver. Each application must state the date and number of the former entry and the land office at which it was made, or give the section, township, and range in which the land entered was located. Any person coming

within paragraphs (a), (b) or (e) above, must state the date when and how the former entry was perfected. Any person coming within paragraph (c) above, must show, by the oath of himself and some other person or persons, the time when his former entry was lost, forfeited or abandoned; that it was not canceled for fraud; and the consideration, if any, received for the abandonment or relinquishment.

Any person mentioned in paragraph (d) above must, in addition to the above evidence as to date and description of his former entry, date of abandonment, and receipt of consideration, show, by duly corroborated affidavit, the grounds on which he seeks relief, and that he used due diligence prior to entry to avoid any mistake.

(g) A person who has made and lost, forfeited or abandoned an entry of less than 160 acres is not entitled to make another entry unless he comes within paragraph (c) or (d) above. Such a person can not make another entry merely because his first entry contained less than 160 acres.

21. *If a homestead settler dies* before he makes entry, his widow has the exclusive right to enter the lands covered by his settlement. If there be no widow the right to enter the lands covered by the settlement passes to the persons who are named as heirs of the settler by the laws of the state in which the land lies. If there be no widow or heirs the right to enter the lands covered by the settlement passes to the person to whom the settler has devised his rights by a proper will; but a devisee of the claim will not be entitled to take when there is a widow or an heir of the settler. The persons to whom the settler's right of entry passes must make entry within the time named in paragraph 4 or they will forfeit their right to the next qualified applicant. They may, however, make entry after that time if no adverse claim has attached.

22. *If a homestead entryman dies before making final proof* his rights under his entry will pass to his widow; or if there be no widow, and the entryman's children are all minors, the right to a patent vests in them upon making publication of notice and proof of the death of the entryman without a surviving widow, that they are the only minor children and that there are no adult heirs of the entryman, or the land may be sold for the benefit of such minor children in the manner in which other lands belonging to minors are sold under the laws of the State or Territory in which the lands are located.

If the children of a deceased entryman are not all minors and his wife is dead, his rights under the entry pass to the persons who are his heirs under the laws of the State or Territory in which the lands are situated. If there be no widow or heirs of the entryman,

the rights under the entry pass to the person to whom the entryman has devised his rights by proper will, but a devisee of the entry will be entitled to take only in the event there is no widow or heir of the entryman.

25. *The residence and cultivation required by the homestead law* means a continuous maintenance of an actual home on the land entered, to the exclusion of a home elsewhere, and continuous annual cultivation of some portion of the land. A mere temporary sojourn on the land, followed by occasional visits to it once in six months or oftener, will not satisfy the requirements of the homestead law, and may result in the cancellation of the entry.

The law contemplates that the entryman make the land the home of himself and his family, and the failure of his family to reside on the land with him raises a presumption against the bona fides of his residence which must be rebutted at the time of proof.

26. *No specific amount of either cultivation or improvements* is required where entry is made under the general homestead law, but there must in all cases be such continuous improvement and such actual cultivation as will show the good faith of the entryman. Lands covered by such a homestead entry may be used for grazing purposes if they are more valuable for pasture than for cultivation to crops. When lands of this character are used for pasturage, actual grazing will be accepted in lieu of actual cultivation. The fact that lands covered by homesteads are of such a character that they can not be successfully cultivated or pastured will not be accepted as an excuse for failure to either cultivate or graze them.

Grazing can not be accepted in lieu of cultivation when entry is made under the enlarged homestead act. (See paragraph 51.)

*Homestead entries for coal lands.*—Where homestead entry is made under the act of June 22, 1910 (36 Stat., 583), for land which has been withdrawn or classified as coal land, or which is valuable for coal, the entryman must show improvements as above stated and must further comply with the requirements of the enlarged homestead act of February 19, 1909 (35 Stat., 639), as to residence and cultivation; that is, he must cultivate at least one-eighth of the area of the entry to agricultural crops other than native grasses, beginning with the second year of the entry, and at least one-fourth of the area of the entry beginning with the third year of the entry and continuing to the date of proof. Entries in this class can not be commuted. (See par. 51.)

27. *Actual residence on the lands entered must begin within six months* from the date of all homestead entries, except additional entries and adjoining farm entries of the character mentioned in paragraphs 14 and 15, and residence with improvements and annual



cultivation must be continued until the entry is five years old, except in cases hereafter mentioned; but all entrymen who actually resided upon and cultivated lands entered by them prior to making such entries and while the land was subject to settlement or entry by them, may make final proof at any time after entry when they can show five years' residence and cultivation.

An entryman can not claim credit for residence prior to entry during the time when the land was not subject to settlement or entry by him, as, for instance, while it was embraced in the entry of another.

Under certain circumstances, leaves of absence may be granted in the manner pointed out in paragraph 36 of these suggestions, but the entryman can not claim credit for residence during the time he is absent under such leave.

*An extension of time for establishing residence* can be granted only in cases where the entryman is actually prevented by climatic hindrances from establishing his residence within the required time. This extension can not be granted in advance; but on making final proof or in case a contest is instituted against the entry the entryman may show the storms, floods, blockades of snow or ice, or other climatic reasons which rendered it impossible for him to commence residence within six months from date of entry, and he must as soon as possible after the climatic hindrances disappear establish his residence on the land entered. Failure to establish residence within six months from date of entry will not necessarily result in a forfeiture of the entry, provided the residence be established prior to the intervention of an adverse claim.

*After an entryman has fully complied with the law* and has submitted proof he is no longer required to live on the land. But all entrymen should understand that if they discontinue their residence on the land prior to the issuance of patent they do so at their risk, and by so doing they may place themselves in such a position that they may be unable to comply with the requirements made by the General Land Office, should their proof on examination there be found unsatisfactory.

31. *Persons who make entry as the widow or heirs of settlers* are not required to both reside upon and cultivate the land entered by them, but they must at least cultivate the land entered by them for such a period as, added to the time during which the settler resided on and cultivated the land, will make the required period of five years. Commutation proof may, however, be made upon showing fourteen months' actual residence performed either by the settler or the heirs or widow, or in part by the settler and in part by the widow or heirs. In case of entries made under the enlarged home-

stead act cultivation as required by that act must be maintained by the widows or heirs. See paragraph 51. The above rules also apply to a devisee of the settlement claim in cases where a devisee is entitled to take.

32. *The widow or heirs of a homestead entryman* who dies before he earns patent are not required to both reside upon and cultivate the lands covered by his entry, but they must, within six months after the death of the entryman, begin cultivation on the land covered by the entry and continue same for such a period of time as will, when added to the time during which the entryman complied with the law, amount in the aggregate to the required period of five years. Commutation proof may be made showing fourteen months' actual residence performed by the entryman or by the widow or heirs, or in part by the entryman and in part by the widow or heirs. In case of an entry made under the enlarged homestead act cultivation as required by that act must be maintained by the widow or heirs. See paragraph 51. The above rules also apply to a devisee of the entry in cases where the devisee is entitled to take.

36. Leaves of absence for one year or less may be granted to entrymen who have established actual residence on the lands entered by them in all cases where total or partial failure or destruction of crops, sickness, or other unavoidable casualty has prevented the entryman from supporting himself and those dependent upon him by a cultivation of the land.

Applications for leaves of absence should be addressed to the register and receiver of the land office where the entry was made and should be sworn to by the applicant and some other disinterested person before such register and receiver or before some officer in the land district using a seal and authorized to administer oaths, except in cases where, through age, sickness, or extreme poverty, the entryman is unable to visit the district for that purpose, when the oath may be made outside of the land district. All applications of this kind should clearly set forth:

(a) The number and date of the entry, a description of the lands entered, the date of the establishment of his residence on the land, and the extent and character of the improvements and cultivation made by the applicant.

(b) The kind of crops which failed or were destroyed and the cause and extent of such failure or destruction.

(c) The kind and extent of the sickness, disease, or injury assigned, and the extent to which the entryman was prevented from continuing his residence upon the land, and, if practicable, a certificate signed by a reliable physician as to such sickness, disease, or injury, should be furnished.

(d) The character, cause, and extent of any unavoidable casualty which may be made the basis of the application.

(e) The dates from which and to which the leave of absence is requested.

An entryman can not claim credit for residence during the time he is absent under a leave of absence, but such a period of absence will not be held to break the continuity of his residence, that is, the period of residence preceding such an absence may be added to the period of residence succeeding such absence to make up the time required for either five year or commutation proof.

37. All original, second, and additional homestead, and adjoining farm entries may be commuted, except such entries as are made under particular laws which forbid their commutation.

Where there has been, immediately prior to the application to submit proof on a homestead entry, or immediately prior to the submission of proof, at least fourteen months' actual and substantially continuous residence, accompanied by improvement and cultivation, the entryman, or his widow or heirs may obtain patent by proving such residence, improvement and cultivation, and paying the cost of such proof, the land office fees, and the price of the land, which is \$1.25 per acre outside the limits of railroad grants, and \$2.50 per acre for lands within the granted limits, except as to certain lands which were opened under statutes requiring payment of a price different from that here mentioned. See circular of October 18, 1907 (Appendix No. 14).

*Commutation proof can not be made* on homestead entries allowed under the act of April 28, 1904 (33 Stat., 547), known as the Kinkaid act; entries under the Reclamation Act of June 17, 1902 (32 Stat., 388); entries under the enlarged homestead act (post par. 46 et seq.); entries allowed for coal lands under the act of June 22, 1910 (36 Stat., 583), so long as the land is withdrawn or classified as coal; additional entries allowed under the act of April 28, 1904 (33 Stat., 527, Appendix No. 4); second entries allowed under the act of June 5, 1900 (31 Stat., 267, Appendix No. 5); or second entries allowed under the act of May 22, 1902 (32 Stat., 203, Appendix No. 5), when the former entry was commuted.

39. *By whom proof may be offered.*—Final proof must be made by the entrymen themselves, or by their widows, heirs, or devisees, and can not be made by their agents, attorneys in fact, administrators, or executors, except in the cases hereinafter mentioned. In order to submit final five-year proof the entryman, his widow, or the heir or devisee submitting proof must be a citizen of the United States. As a general rule commutation proof may be submitted by one who has declared his or her intention to become a citizen, but on entries made

for land in certain reservations opened under special acts the person submitting commutation proof must be a citizen of the United States.

An entrywoman who marries after making an entry must, in submitting proof, show the citizenship of her husband, as she by her marriage, takes his status in respect to citizenship.

(a) If an entryman becomes insane after making his entry and establishing residence, patent will issue to the entryman on proof by his guardian or legal representative that the entryman had complied with the law up to the time his insanity began. In such a case if the entryman is an alien and has not been fully naturalized evidence of his declaration of intention to become a citizen is sufficient.

(b) Where entries have been made for minor orphan children of soldiers or sailors, proof may be offered by their guardian, if any, if the children are still minors at the time the proof should be made.

(c) When an entryman has abandoned the land covered by his entry and deserted his wife, she may make final or commutation proof as his agent, or, if his wife be dead and the entryman has deserted his minor children, they may make the same proof as his agent, and patent will issue in the name of the entryman.

(d) When an entryman dies leaving children, all of whom are minors, and both parents are dead, the executor or administrator of the entryman, or the guardian of the children, may, at any time within two years after the death of the surviving parent, sell the land for the benefit of the children by proper proceedings in the proper local court, and patent will issue to the purchaser; but if the land is not so sold patent will issue to the minors upon proof of death, heirship, and minority being made by such administrator or guardian.

47. *Designation of lands.*—From time to time lists designating the lands which are subject to entry under these acts are sent to the registers and receivers in the States affected, and they are instructed immediately upon the receipt of such lists to note the same upon their tract books. In the order designating land a date is fixed on which such designation will become effective. Until such date no applications to enter can be received and no entries allowed under these acts, but on or after the date fixed it is competent for the registers and receivers to dispose of applications for land designated under the provisions of these acts, in like manner as other applications for public lands.

The fact that lands have been designated as subject to entry is not conclusive as to the character of such lands, and should it afterwards develop that the land is not of the character contemplated by the above acts the designation may be canceled; but where an entry is

made in good faith under the provisions of these acts, such designation will not thereafter be modified to the injury of anyone who, in good faith, has acted upon such designation. Each entryman must furnish affidavit as required by section 2 of the acts.

53. *Constructive residence on certain lands in Utah.*—The sixth section of the act of February 19, 1909 (35 Stat., 639, Appendix No. 15), provides that not exceeding 2,000,000 acres of land in the State of Utah, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of that act; with the exception, however, that entrymen of such lands, will not be required to prove continuous residence thereon. This act provides, in such cases, that all entrymen must reside within such distance of the land entered as will enable them successfully to farm the same as required by the act; and no attempt will be made at this time to determine how far from the land an entryman will be allowed to reside, as it is believed that the proper determination of that question will depend upon the circumstances of each case.

Applications to enter under section 6 of this act will not be received until the date fixed in the order designating the lands as subject to entry under this section. Lists of lands designated under this section will be from time to time furnished to the registers and receivers, who will be instructed to note same on their tract books immediately upon their receipt. These lists will fix a date on which the designations will become effective. Applications under this section must be submitted on form number 4-003a.

Final proof under this section must be made as in ordinary homestead entries, except that proof of residence on the land will not be required, in lieu of which the entryman will be required to show that, from the date of entry until the time of making final proof, he resided within such distance from said land as enabled him to successfully farm the same. Such proof must also show that not less than one-eighth of the entire area of the land entered was cultivated during the second year, not less than one-fourth during the third year and not less than one-half during the fourth and fifth years after entry.

54. *Constructive residence permitted on certain lands in Idaho.*—The sixth section of the act of June 17, 1910 (36 Stat., 531), provides that not exceeding 320,000 acres of land in the State of Idaho, which do not have upon them sufficient water suitable for domestic purposes as will render continuous residence upon such lands possible, may be designated by the Secretary of the Interior as subject to entry under the provisions of this act, with the exception, however, that entrymen of such lands will not be required to prove continuous residence thereon. This section provides, in such cases, that after six months

from date of entry and until final proof, all entrymen must reside not more than 20 miles from the land entered, and be engaged personally in preparing the soil for seed, seeding, cultivating, and harvesting crops upon the land during the usual seasons for such work, unless prevented by sickness, or other unavoidable cause. It is further provided, that leaves of absence from the residence established under this section, may be granted upon the same terms and conditions as are required from other homestead entrymen.

Applications to enter under this section of this act will not be received before the date fixed in the order designating the land as subject to entry under this section. Lists of lands designated under this section will from time to time be furnished the registers and receivers who will be instructed to note the same on their tract books immediately upon their receipt. In the lists furnished the registers and receivers a date will be fixed on which the designation will become effective. Applications under this section must be submitted on form 4-003a.

### COOPER v. OREGON AND CALIFORNIA R. R. CO.

*Decided April 20, 1911.*

#### OREGON AND CALIFORNIA RAILROAD GRANT—PRE-EMPTION DECLARATORY STATEMENT FOR UNSURVEYED LAND.

A pre-emption declaratory statement covering unsurveyed lands, not refiled within the time required by the act of May 30, 1862, after survey of the lands, is not sufficient to except the lands from the grant to the Oregon and California Railroad Company made by the act of July 25, 1866.

*PIERCE, First Assistant Secretary:*

The Department has received your office letter of April 14, 1911, submitting for instructions the matter of the claim of the Oregon and California Railroad Company to the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 23, T. 28 S., R. 5 W., in the Roseburg, Oregon, land district.

It appears from your said letter that the lands described are within the primary limits of the grant made by the act of July 25, 1866 (14 Stat., 239), being opposite that portion of the road definitely located January 7, 1881, and said tracts were listed by the company May 15, 1890, per list No. 21, as inuring under the grant; that the lands are of the class known as unoffered lands and upon examination it was found that they were embraced in the preemption declaratory statements of C. A. Boyles, filed January 26, 1861, alleging settlement November 8, 1860, and F. Lawrence, filed June 24, 1858, alleging settlement June 15, 1858.

In view of the showing made by the records, your office, by decision of October 26, 1899, held that the declaratory statements, being of record and uncanceled and subsisting at the date of the grant to the company served to except the lands covered thereby from the grant, in view of which the company's listing of the tracts was held for cancellation. The company appealed and the Department on April 4, 1900, affirmed the decision of your office. No motion having been filed the decision was declared final by your office July 25, 1900, and the company's listing canceled.

February 23, 1911, the local land officers at Roseburg forwarded, without action, the application of Pliny E. Cooper to purchase said tracts under the act of March 3, 1887 (24 Stat., 556), in the event that the Department should hold upon reconsideration that the lands were excepted from the operation of the grant to the railroad company. In support of this application it is alleged that one Plinn Cooper, father of the applicant, purchased said tracts, with other lands, from the company in the year 1888, receiving a deed February 6, 1899; that ever since the purchase the purchaser has been in actual, open, notorious and adverse possession of the land, having the same under fence and using it as a part of his farm until about three months prior to this application, when he conveyed it to his son, Pliny E. Cooper, the present applicant, and that the latter did not learn of the cancellation of the company's listing or the Department's decision holding the land excepted from the grant until about February 11, 1911.

It is further shown that under date of April 4, of this year, the resident attorney for the company called attention to the pending application of Cooper and stated that the filings which were held to except the land from the company's grant were for unsurveyed lands and for that reason a mere nullity and did not except the land from the operation of the grant; in view of which, counsel for the company requested that the decisions canceling the company's listing be recalled and vacated.

It is further stated in your letter that upon examination it is found that the greater portion of the township in which these two tracts are situated was surveyed in 1853, as shown by a plat approved September 9 of that year, but that the portion of the township in which section 23 is located was not surveyed until July, 1871, as shown by the plat approved March 26, 1872, and that, therefore, at the time the preemption declaratory statements were filed the land covered thereby was unsurveyed.

Your office letter states that in view of the Department's decision ordering the cancellation of the company's listing and holding the lands were excepted from the grant, your office no longer has juris-

diction, and it is recommended that the decisions referred to, in which it was held that the land was excepted from the grant to the company, be vacated, and that the application of Cooper to purchase said tracts under the act of 1887 be rejected without prejudice to his right to renew his application, if it should be eventually determined that the land does not pass under the grant.

That portion of the act of May 30, 1862 (12 Stat., 410), incorporated in the Revised Statutes as section 2266, provided that in regard to settlements which were authorized upon unsurveyed lands the preemption claimant shall in all cases be required to file his declaratory statement within three months of the date of the receipt at the district land office of the approved plat of the township embracing such preemption settlement. The land department has recognized the right of a preemptor to settle on unsurveyed lands, but declaratory statements are not allowed to be filed until after the lands are surveyed.

The act of 1866, making the grant to the California and Oregon Railroad Company, provides that where any of the granted sections, or parts of sections, shall be found to have been "granted, sold, reserved, occupied by homestead settlers, preempted, or otherwise disposed of, other lands" shall be selected by the company in lieu thereof. This provision evidently had reference to legal preemptions, and inasmuch as the preemption declaratory statements filed by Boyles and Lawrence in this case were filed before the lands were surveyed and were not refiled after the lands were surveyed, and within the time required by the act of 1862, it follows that they did not serve to except the lands covered thereby from the operation of the grant to the railroad company.

The Department's decision of April 4, 1900, is accordingly vacated and your office authorized to dispose of the case in accordance with the views expressed herein.

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#### RECLAMATION—NORTH PLATTE PROJECT—WATER SUPPLY.

##### ORDER.

##### DEPARTMENT OF THE INTERIOR,

*Washington, April 21, 1911.*

1. Pending the issue of the public notice under the terms of the Reclamation Act of June 17, 1902, announcing the limitations, charges, terms and conditions, under which water will be furnished to lands in the third lateral district, North Platte Project, Nebraska-Wyoming, and as preliminary to the issue of such public notice, it is hereby ordered that water be furnished to lands in said district, as



shown on plats approved March 10, 1911, for the irrigation seasons of 1911 and 1912, without charge for operation and maintenance, in pursuance of the plans heretofore adopted as the result of contract with the water users' association.

2. The public notice fixing the building charge and times of payment will be issued during the current year and the first installment of the charges will become due on December 1, 1911.

FRANK PIERCE,  
*Acting Secretary of the Interior.*

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### RECLAMATION—TRUCKEE-CARSON PROJECT—PAYMENT.

#### ORDER.

DEPARTMENT OF THE INTERIOR,  
*Washington, April 22, 1911.*

1. In pursuance of the act of Congress approved February 13, 1911 (Public—No. 353), entitled "An act to authorize the Secretary of the Interior to withdraw public notices issued under section four of the Reclamation Act, and for other purposes," the terms and conditions of the public notice issued May 6, 1907, for lands irrigable under the Truckee-Carson Project, Nevada, constructed in pursuance of the Reclamation Act of June 17, 1902 (32 Stat., 388), and of all orders and notices amendatory thereof or supplementary thereto, in so far as the same relate to the time when installments shall be due and payable for lands hereinafter designated, are hereby modified as follows:

2. For all water-right applications, whether for public or private lands, filed on and after June 15, 1907, and prior to January 1, 1908, the date when the first installment of the charges for building, operation and maintenance became due is hereby advanced to December 1, 1908; the second and third installments of such charges are hereby advanced to December 1, 1909, and December 1, 1910, respectively. The installments of said charges for subsequent years shall be due on December 1 of each subsequent year.

3. The terms and conditions of public notice issued May 6, 1907, and of all orders and notices amendatory thereof or supplementary thereto shall remain in full force and effect except as modified herein.

4. The payments heretofore made on account of operation and maintenance charges for the lands affected shall be adjusted in accordance with the provisions of this order.

WALTER L. FISHER,  
*Secretary of the Interior.*

**WILLIAM W. FRY.**

*Decided April 22, 1911.*

**SOLDIERS' ADDITIONAL RIGHT—ADVERSE CLAIMANTS—JURISDICTION.**

An application to locate a soldiers' additional right by one claiming to be assignee thereof will not be allowed in the face of a certificate covering the same right known by the land department to be in existence and held and claimed adversely to the applicant; nor may the holder of such certificate be required by the land department to show how he came into possession of and by what authority he is claiming the same, or to defend his title thereto, until such time as he may apply to locate the right.

**PIERCE, *First Assistant Secretary:***

William W. Fry, alleged assignee by mesne conveyances of the soldiers' additional homestead right of Jesse G. Barrick, appealed from a decision of the Commissioner of the General Land Office, November 4, 1910, denying his application under section 2306 of the Revised Statutes to enter forty acres of land, being the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 14, T. 32 S., R. 6 W., Roseburg land district, Oregon.

A certificate of additional right for eighty acres of land issued to the said Jesse G. Barrick, the soldier, April 16, 1883, upon the application of one W. E. Chidester, of Alexandria, Minnesota, and was transmitted to Chidester at that time.

Fry's application was filed in the local land office at Roseburg, April 19, 1909. He claims under assignment from one D. N. Clark, April 12, 1909, Clark claiming to be the owner of the right by assignment from Barrick, March 29, 1907. This claim, in a different form, has heretofore been the subject of numerous decisions by the land department upon the application of Clark for a recertification of the right. A recitation of those proceedings in detail would be supererogatory. For the purposes of this decision it will be enough to say that such application was denied at one time because of insufficient evidence of loss of the original certificate, and at another time because one C. F. Chisholm, of Garrett Park, Maryland, had, during the course of the proceedings, exhibited the original certificate in the General Land Office. Said proceedings also involved the application by Clark for a rule against Chisholm to show by what right he claims this certificate and in what manner he came into possession of it; but this application was also finally denied by departmental decision of August 7, 1908, upon the ground of want of jurisdiction and authority of the land department to try the issue, there being no application to enter public lands in satisfaction of the right.

The application now in question was apparently made pursuant to this suggestion, and it is urged with much earnestness that the Department not only has now jurisdiction and authority to determine the ownership of the right, but that in equity and good conscience this should be done.

This presents a many-sided question, but the contention, while forceful from the viewpoint of the applicant, can not be successfully maintained. It is incumbent upon an applicant to enter public lands of the United States to submit to the land department sufficient evidence of his right to do so. He must not only show that he is qualified to make entry, but if he relies upon a statutory right by assignment, he must show affirmatively that he took title thereby and that he has not been divested of the same. Of course, the mere suggestion of adverse claim in another to the right which he seeks to exercise, unsupported by proof, would not authorize a rejection of his claim; but such is not this case.

In the first place, the government, through the land department, has issued its certificate, which is the highest and best evidence of the right; that certificate was not only evidence of title but its assignment, if regular, operated as a deed of conveyance. In the hands of an innocent purchaser, for value, it was validated by the act of August 18, 1894 (28 Stat., 372, 397), and such validation conferred ownership upon the holder thereof. Now it is known to the land department that the certificate in question is outstanding. It is not known who is the owner thereof. Being in the hands of Chisholm, it *prima facie* belongs to him. If it does not belong to him, unless it was stolen from Barrick or converted in breach of trust, the property right therein belongs to some one other than Fry. It seems to have been properly delivered to Chidester, and Fry does not claim title to the right through Chidester. If Chidester had the legal right to dispose of the certificate he may have done so. If he was acting only as the agent of Barrick and delivered it to him upon failure of negotiations pending between them, then it may be that Barrick sold or assigned it to some one and that it came properly into the hands of Chisholm. This certificate, therefore, *prima facie* would seem to belong to some one not in privity with Fry, and if this be established Fry's title fails. At any rate, the exhibition of the certificate by Chisholm was in the nature of a caveat and a proper regard for the interests of the United States will not permit the warning thereby given to be ignored.

It is evident that this raises a question which the land department has no adequate machinery to try out. Neither has it authority to do so, if such course were desirable from the standpoint of the government. It is immaterial whether rights under this certificate are claimed by Chisholm or by a stranger. Such person, whoever he may be, is not limited in time as to the assertion of that right. Under existing law, so long as there is public land subject to such location he may exercise it, and he does not have to defend his claim thereto before the land department, because some one else claims the right of additional entry through assignment from the soldier. The

allowance of other claim, though intended in satisfaction of the soldier's right, would in nowise impair his right under the certificate, and laches in the assertion of such right may not be imputed.

Under what theory, therefore, may he be required to answer before the land department the claim of another, when his claim may not be put in issue until he chooses to assert it?

In view of the pertinacity with which the Clark-Fry claim has been urged, and because of informal representation as to certain suggested irregularities involved in the possession of this certificate by a man not named in this record, who, it is said, delivered the certificate to Chisholm, it is suggested that Fry file a bill in a court of competent jurisdiction, setting up his ownership of the right in question, the cloud cast upon the title thereto by Chisholm's alleged possession and ownership of the certificate, and asking the court for a decree quieting title. Such a decree, when rendered, would enable the land department to deal with the proper party and protect the interests of the United States.

The decision appealed from is affirmed.

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### NEWTON DEXTER BURCH.

*Decided April 26, 1911.*

#### ROSEBUD INDIAN LANDS—SOLDIERS' ADDITIONAL RIGHT.

Lands in the former Rosebud Indian reservation opened by proclamation of August 24, 1908, under the act of March 2, 1907, to disposal under the general provisions of the homestead and townsite laws, are not subject to appropriation by location of soldiers' additional right.

#### PIERCE, *First Assistant Secretary:*

Newton Dexter Burch has filed appeal from decisions of January 18, 1911, by the Commissioner of the General Land Office, holding for cancellation the final certificate and rejecting his several applications filed on or about October 8, 1909, under sections 2306 and 2307, R. S., for the different subdivisions of the SW.  $\frac{1}{4}$  of Sec. 27, T. 101 N., R. 76 W., 5th P. M., containing 160 acres, Gregory, South Dakota, land district. The said tracts are a part of the former Rosebud Indian Reservation, opened by proclamation of the President, dated August 24, 1908 (37 L. D., 122), under the act of March 2, 1907 (34 Stat., 1230). The applications are based upon a number of assignments of alleged additional rights under sections 2306 and 2307, R. S.

Said lands were opened in accordance with the proclamation by a drawing for numbers, and the right of entry accorded in the order of numbers drawn. Robert R. Hedtke drew No. 457, and made

homestead entry in the manner prescribed thereunder. It appears that the Commissioner, responding to an inquiry made in Hedtke's interest, stated in a letter dated April 23, 1909, as follows:

That any person holding a number entitling him to make entry of Tripp County, South Dakota, lands, prior to October 1 next, may make a soldiers' additional entry of the land by paying the Indian price of six dollars per acre, if the entry is made before May 3, or four dollars and fifty cents per acre, if the entry is made after September 8. Under an entry of this kind, the entryman would not be required to reside on the land.

If an entryman has already made an ordinary homestead entry for Tripp County lands, he may, after September 30, relinquish his entry and make a soldiers' additional entry of the same land, but he would forfeit the payment made under his former entry, and be required to pay six dollars an acre for the land, if the former entry was made prior to September 8, 1909, or four dollars and fifty cents an acre, if it was made after that date.

In accordance with the above instructions Hedtke relinquished his homestead entry and procured soldiers' additional rights and caused same to be located upon said lands by Burch. Hedtke, it is stated, was not able to appear personally at the land office to file the additional rights because of the serious illness of his wife and he procured Burch as his agent and attorney to make the filings in his own name, and Burch, it appears, on the same day conveyed the lands by quit-claim deed to Hedtke, who is, therefore, the real party, in interest.

The local officers accepted payment of the full Indian price for the lands and issued final certificate upon the applications. The action of the local officers was irregular as a matter of procedure as the regulations require that such applications be submitted to the Commissioner for consideration before allowance. The Commissioner in his decisions referred to said irregularity but the rejection of the applications was based upon the view that said lands were not subject to entry with such additional rights. The act under which the lands were opened to entry reads in part as follows:

That the land shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation. . . . *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged.

That the price of said lands entered as homesteads under the provisions of this act shall be as follows: Upon all land entered or filed upon within three months after the same shall be opened for settlement and entry, six dollars

per acre. . . . One-fifth of the purchase price to be paid in cash at the time of the entry, and the balance in five equal annual installments, to be paid in one, two, three, four and five years, respectively, from and after the date of entry. . . . In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law, where the price of the land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered.

It clearly appears from the language used in said act that actual residence was contemplated, and this requirement, together with the annual installments to be paid by the entryman, constitute conditions not compatible with the assignable right to make entry under section 2306, R. S., as defined in the case of *Luther v. Webster* (163 U. S., 131). The provisions of said section were not made applicable to this land by said act although sections 2304 and 2305, conferring benefits to soldiers, were specifically mentioned and made applicable. This omission of reference to section 2306 would indicate that Congress did not intend to extend the provisions thereof to the lands in question, and this conclusion is strengthened and emphasized by the conditions imposed as above stated. See case of *William M. Wooldrige* (33 L. D., 525).

However, in view of the fact that the claimant was instructed as above shown, that he could relinquish his homestead entry and perfect his claim to the land under section 2306 R. S., and as said instructions appear to represent the practice obtaining in the land office at that time and claimant has acted in accordance with same, the final certificate will be allowed to stand if the applications are found in other respects proper and sufficient, and if in any way defective, the claimant should be allowed to cure the defect. This is in accordance with the principles of equity as applied in the case of *Roy McDonald et al.* (36 L. D., 205).

The decisions appealed from are modified accordingly and the case is remanded for further consideration as indicated herein.

#### CHEYENNE RIVER AND STANDING ROCK INDIAN LANDS.<sup>a</sup>

*February 7, 1910.*

SIR: Because of the present unusual climatic conditions, it is respectfully recommended that the date on which the Cheyenne River and Standing Rock lands are to become subject to entry under the proclamation of August 19, 1909 [38 L. D., 157], be extended from April 1, 1910, to May 1, 1910.

<sup>a</sup> Omitted from Volume 38.

It is further recommended that all persons to whom numbers were assigned under that proclamation be permitted to select the tracts they desire, at Aberdeen, South Dakota, from the whole body of lands subject to entry on such dates after April 30, 1910, as may be assigned them for that purpose; and further that all persons who fail to enter tracts so selected within ten days after such selection shall forfeit their right to make entry under the numbers assigned to them.

It is also further recommended, that all of said lands which have not been entered prior to November 1, 1910, by persons to whom numbers have been assigned, shall, on and after that date, be subject to settlement and entry under the act approved May 29, 1908 (35 Stat., 460), by any qualified applicants.

Very respectfully,

THE PRESIDENT,  
*White House.*

R. A. BALLINGER, *Secretary.*

WM. H. TAFT

Approved February 8, 1910.

#### COEUR D'ALENE AND FLATHEAD INDIAN LANDS.\*

*February 23, 1910.*

SIR: Because of the unexpected delays in the completion of classifications and appraisements and other preliminary arrangements, it is respectfully recommended that the date for the opening of Coeur d'Alene and Flathead lands under the Proclamation of May 22, 1909 [37 L. D., 698], be extended from April 1 to May 2, 1910.

It is also recommended that all persons to whom numbers have been assigned under said proclamation be permitted to select the tracts they desire to enter, at the land office for the district in which they make their selections on such date after May 1, 1910, as may be severally assigned to them for that purpose; and, further, that all persons who fail to enter the tracts they select, within ten days after their selections, shall forfeit all rights under the numbers so assigned.

It is also further recommended that all lands subdivided into farm units in the Flathead Reservation under the act of May 29, 1908 (35 Stat., 444), shall be subject to entry by persons to whom numbers have been assigned under said proclamation subject to the charges, terms, and conditions of that act.

It is also further recommended that all the Coeur d'Alene and Flathead lands subject to entry under said proclamation, which have not been entered prior to November 1, 1910, by persons to

\* Omitted from volume 38.

whom numbers have been assigned, shall on and after that date be subject to settlement and entry under the provisions of the acts of Congress relating thereto, by any qualified applicant.

Very respectfully,

R. A. BALLINGER, *Secretary.*

THE PRESIDENT,  
*White House.*

WM. H. TAFT.

Approved February 26, 1910.

## CHEYENNE AND ARAPAHOE LANDS—ACT OF JUNE 17, 1910.

### REGULATIONS.<sup>a</sup>

DEPARTMENT OF THE INTERIOR,  
*Washington, July 5, 1910.*

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Pursuant to the Proclamation issued July 1, 1910, the lands enumerated in the attached schedule<sup>b</sup> will be sold at public auction at the city of El Reno, Oklahoma, beginning Tuesday, November 15, 1910, under the provisions of the act of Congress approved June 17, 1910 (Public—No. 215; 36 Stat., 533), and in accordance with the following regulations.

2. *Area in which lands will be offered.* These lands will be offered for sale under the supervision of Jas. W. Witten, Superintendent of the Opening and Sale of Indian Lands, by legal subdivisions in tracts embracing approximately eighty acres each in the order in which said tracts are numbered in the attached schedules, and no person will be permitted to purchase or enter more than one tract.

3. *The method of making bids.* Bids may be made either through agents or in person by any person qualified to make entry under the homestead laws, but no bid of less than five dollars per acre from the first bidder on any tract or of less than ten cents per acre after the first bid will be considered or accepted; and no bid can be made through the mails or at any time or place other than the time and place at which the lands are offered for sale.

4. *Entries, payments, and forfeitures.* All successful bidders must present their applications to make homestead entries for the tracts awarded them and pay one-fifth of the total amount of their bids therefor and the usual homestead fees and commissions, at the United States Land Office at El Reno, Oklahoma, within two days after the

<sup>a</sup> Omitted from volume 39.

<sup>b</sup> Schedule omitted.



tracts are awarded to them; and the balance of the purchase price must be paid in six equal annual instalments, but any and all instalments may be paid before they become due. If any bidder fails to make his first payment and present his application to enter within the prescribed time, all right secured under his bid will be forfeited and he will not thereafter be permitted to bid on or purchase and enter any other tract; and, if any entryman fails to pay any annual instalment when it becomes due or fails to comply with the requirements of the homestead laws as to residence and cultivation, all former payments made by him will be forfeited and his entry and all rights thereunder will be forfeited and canceled.

5. *Lands re-offered.* All tracts awarded to persons who fail to make entry and payment therefor within the proper time, and all tracts not sold when first offered, will be re-offered on the fourth day after all the tracts have been once offered or at such other time as the superintendent of the sale shall designate.

6. *Filings and entries by soldiers and sailors.* All successful bidders who were honorably discharged after at least ninety days' service in the army, navy, or marine corps of the United States during the Civil War, the Spanish-American War, or the Philippine Insurrection may file declaratory statements either in person or through duly qualified agents, for the tracts awarded them, within two days after their awards are made, or they may within that time make entry in person, but not through agents. At the time declaratory statements are filed, one-fifth of the amount bid and the usual fees must be paid; and the persons by or for whom they are filed must make entry and begin residence on the land within six months from the date on which their declaratory statements are accepted.

7. *Residence, cultivation, and patents.* All persons who make entry must within six months after the date on which their entries are allowed, establish their actual homes on the land entered, to the exclusion of a home elsewhere, and thereafter they must continuously reside upon, improve, and cultivate the land for five years; or they may, after fourteen months' actual and continuous residence and cultivation, make payment of all the unpaid instalments of purchase money and obtain patent to the land. Former soldiers and sailors who make entry may, after residing upon the lands for at least one year, claim credit on the five-year residence period for the time of their military or naval service.

8. *Relinquishments and cancellations.* When an entry embracing any of these lands is canceled either on relinquishment or otherwise, the land will not become subject to entry by other persons but will be held for future disposal in such manner as may hereafter be prescribed.

9. *Warning against combinations, etc.* All persons are warned against entering into any conspiracy, contract, agreement, or understanding with other persons, or from doing any other act which will in any way tend to prevent competitive bidding or in any other manner interfere with the orderly and successful conducting of the sale; and all persons so offending will be prosecuted under Sec. 2373, Revised Statutes of the United States, which reads as follows:

Every person, who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation, combination, or unfair management, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.

10. The Superintendent of the sale will be authorized to reject any and all bids and to adjourn the sale to any other time or place which in his judgment may seem best, and he may prescribe rules for the conduct of the sale which are not in conflict with these regulations.

Very respectfully,

R. A. BALLINGER,  
*Secretary.*

## RECLAMATION—LOWER YELLOWSTONE PROJECT—PAYMENTS.

### ORDER.

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., May 1, 1911.*

In pursuance of the provisions of the act of June 17, 1902 (32 Stat., 388), known as the reclamation act, and the act of February 13, 1911 (Pub. No. 353), authorizing the withdrawal and modification of public notices issued under the reclamation act for the Lower Yellowstone Project, Montana-North Dakota, and for the purpose of obtaining a definite expression of the views of the water users regarding a modification or abrogation of the water-right applications heretofore filed and a modification of the contract heretofore made with the Lower Yellowstone Water Users' Association, the following order is issued:

1. For the purpose of carrying out an adjustment of the building charge in conformity with offers suggested by the water users individually and by representatives of the water users' association, it is proposed to issue a public notice fixing a building charge of \$45 per acre payable in graduated instalments beginning in 1913 under the conditions hereinafter stated: *Provided*, That it is shown to the sat-

isfaction of the Secretary of the Interior that the owners of at least 80 per cent of the irrigable land now subject to the filing of water-right applications under the project shall file with the project engineer at Glendive, Montana, water-right applications at \$45 per acre and make payment to the Special Fiscal Agent of the Reclamation Service for the project of 25 cents per acre on account of the operation and maintenance charge of \$1.50 per acre fixed for the year 1911, the balance of said charge, namely, \$1.25 per acre, to be payable on or before December 1, 1911. Such water-right applications and payments shall not become binding upon the Government until water-right applications with corresponding payments for 80 per cent of the land have been made as aforesaid. In case such per cent of water-right applications with accompanying payments shall not have been made on or before May 24, 1911, the conditions herein proposed may be withdrawn, in which case all water-right applications and payments will be returned to the applicants, and all entrymen and landowners on the project shall remain subject to the existing public notices and orders.

2. If the required per cent of applications and corresponding payments are made as herein provided on or before May 24, 1911, and the water users' association shall thereupon adopt amendments (in form approved by the Secretary of the Interior) to the contract dated October 25, 1905, now existing between the association and the United States so as to put into effect the conditions hereof, the Secretary of the Interior will thereafter issue a public notice making effective the conditions hereof and accepting such water-right applications and payments, which will then be transmitted to the local land office.

3. The building charge for the project shall be fixed at \$45 per acre payable in not more than 10 annual instalments, the first of which shall be due December 1, 1913, and shall be \$2 per acre. The subsequent instalments shall be due on December 1 of subsequent years, graduated so that the total payment of \$45 shall be made in 10 years and shall be due as follows:

December 1, 1913.....	\$2.00
December 1, 1914.....	\$4.50
December 1, 1915.....	\$4.50
December 1, 1916.....	\$4.50
December 1, 1917.....	\$4.50
December 1, 1918.....	\$4.50
December 1, 1919.....	\$4.50
December 1, 1920.....	\$4.50
December 1, 1921.....	\$4.50
December 1, 1922.....	\$7.00

As heretofore provided full payment of the charges may be made at any time upon compliance with the provisions of the reclamation

act as provided in public notices heretofore issued. All water-right applicants who have heretofore made payment on the building charge shall receive corresponding deductions from their future building charge payments.

4. The operation and maintenance charge for 1911 shall be \$1.50 per acre, 25 cents per acre of which shall be paid on or before May 24, 1911, at the time of filing new water-right applications, and the remainder on or before December 1, 1911. For 1912 the operation and maintenance charge shall be \$2.50 per acre of which 50 cents per acre shall be payable on or before April 1, 1912, and the remainder of \$2 on or before December 1, 1912. The charge for operation and maintenance for 1913 and subsequent years shall be hereafter announced.

5. All entrymen or owners of lands to be covered by gravity extensions of the project may obtain the benefit of the building charge of \$45 per acre payable in graduated instalments as herein provided with such charges for operation and maintenance as may be hereafter fixed, by becoming members of the water users' association and pledging their lands for the repayment of the charges, making payments to the water users' association of the necessary amounts to cover all assessments or calls made by the association and due at the time of filing stock subscriptions, and filing certificate of the secretary of the water users' association to this effect in the office of the project engineer on or before May 24, 1911.

6. In case of the issue of public notice as herein provided, the benefits thereof will not be extended to those who have not complied with the terms hereof, but they shall become subject to the terms of such notices as may be thereafter issued, which will provide for a further increase in the charges.

WALTER L. FISHER,  
*Secretary of the Interior.*

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WILLIAM C. McDONALD.

*Decided May 2, 1911.*

SOLDIERS' ADDITIONAL—WIDOW—BASIS OF RIGHT.

The death of a soldier who while in the military service executed an affidavit under the provisions of the act of March 21, 1864, authorizing another as his representative to make homestead entry for his benefit, operates to revoke the authority, and an entry thereafter allowed upon such authorization is null and void and does not constitute a basis for an additional right under section 2307 of the Revised Statutes.

PIERCE, *First Assistant Secretary:*

The assignee in the above entitled case has appealed from a decision of the General Land Office of January 27, 1911, rejecting his

application to enter under the provisions of section 2307, Revised Statutes, the NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 3, T. 8 S., R. 10 E., N. M. P. M., Roswell, New Mexico, land district, by assignment of the supposed right of Julia E. Revere Phillips, as widow of William H. Revere, Jr., based on service of not less than 90 days in the United States Army between May 7, 1861, and September 20, 1865, and on a homestead entry made in the name of said Revere November 18, 1865, at the St. Cloud, Michigan, land office, for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and lots 7 and 8, Sec. 7, T. 129 N., R. 38 W., canceled for abandonment July 15, 1870.

It is shown in evidence that the soldier died in the service September 20, 1865, leaving a widow and an infant son. The latter died two months afterward. The widow remarried January 8, 1890, to Joseph L. Phillips, who died on the 16th of the same month. The assignment, by Julia E. Revere Phillips, of a right to make the additional homestead entry is dated January 8, 1909.

In the decision appealed from the General Land Office refused to recognize this assignment and rejected the application to make entry on the ground that by reason of her remarriage Mrs. Phillips had lost her right, as widow, to the benefits of section 2307, Revised Statutes, but it was held further that the pending assignment could be regarded, and would be accepted, as having been made by her as the heir of the soldier if satisfactory proof be furnished of her being his sole and only heir.

The Department has heretofore decided that the right conferred on the widow of a soldier-entryman by section 2307, Revised Statutes, can be exercised by her during widowhood only and if not so appropriated before her remarriage or death, and no minor orphan child is entitled to succeed to such right, it remains an asset of the soldier's estate, subject to disposition as other personal property. Allen Laughlin (31 L. D., 256); Isabelle L. Thompson (38 L. D., 340); Warren W. Williams (39 L. D., 108).

It appears, however, that the original entry was not made at the St. Cloud office until after the death of the soldier. This entry was made pursuant to the act of March 21, 1864 (13 Stat., 35), and was based upon an affidavit made by William H. Revere, Jr., September 9, 1865, at which time he was in the military service of the United States, in which affidavit he authorized F. A. Conwell, as his representative, to designate the tract selected for his homestead. Said affidavit could only become effective when filed with the register of the land office, November 18, 1865, prior to which date, namely on September 20, 1865, the death of the soldier had occurred.

The power given to Conwell was a naked power—not coupled with an interest in the land to be entered—and it therefore terminated with the death of Revere. *Hunt v. Rousmanier* (8 Wheat.,

172, 203). In the case of *Galt v. Galloway* (4 Pet., 344), the court said:

The question is presented whether the decease of the owner of the warrant puts an end to the power of the locator. No principle is better settled than that the powers of an agent cease on the death of his principal. If any act of agency be done subsequent to the death of the principal, though his death be unknown to the agent, the act is void.

And in *McDonald's Heirs v. Smalley* (6 Pet., 260), citing *Galt v. Galloway*, it was held that an entry made in the name of a person who had died prior thereto was a nullity.

On the date entry was made in the present case the affidavit was of no effect for such purpose and the authority of Conwell as agent to make the entry had terminated by reason of the death of his principal, Revere. The entry was, therefore, null and void and cannot be made the basis of an additional entry under section 2307, Revised Statutes, under the assignment here under consideration or under any assignment by an heir of the soldier. The purpose in the Commissioner's decision to regard the assignment as having been made by Mrs. Phillips as the heir of the soldier, on proof that she is the sole heir, is not concurred in. For the reasons stated the application to make the additional entry must be rejected.

As herein modified the decision appealed from is hereby affirmed.

### NORTHERN PACIFIC RY. CO.

*Decided May 3, 1911.*

#### NORTHERN PACIFIC SELECTION—ACT OF MARCH 2, 1899—CLASSIFICATION.

Only lands in fact nonmineral and classified as such at the time of the government survey are subject to selection by the Northern Pacific Railway Company under the act of March 2, 1899; and the land department is without authority to permit selection of lands not so classified, even though they may in fact be non-mineral.

*PIERCE, First Assistant Secretary:*

This is the appeal of the Northern Pacific Railway Company from the decision of the Commissioner of the General Land Office, dated February 3, 1911, holding for cancellation the company's lists of selections, presented under the act of March 2, 1899 (30 Stat., 993), embracing 160 acres in Sec. 6, T. 37 N., R. 9 E., and some 3400 acres in Secs. 6, 8, 14, 18, 20, 24, 30 and 32, in R. 38 N., R. 9 E., Lewiston, Idaho, land district.

It appears that the selections were presented by the company on November 17, 1902, and March 14, 1903, per lists Nos. 47 and 48, respectively; that the lands were surveyed in the years 1906 and 1907, the official plats being filed in the local office on July 1, and 26,

1909; whereupon the company presented rearranged lists of the lands selected, describing the tracts conformably to the plats of survey, as provided by section four of the act of March 2, 1899, *supra*.

By section three of said act of March 2, 1899, the company, in lieu of lands relinquished by it in the Pacific Forest Reserve, was authorized to select "an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States, not reserved," etc.

The report of the surveyor on township 38 N., R. 9 E., contains the following statement:

This township is very mountainous and covered with heavy timber and dense undergrowth . . . . There is no agricultural land in this township, with the exception of two small bottoms along the north fork of Clearwater river, probably not exceeding a quarter section in area . . . . Some mineral indications are found in all parts of the township.

The report on township 37 N., R. 9 E., contains the following:

This township is very mountainous and covered with heavy timber and dense undergrowth . . . . There is practically no agricultural land in this township, there being only small bottoms along Weitas Creek, and a small meadow situated in Sec. 11, and known as Crayer Meadow, but which is so high as to be valueless . . . . There are mineral indications throughout the township.

The Commissioner holds in his decision that while the surveyor does not specifically designate any particular tract in the townships as mineral land, yet, in view of the surveyor's report that there are mineral indications found in all parts of the townships the lands can hardly be considered as having been classified as nonmineral, and inasmuch as they were not so classified he was forced to the conclusion that the lands were not of the character contemplated by the act as subject to selection by the company.

It is urged in the appeal that the report of the surveyor on these two townships was under the departmental rules and practically a nonmineral return, and the decisions relied upon in support of that contention are those rendered by the Department in the cases of *Davenport v. Northern Pacific* (32 L. D., 28); *State of Idaho v. Northern Pacific* (37 L. D., 135); *Bedal v. St. Paul, Minneapolis & Manitoba Ry. Co.* (29 L. D., 254); and *St. Paul, Minneapolis & Manitoba Ry. Co.* (34 L. D., 211).

Inasmuch as in each of the cases cited, except that of *Davenport v. Northern Pacific Ry. Co.*, it was expressly stated that the surveyor returned the lands as nonmineral, it is unnecessary to discuss or further consider those cases.

The case of *Davenport v. Northern Pacific Railway Company*, however, is somewhat in line, inasmuch as there was some room for

question as to whether or not the surveyor's return was mineral or nonmineral.

In the Davenport case it was said:

Nor does the phrase "so classified as nonmineral at the time of the actual government survey," as the same is employed in section three, refer only to lands which the survey affirmatively states or shows as nonmineral. It is the uniform custom in surveying public lands to make in the field notes and surveyor's return, notation of mines, outcroppings and evidences of valuable mineral deposits where found, and to say nothing upon the subject of minerals where no mining, outcroppings, or evidences of valuable mineral deposits are found. When therefore, the field notes and surveyor's return make no notation of mineral in the land being surveyed, such lands are considered and treated as given a nonmineral classification by the surveyor.

In the surveyor's return in the case cited it was stated that the township is largely broken and rough; that the northern part contains some fine coal land lying in the basin at or near the head of Bear Creek; that no mineral except coal has been discovered in the township; that the southeast quarter of section 8 contained a coal mine with a five-and-a-half-foot vein of good coal which dipped to the southwest quarter 9 degrees, 30 minutes, upon which a drift had been run 150 feet, and that also in the northeast quarter of section 7 there was a six-foot vein of the same quality which dipped 8 degrees to the southwest, on which there was a drift of 100 feet. The Department held that that statement in the surveyor's return was not a mineral classification of the southeast quarter of section 19, the tract involved, at the time of the survey of the township.

It will be seen that in the Davenport case the surveyor not only stated that there was some coal land in the township but he specifically located the same; while, on the other hand, he expressly stated that there had been no discovery of any other mineral than coal. This, in effect, was, in accordance with the well-established rules of the Department, a nonmineral classification of all land not mentioned as containing mineral. In the surveyor's return on the townships involved herein, however, it was stated in the one case that there are mineral indications throughout the township, while in the other case that some mineral indications are found in all parts of the township. This certainly was not a classification of the lands in any part of the township as mineral, within the meaning of the act of 1899.

It is true that the lands selected by the company may not in fact be mineral, but under the terms of the act which authorizes the company to select lands in satisfaction of those relinquished by it it is not believed that the Department can inquire into the question as to whether or not the lands are mineral where they are not classified as nonmineral by the return of the surveyor.

Having under consideration this act of 1899, the Circuit Court of Appeals for the Ninth Circuit held that the words "public lands,"



as used in the clause of the law quoted above, were qualified by the adjective "nonmineral" which precedes them as well as by the phrase "so classified as nonmineral at the time of the actual government survey, which has been or shall be made," which follows them. (Northern Pacific Railway Company *et al.* v. United States (176 Fed. Rep., 706.) In other words, that the lands authorized by Congress to be taken by the railway company must not only be in fact nonmineral but must also have been classified as such by the government surveyor.

Congress has thus established a rule of evidence by which the Department must be controlled. If the lands are classified as mineral, they are not subject to selection by the company, while if classified as nonmineral, while subject to selection, the government may still inquire into their actual character.

The return of the surveyor in this case not having classified the lands as nonmineral operates to except them from the company's right of selection, and the action of the General Land Office in holding the selections for cancellation must be affirmed.

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### RECLAMATION—BELLE FOURCHE PROJECT—PAYMENT.

#### ORDER.

#### DEPARTMENT OF THE INTERIOR,

*Washington, D. C., May 4, 1911.*

1. The order issued January 24, 1911 (39 L. D., 531), under the provisions of the reclamation act, for the Belle Fourche Project, South Dakota, suspends the provisions of prior notices as to the charges, time and manner of payment on water-right applications for lands thereafter entered, lands in private ownership not held under trust deed, and lands not signed under contract with the Belle Fourche Valley Water Users' Association. It was announced that applications for water rights for such lands might be received, subject to such charges, time and manner of payment as may be fixed by public notice thereafter issued.

2. Pending the issuance of such notice, it is hereby ordered that all entries made on and after January 24, 1911, whether for lands not theretofore entered, or for land covered by prior entries which have been canceled by relinquishment or otherwise, shall be accompanied by applications for water right in due form and by the first installment of the charges for building, operation and maintenance as theretofore required, not less than \$3.60 per acre of irrigable land, subject, however, to such additional payments and such increased charges for building, operation and maintenance as may be prescribed by public notice to be hereafter issued.

3. Water-right applications may also be made for lands in private ownership not deeded in trust to the Belle Fourche Valley Water Users' Association, and lands not signed under contract with the said association, subject to the terms of public notices heretofore issued except the amount of the building charge; but all such water-right applications filed on or after January 24, 1911, shall be subject to the terms of public notice to be hereafter issued which will prescribe an increased building charge.

FRANK PIERCE,  
*Acting Secretary of the Interior.*

### VERNILE F. HOPKINS.

*Decided May 6, 1911.*

#### ENLARGED HOMESTEAD—ADDITIONAL—LAND NOT DESIGNATED.

An enlarged homestead entry can not be made so as to contain in either the original or additional entry a tract of land which has not been designated as subject to the provisions of the enlarged homestead act.

PIERCE, *First Assistant Secretary:*

Vernile F. Hopkins has appealed to the Department from the decision of the Commissioner of the General Land Office of February 18, 1911, sustaining the action of the local officers rejecting his application 06861 filed September 21, 1909, to enter under Sec. 3 of the act of February 19, 1909 (35 Stat., 639), lot 2 and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 3, and SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 2, T. 30 N., R. 29 E., W. M., as additional to his homestead entry 06845 made September 20, 1909, for lot 3, Sec. 3, T. 30 N., R. 29 E., and lots 6 and 7 and SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 34, T. 31 N., R. 29 E., W. M., all in Waterville, Washington, land district.

The local officers rejected claimant's additional application for the reason that he was not qualified to make additional homestead entry under the act of February 19, 1909. In disposing of the case the Commissioner says:

It is contended that your office erred in holding that as applicant had resided on his original homestead for nineteen years and could not make entry therefor until September 20, 1909, that said entry should not relate back prior to February 19, 1909, and for the further reason that part of the original entry had to be made under section 2289 R. S.

It appears from the records in this office that plat of township 30 N., R. 29 E., W. M., was officially filed in your office September 19, 1909, with a township plat for township 31 N., R. 29 E., so filed on September 20, 1909; that township 30 N., R. 29 E., was designated as subject to the provisions of the act of February 19, 1909, on August 26, 1909, of which designation you were advised by my letter "C" of September 10, 1909, that township 31 N., R. 29 E., has not been designated as subject to the provisions of the act of February 19, 1909, as all

the lands in his former homestead entry have not been designated as subject to the enlarged homestead act, Hopkins is not qualified to make an additional homestead entry under said act of February 19, 1909.

Upon careful consideration of the facts and law applicable thereto, the Department is clearly of the opinion that an enlarged homestead entry can not be made so as to contain in either the original or the additional entry a tract of land which has not been designated as subject to the provisions of the enlarged homestead act.

The decision appealed from is affirmed.

### SYVERT LARSON.

*Decided May 6, 1911.*

#### HOMESTEAD—DEATH OF ENTRYMAN—DEVISEE.

Upon the death of a homesteader leaving no widow and no heirs qualified to take, a devisee to whom he has bequeathed all his right and interest in the land thereby becomes his representative entitled under the express terms of section 2291, Revised Statutes, to complete the entry as the next beneficiary in the order of succession named therein.

#### PIERCE, *First Assistant Secretary*:

Syvrt Larson appeals from a decision of the General Land Office rejecting the final proof submitted by him as devisee upon the homestead entry, made February 7, 1903, in the name of Henry Olson, for the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 22, and S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 23, T. 153 N., R. 84 W., Minot, North Dakota, holding said entry for cancellation.

Olson, an unmarried man, made entry April 8, 1901, of a certain tract of land and, on May 7, 1902, made application for the land in question as a second entry, which was allowed by the General Land Office for sufficient reason, and the former entry canceled January 22, 1903.

In the meantime, to wit, December 2, 1902, Olson, still unmarried, died leaving a will, executed October 29, 1901, bequeathing to Syvert Larson all interests and title to the land described in his first entry that may belong to him at the time of his death, and—

should I die before I prove up on said described land my heir herein named is empowered to have the same proved up after which all right and title will vest in him to said described land, or other lands I may acquire by virtue of a second homestead right.

Upon payment of the fees and commissions by Syvert Larson the entry for the land in question was allowed and placed of record February 7, 1903, in the name of Henry Olson upon the application filed May 7, 1902.

February 8, 1909, Larson, as devisee under the will of Olson, submitted final proof upon said entry and final certificate was issued

February 11, 1909, in the name of "Syvert Larson, devisee of Henry Olson."

By decision of November 10, 1909, the General Land Office advised the local officers that the certificate was erroneously issued and they were directed to notify Larson to show cause within sixty days from notice "why said certificate should not be changed so as to read *to the heirs or devisees of Henry Olson, deceased.*" It was further directed that, upon failure to answer said rule "the certificate will be changed as above indicated, in which event you will recall the duplicate certificate, and correct the same accordingly, if found to agree therewith."

No answer was made to the rule and the General Land Office, by decision of February 14, 1911, revoked its decision of November 10, 1909, and held the entry for cancellation for the reason that, under the ruling of the Department in the case of *Knight v. Heirs of Knight* (39 L. D., 362), the deceased entryman, not having earned title to the land, had nothing to devise, and the proof made by a devisee can not therefore be accepted.

The ruling of the Department in the case cited was misapplied. It is not authority for the decision of the General Land Office. In that case it was held that before completion of title by compliance with the homestead law an entryman can not by will pass any interest in land that will defeat the right to complete the entry by those upon whom the law casts the succession. Until that time the entryman has no such title to the land as he can convey. But the statute provides (section 2291, Revised Statutes) that, if the person making such entry, be dead, "his widow, or in case of her death, his heirs or devisee," may complete the entry by complying with the homestead law in the manner provided by said section.

The person or persons entitled to complete the entry, in the order of succession named in the statute, takes such right and acquires title direct from the Government and not by virtue of inheritance or bequest from the entryman.

In *Knight v. Heirs of Knight*, *supra*, it was held that the right of the heirs of the entryman to acquire title to the land entered can not be defeated by a devise of the land, from which it must necessarily be inferred that the heirs of the entryman are prior in the order of succession under the statute and are entitled to complete the entry by complying with the provisions of said section 2291, Revised Statutes. But where there is no widow and there are no heirs qualified to take, a devisee to whom the entryman has bequeathed all his right and interest in the land, while not deriving title under the will, is made by such bequest the representative of the entryman and may complete said entry under the express terms of the statute as the next bene-

ficiary in the order of succession named therein. Tobias Beckner (6 L. D., 134); *Turner v. Wilcox Heirs* (38 L. D., 521, 524).

In the case at bar appellant alleges, under oath, that at the time of said devise Olson had no heirs in this country and made appellant his devisee as compensation for attention to the devisor in his last sickness. From that statement, it may be inferred that his heirs, whoever they may be, are incompetent to complete the entry by reason of alienage.

If such fact is satisfactorily established appellant is the statutory successor to whatever right or interest Olson may have acquired prior to his death and, if the law has been complied with, he is entitled to a patent for said entry, and the final certificate should issue "to the heirs or devisees of Henry Olson, deceased," as directed in the decision of the General Land Office of November 10, 1909.

It will be observed that this entry was not allowed until after Olson's death, but the application was made May 7, 1902, and was a pending application at the time of his death, December 2, 1902. Furthermore, the proof shows that Olson was a settler upon the land at the time of his application and the right to complete the same, in the event of his death, is given by statute to his widow and, if there be no widow, to his heirs or devisee. *Turner v. Wilcox, supra*.

The final proof was made February 8, 1909, which shows that Olson established actual residence "in the spring of 1902;" that Olson died December 2, 1902; and that appellant, as devisee, had improved and cultivated the land since the death of Olson up to the date of final proof and that he, Larson, has by naturalization been admitted to be a citizen of the United States.

In answer to the question—

How much of the homestead has the settler cultivated and for how many seasons did he raise crops thereon? If used for grazing only, describe fencing, state number and kind of stock grazed and by whom—

he answered: "60 acres—three." He also stated that the land was used for farming and grazing.

The General Land Office evidently construed this answer to mean that claimant had only cultivated the land three seasons. The answer does not necessarily require such construction in view of the preceding statement that he had cultivated and improved the land since the death of Olson to date of proof. Furthermore, he states in his appeal that the General Land Office made a mistake as to the period of cultivation of the land; that it had been cultivated and improved for over five years and all of it was inclosed within a fence prior to proof. The word "three" may have had reference to the number of stock grazed, the number of seasons that he cultivated as much as 60 acres, or to the number of crops raised thereon, as on appeal it is stated that crops had been short.

The explanation of his answer in his appeal, which is corroborated by two witnesses, is sufficient to warrant the acceptance of said proof and it is so ordered.

The decision of the General Land Office is reversed.

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**AUSTIN A. BALL.**

*Decided May 8, 1911.*

**SOLDIERS' ADDITIONAL—PRESUMPTION OF DEATH—ASSIGNMENT BY HEIRS.**

Where a soldier entitled to an additional right of entry under section 2306, Revised Statutes, disappeared from his place of residence and has been continuously absent, without having been heard from, for a period of seven years, it will be presumed that he is dead, and an assignment of the additional right by his heirs will be recognized, upon proof that there has been no administration of his estate.

*PIERCE, First Assistant Secretary:*

This is an appeal by Austin A. Ball from the decision of the Commissioner of the General Land Office of January 7, 1910, holding for rejection his soldiers' additional homestead application No. 013413, filed July 27, 1909, at Tucumcari, New Mexico, for the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 15, T. 15 N., R. 35 E., N. M. P. M., as the assignee of the heirs of Abram L. Abbott.

The assignment of the alleged right was executed by Aimee A. Earl, Elizabeth Abbott, James E. Abbott, Mrs. Sarepta Rowse, and E. F. Abbott, who are stated to be the brothers and sisters of said Abram L. Abbott, and his sole heirs. Accompanying the assignments is an affidavit by Aimee A. Earl, corroborated by two witnesses, who state that they were acquainted with said Abram L. Abbott for a period of fifty years; that said Abram L. Abbott died in or about the year 1888 or 1889, escaping from the asylum at Pontiac, Michigan; that he had not been heard of since, and that he had been divorced from his wife. In another affidavit said Earl states that prior to the soldier's becoming insane and his being confined in the insane asylum at Pontiac, Michigan, he resided in Iosco County, Michigan; that after having been confined in the insane asylum for about four years, he escaped, about the year 1888 or 1889, from that asylum, and that none of his brothers or sisters had ever heard anything from him since; that at that time he was a single man, and that no administration had ever been had upon his estate. Her affidavit is corroborated by B. M. Earl and Mrs. Sarepta Rowse. In another affidavit said Earl states that the soldier died, "as near as I can state, in or about the year 1888 or 1889, after having escaped from an insane asylum at Pontiac, Michigan, intestate." The assignments were also

accompanied by a certificate of the Probate Register, Probate Court of Iosco County, Michigan, to the effect that there was no record of administration upon the estate of Abram L. Abbott, nor did the records show any bills had been presented by creditors of the estate, nor had any application been made by creditors for administration.

The Commissioner, in his decision, required the applicant to make the following showing:

Duly corroborated evidence of the date and place of death of the said soldier is required, and record evidence of the decree of divorce alleged to have been granted to his wife, also a finding by the proper court having jurisdiction in the county where the soldier had his last domicile, that the heirs claiming are all of the heirs of the said soldier, and if his place of last domicile was not in Iosco County, Michigan, a certificate that no administration has been had.

Upon the showing here made, it is apparent that the soldier escaped from the insane asylum some twenty-two years ago, and has not been heard of by his nearest relatives since.

An absentee shown not to have been heard of for seven years by persons, who, if he had been alive would naturally have heard of him, is presumed to have been alive until the expiry of such seven years, and to have died at the end of that term. (Lawson on Presumptive Evidence, p. 200.)

Greenleaf, 16th Edition, states the rule, at page 139, as follows:

It is sufficient, if it appears that he has been absent for seven years from the particular State of his residence, without having been heard from. The presumption in such cases is, that the person is dead; but not that he died at the end of seven years, nor at any other particular time.

Wigmore states the rule, Vol. 4, Sec. 2531:

But there is a genuine presumption of long standing and of universal acceptance, to aid proof of *death*. It is generally said to arise from the fact of the person's continuous absence from home, for seven years, unheard of by the persons who would naturally have received news from the absentee.

Under the above rule, presumptive evidence of the soldier's death has been furnished, and there is nothing in the record to counteract such presumption. As the soldier was a resident of Iosco County, Michigan, at the time of his commitment to the insane asylum, the certificate of no administration by the probate officer of that county is sufficient. However, this showing should be corroborated by a certified copy of the soldier's commitment or admission to the insane asylum, and of the records of the asylum relative to his alleged escape and disappearance therefrom in 1888 or 1889.

In the case of William D. Kilpatrick (38 L. D., 234), at page 236, the Department said:

However, where the soldier dies intestate, and there has been no administration of his estate, the Department will recognize an assignment by all the heirs of the deceased soldier, but the fact that there has been no administration of his estate should first be shown by certificate of the proper Probate Court. Such finding may also properly be accompanied by a finding of the Probate

Court to the effect that the assignors are the sole heirs of the deceased soldier. Such a finding, however, is merely a matter of evidence, and is not absolutely indispensable. Proof of that fact could also be made by the affidavits of disinterested parties having knowledge of the facts.

Showing in this case has been made by the affidavits of disinterested parties having knowledge of the facts, and under the above rule it is sufficient.

The requirement by the Commissioner of record evidence of the decree of divorce dissolving the marriage of the soldier and his wife is correct.

The decision of the Commissioner is accordingly modified, and the matter remanded for further proceedings in harmony with the above.

There is some suggestion in the record that the lands here involved form the townsite of Obar, New Mexico, and soldiers' additional entry of the tracts should not be allowed without an investigation as to whether the lands were of a character subject to such entry at the time of filing the application to make entry thereof.

### J. B. PITAVAL, ARCHBISHOP.

*Decided May 11, 1911.*

#### CEMETERY—AUTHORITY OF OFFICER OF CATHOLIC CHURCH TO HOLD TITLE.

The land department will take notice that title to property of the Catholic Church rests in the Bishop or Archbishop as a corporation sole under the polity of the church, and that such officer has the power and authority to take and hold land for cemetery purposes for the members of his church.

#### ENTRY FOR CEMETERY PURPOSES—NONCONTIGUOUS TRACTS.

Noncontiguous tracts are not subject to entry under the act of March 1, 1907, for cemetery purposes.

#### CEMETERY—LAND USED PRINCIPALLY FOR CHURCH PURPOSES.

Land used principally as a church site, and only incidentally as a cemetery, subsidiary to its use for church purposes, is not subject to entry as a cemetery under the act of March 1, 1907; but where used principally and substantially as a whole for cemetery purposes, and only incidentally and secondarily to a minor extent for church purposes, such latter use will not work a forfeiture thereof under said act.

#### ISOLATED TRACT—DISCRETION OF COMMISSIONER.

It is within the discretion of the Commissioner of the General Land Office to determine when a tract of land is isolated and whether or not the same should be offered for sale under section 2455, Revised Statutes.

#### PIERCE, *First Assistant Secretary*:

Appeal is filed in behalf of J. B. Pitaval, Archbishop of the archdiocese of Santa Fe, New Mexico, from decision of February 27, 1911, of the Commissioner of the General Land Office, requiring republication for and supplemental proof under said Pitaval's cemetery application filed under the act of March 1, 1907 (34 Stat., 1052),



for two disconnected tracts known as lots 1 and 2, Sec. 31, T. 29 N., R. 13 E., N. M. M., Santa Fe, New Mexico, land district, containing .93 and 1.15 acres, respectively.

Application is made by said Pitaval, Archbishop, as trustee for the Roman Catholic Church for said archdiocese. Publication was made for submission of proof on September 22, 1910, but proof was not submitted until October 3, 1910, because, as stated, the witnesses lived at a great distance from Santa Fe, where proof was made, and were unable to leave their parishes on the published date.

The proof submitted shows the applicant is Archbishop of said archdiocese, and possesses, by virtue of his ecclesiastical office, power and right to hold, for the purposes of said archdiocese, the title to property for its uses, one witness as to such fact being the vicar-general of this archdiocese; that these tracts have been used for many years by said archdiocese for cemetery purposes; and that a Roman Catholic Church is located on the corner of one lot.

These tracts are known also as small holding claim No. 2741, made under the act of March 3, 1891 (26 Stat., 854), by Pedro y Martinez as trustee for the members and congregation of the Roman Catholic Church of San Antonio, of Questa, Taos County, New Mexico, and canceled March 31, 1903, for the stated reason that said act under which it was made confers no rights upon a corporate body or religious association or upon an aggregation of persons having no individual interest in the land; citing Edward Gerard, Trustee (31 L. D., 323). The proof submitted under that claim showed said lot 1 was used only as a church site and said lot 2 as a cemetery for the church.

Application on behalf of the church members for said lots as isolated tracts was also rejected June 15, 1905, for the stated reason that said lots had not been submitted for homestead entry for three years after entry, filing or sale of surrounding land, as required by the act of February 26, 1895 (26 Stat., 687).

No protest against said Pitaval's application or proof appears.

Said proof was held insufficient as to showing that both lots are used or are necessary for cemetery purposes or that the applicant is authorized by law to hold real estate as a sole corporation; upon which points supplementary proof is required, in the decision appealed from; also that it be shown that no other entry for cemetery purposes has been made by the association represented by applicant, and that republication of notice of submission of proof be made, the proof now made not having been submitted within ten days after the published date, in accordance with the act of March 2, 1889 (25 Stat., 854), and the circular of March 8, 1889 (8 L. D., 314).

It is urged particularly in this appeal that the power and right of the ecclesiastical head of this archdiocese to hold real estate for the uses and benefit of its church adherents is well, and has been long,

recognized, and no specific authority therefor exists; and that the expense of again publishing notice and producing proof will greatly exceed the value of the land; wherefore, it is asked that the present proof be accepted.

The proof submitted sufficiently shows the power and authority of this applicant to hold land for cemetery purposes of his church members. The Assistant Attorney-General for this Department held, in an opinion rendered April 14, 1911, with reference to property claimed and held by this same archbishop as such, that "the Department would take notice that title to property of the Catholic Church rests in the Bishop or Archbishop as a corporation sole under the polity of that Church." That such power and authority inhere in the office of such ecclesiastical head of that church has been long recognized, as stated in the appeal, and the testimony herein amply attests such power and authority.

These lots applied for being non-contiguous, however, both are not subject to be entered by the applicant under said act of March 1, 1907, and the regulations issued pursuant thereto (38 L. D., 125).

It appears furthermore that one of these lots is used in part, at least, and principally as a church site. This lot, therefore, is not subject to entry under said act, which provides for the sale of public lands to be used for cemetery purposes and contains the proviso:

That title to any land disposed of under the provisions of this act shall revert to the United States should the land or any part thereof be sold or cease to be used for the purpose herein provided.

This proviso necessarily inhibits the use of any part of the land for any other than cemetery purposes. Where land is used principally, and substantially as a whole, for cemetery purposes and only incidentally and secondarily and to a minor extent for church purposes, as merely for religious rites in connection with interments, such latter use might be held not to work a forfeiture of such land under said act. But such does not appear to be this case, the principal use of said lot 1 being for a church site and its use for cemetery purposes being only incidental and subsidiary.

This application under said act of March 1, 1907, is allowable, therefore, only as to said lot 2; and in view of the long and unquestioned usage of this tract for cemetery purposes, the small acreage and value to the government involved, and of the fact no protest has been or appears likely to be filed against this entry, the Department is fully warranted in exercising its equitable powers and authorizing the acceptance of the submitted proof notwithstanding it was submitted out of time under the regulations. It is accordingly so directed, and further publication or proof as to said lot 2 is dispensed with as to the matters required in the Commissioner's decision, except that supplemental showing should be made as to whether other

cemetery entries by said applicant have been made on behalf of this particular church.

While this application is not allowable as to said lot 1, no reason appears why said tract may not be now sold as an isolated tract upon proper application and proof being filed; the provision of said act of February 26, 1895, restricting entries of such tracts to cases where the land has been submitted for entry for three years after entry, filing or sale of the surrounding land, having been repealed by the act of June 27, 1906 (34 Stat., 517).

It is within the Commissioner's discretion to determine when a tract is isolated (Peter Kolberg, 37 L. D., 453), and also the matter of offering same (Andrew Rafshol, 38 L. D., 84), and the disposal of such tracts is governed by departmental regulations (*ibid.*).

It is, therefore, directed further that the applicant be notified of the requirements as to applying for and entering isolated tracts, and that the necessary blanks therefor be sent him.

The decision appealed from is modified accordingly and appropriate action as indicated will be taken.

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### NANCY THOMAS.

*Decided May 11, 1911.*

#### NOTICE TO MAKE PAYMENT UNDER TIMBER AND STONE ACT.

An applicant to purchase under the timber and stone act is entitled to thirty days from service of notice within which to make payment of the appraised price of the land.

#### FORM AND MANNER OF SERVICE OF NOTICE.

Directions given respecting the form and manner of service of notice to make payment under the timber and stone act.

#### PIERCE, *First Assistant Secretary:*

Nancy Thomas has appealed from decision of January 24, 1911, by the Commissioner of the General Land Office, affirming the action of the local office in rejecting her application to make entry under the timber and stone act for the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 24, SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 23, T. 47 N., R. 2 E., B. M., Coeur d'Alene, Idaho, land district.

May 6, 1910, the local officers issued notice to the claimant allowing her thirty days from the date thereof within which to pay the appraised price of the land. On June 7, 1910, no action having been taken by her, said application was rejected and canceled, and one Hildenbrandt was permitted to file his application to enter under the timber and stone act. Thomas appealed from the rejection of her

application and also protested the application of Hildenbrandt. July 15, 1910, the latter filed relinquishment of his application and one Peterson was permitted to file his application to enter the land under the said act.

The application of Thomas was rejected as above stated because the payment of the appraised price was not tendered within thirty days from the date of the issuance of notice. It is stated in an affidavit that she did not receive said notice until May 18, 1910. The registry return receipt is not with the record. It is shown she made tender of the appraised price on June 10, 1910, which was refused by the local officers.

It is urged in behalf of claimant that she was entitled to thirty days from receipt of notice within which to make the required payment, and that she should not be restricted to the period of thirty days from the date of issuance of the notice.

Section 20 of the above said regulations directs that the register and receiver, after noting the appraised price on their records, will immediately inform the applicant that he must "within thirty days from the date thereof" deposit the necessary money. The form of notice accompanying the regulations and prepared for the use of the local officers reads in part as follows:

You are therefore notified that your application for said lands will be dismissed without further notice if you do not within thirty days after date of this notice deposit the appraised price of the land with the receiver of this office or file your written protest against such appraisement. \* \* \*

As above stated it was held that applicant had only thirty days from the date of the issuance of the notice within which to make the required payment, and not thirty days from the date of the service of the notice. The regulations and the form of notice are susceptible of the construction placed thereon by the local officers and the Commissioner, owing to the peculiar wording of same. However, a different interpretation could reasonably be given, and it appears that the claimant considered and was so advised that she was allowed thirty days from service of notice within which to make payment, and such is the usual practice in land department proceedings. No good reason is seen for departing from the usual practice respecting notice and thus causing uncertainty and confusion to applicants. It is believed that an applicant under said act should have thirty days from service of notice within which to make the required payment, and that said instructions should be so construed in all pending cases where action has heretofore been taken thereunder. It is further directed that the form of notice be amended so as to make the notice clearly effective only from the date of service. Such notice should be given by registered letter, and the envelope should be marked for return if not delivered within thirty days. Such letter

should be held in the post office for thirty days unless sooner delivered. If delivered, the time will run from date of delivery, and payment must be made at the land office within thirty days from that date. If the notice be returned to the land office unclaimed after having been held in the post office for thirty days, such proceedings will constitute constructive notice for thirty days, and if no action has been taken by applicant, the application will be rejected and the case closed.

Under the rule as here construed and declared, the claimant in this case was not in default in making tender of the purchase money if service was had upon the date stated.

For reasons above stated this applicant should be permitted to perfect entry according to the appraisal made under her application, if the alleged date of service of notice be found correct, and any other adverse application will be rejected, or if entry has been made it will be canceled if this claimant shall deposit the amount required under said appraisal. The decision appealed from is accordingly reversed and the case remanded for action as indicated.

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**GEORGE F. BIXLER.**

*Decided May 12, 1911.*

**ALIENATION—HOMESTEAD ENTRY—RESCISSION OF CONTRACT.**

Where a homestead entryman, after full compliance with the requirements of law in the matters of residence, cultivation and improvement, but prior to acquiring equitable title, innocently and in good faith, with no intent to violate or evade any law, conveys the land embraced in his entry, upon the supposition and belief that he has done all that the law requires of him and that he has a right to make such conveyance, such action will not be held to require cancellation of the entry, which, upon rescission of the contract of conveyance, may be carried to completion.

*PIERCE, First Assistant Secretary:*

Appeal was filed herein by George F. Bixler from decision of July 15, 1910, of the Commissioner of the General Land Office holding for cancellation said Bixler's homestead entry made October 30, 1903, for lot 5, Sec. 32, T. 19 N., R. 1 W., M. D. M., Sacramento, California, land district, for the assigned reason that said Bixler had sold and conveyed said land prior to his submission of final proof under said entry on December 10, 1909.

It appearing from said proof that the entryman had resided upon this land continuously from 1880 to 1904, when he traded it to one Pitcairn for other lands, and had cultivated and improved it, and apparently fulfilled long prior to entry all the conditions as to resi-

dence, cultivation and improvement to be performed to complete equitable title to the land, the Department remanded the case on December 15, 1910, for showing as to the details of said trade, as requested in the appeal, which contended that a full showing would prove the entryman had not in any way violated the law.

The Commissioner has resubmitted the case, stating the further showing made is not such as materially changes his former decision.

Such further showing is made in two affidavits, one by said Bixler himself, the other by the party who, he says, was instrumental in effecting said trade between the entryman and Pitcairn.

Bixler's affidavit recites that he employed, during the first four years of his settlement, a man named Bird, against whom and himself one George F. Packer instituted dispossession proceedings in the courts of the State of California, claiming this land, an island in the Sacramento River; that Bird at the trial disclaimed interest in said land, and the suit proceeded to judgment in favor of Bixler, and such judgment was affirmed both in the State Supreme Court (71 Cal., 134) and in the United States Supreme Court (137 U. S., 661); that many times during the course of this litigation he offered to file on this land but his filing was refused because of such litigation; that on termination thereof the land was surveyed by one Pennington to whom he intrusted the money for filing, but many months or years later he learned, on applying to make final payment, as he supposed, on October 30, 1903, that Pennington had not made such filing, and he understood then, after talking with the local officers, that on account of his long residence and continued cultivation patent would at once be issued to him on paying the fee; that he returned home and, after waiting a considerable time, wondering why patent was not received, and believing there was nothing else for him to do in the matter, and having become, because of rheumatism, almost totally incapacitated for business and being advised by his physician to get away from the river, he embraced an opportunity to exchange this place for one in the foothills, and after investigating the situation and consulting an attorney who advised him he had a perfect right to deed the property, he made such exchange in reliance upon the stated premises, and "under a complete misapprehension of the law and of the fact," and did not know of the necessity for any further showing until long after said trade, made in 1904. He submitted proof accordingly in 1906 fully revealing the fact of said trade, and he concludes his affidavit as follows:

Deponent disclaims any intention of violating the law and believed at the time he made the deed or traded the property that he had a full right to do so and is willing to re deed the property for which he deeded this property and the grantee of this property is willing to re deed it or take any other course that the deponent may consider meet and proper in the premises but prays that he be given the benefit of his homestead entry.

The other affiant states in his affidavit that he knows the circumstances of said trade, having been instrumental in effecting it; that Bixler then told him everything had been done at the land office, and he expected patent any time; that he knows Bixler had consulted an attorney and was advised by the latter that he could properly make deed to the land, and made said trade on such advice; that Bixler is a thoroughly reliable and honest man, and acted in entire good faith, and did not learn of the necessity of further proof until several years later, when affiant was the first to discover such necessity; and that all parties acted on the assumption that everything necessary had been done.

It is manifest that this entryman has acted in good faith throughout. He made this land his home for 24 years, was delayed by litigation for many years in making entry, and at once on termination of such litigation took what he supposed and believed were the only necessary steps to secure patent under his already equitably completed title—completed so far as performance on the land was concerned—and he only attempted to dispose of this land after legal assurance that he might lawfully do so.

There was no conscious violation of law by Bixler, and apparently an earnest attempt by him to conform to the requirements of the law. His attempted conveyance of the land was, in fact and in law, void and said trade rescindable, and a mutual rescission is tendered herein in an apparently honest attempt now to conform to legal requirements upon ascertaining them.

The right of rescission is recognizable in such cases, as shown in the case of *Blanchard v. Butler* (37 L. D., 677), wherein the Department, in its decision, discussed the principles and reviewed and distinguished the authorities.

In that case, the entryman acting innocently was induced by another acting corruptly to make a contract for a future conveyance after final proof of part of the land, upon discovery of the illegality of which the entryman rescinded, tendering repayment of the consideration, and his entry was contested accordingly by said other contracting party who refused to accept such rescission. The Department held that:

Where a party acting in good faith with intent to acquire a home has inadvertently or through false suggestion made a contract of this kind and voluntarily rescinds it, under no pressure of contest or adverse claim, moved solely by desire to comply with the law, it is against public policy to impose a forfeiture, thus binding him to abide his illegal contract.

In the present case, both parties to the illegal contract acted innocently and in good faith, with no intent to violate or evade any law. This was not a contract for a future conveyance after proof, but for a present conveyance, made upon the supposition and in the

belief that final and complete proof had been made. It was founded in mutual honest mistake, misapprehension, and ignorance.

The rule of rescission is that:

Where parties have apparently entered into a contract evidenced by a writing, but owing to a mistake their minds did not meet as to all the essential elements of the transaction, so that no real contract was made by them, then a court of equity will interpose to rescind and cancel the apparent contract as written and to restore the parties to their former position. This relief may be granted although the apparent obligations of the parties have been fully performed. [24 Am. & Eng. Encyc. of Law, p. 618.]

Mutual ignorance by the parties to a contract for the sale of land of some settled principle of law by the operation of which the party contracting to sell had, in fact, no title to the land is such mistake as invalidates the contract (20 *Ibid.*, p. 814).

See the decision, and cases cited therein, of the Supreme Court of the United States in the case of *Allen v. Hammond* (11 Pet., 63).

While ignorance of the law does not excuse one from the legal consequences of his willful act, the object and purposes of the homestead law would be largely frustrated if an entryman acting innocently and in good faith might not be relieved by the Department, the only tribunal having jurisdiction in the premises, from his honest mistake. The law was not designed to oppress the innocent or take from them the fruits of their years of labor, but to punish the guilty; and the Department has unquestioned power and authority to do justice to the Government's beneficiaries, certainly in a case of this kind where there is no adverse interest or claim. Even if *Pitcairn* were a contestant herein, as in the case of *Blanchard v. Butler*, *supra*, such fact would not affect the case. The decision appealed from is accordingly reversed, and the entry of *Bixler* will be submitted to the Board of Equitable Adjudication for consideration.

## RECLAMATION—BUFORD-TRENTON PROJECT—PAYMENT.

### ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, D. C., May 13, 1911.*

1. On March 9, 1911, an order was issued for the Buford-Trenton Project, North Dakota, providing for a stay of proceedings looking to the cancellation of entries and water-right applications under certain conditions. The said order is hereby modified so as to read as follows:

2. Water-right applicants who, on or before June 15, 1911, comply with the provisions of existing public notices, by making the pay-



ments required thereunder on or before that date, shall be permitted to continue under the terms of the former public notices; and water-right applications may be filed on or before June 15, 1911, under the provisions of the public notices heretofore issued, if accompanied by the payments required thereunder, and shall be entitled to continue under the terms thereof.

3. Those who do not avail themselves of the provisions hereinabove stated, whether or not they have filed water-right applications, may receive water for the coming irrigation season by payment of the sum of \$1.50 per acre for operation and maintenance charge, of which 50 cents per acre must be paid on or before June 15, 1911, and the balance, \$1.00 per acre, on or before December 1, 1911; and conditioned also upon the payment on or before December 1, 1911, of \$1.00 per acre-foot for all water delivered in 1911. Those who take advantage of these conditions are to be subject to the terms of a public notice to be hereafter published providing for an increased building charge, the amount of which can not be stated at this time.

4. The pumping barge will not be launched in 1911 until the aggregate payments made for operation and maintenance for 1911 at 50 cents per acre shall have amounted to at least \$500 for 1,000 acres. The operation of the pumps will be planned with a view to an approximately uniform rate of delivery of water and for adequate irrigation in the shortest practicable operating period, namely, for an irrigation season of 80 days beginning not earlier than June 1 and not later than June 15 and closing not earlier than August 19 and not later than August 30 of each year, and a water supply during each season of 2 acre-feet of water for each acre of land irrigated and cultivated or so much thereof as the water users may require.

5. For the years 1912 and 1913 the terms hereinabove stated will apply to all uncanceled entries of water-right applications; provided, however, that the barge will not be launched in 1912 until payment has been made at 50 cents per acre for operation and maintenance for 1,500 acres and all other amounts due hereunder for the year 1911; and it will not be launched in 1913 until said payment of 50 cents per acre has been made for 2,000 acres, and all other amounts due hereunder for 1912.

6. Upon failure to make payment as herein required on or before June 15, 1911, the entry or water-right application or both, as the case may be, which would otherwise be subject to cancellation will be promptly cancelled without further notice; and the forfeiture provided for in the reclamation act for failure to pay installments when due will be enforced as to future failure to pay under existing public notices in every case where the provisions of this order are not complied with.

WALTER L. FISHER,  
*Secretary of the Interior.*

**ANNA DILLON.**

*Decided May 13, 1911.*

**NONMINERAL ENTRY OF LAND ADJOINING MINING CLAIM.**

The mere fact that a tract of land adjoins the end of a patented lode claim will not prevent appropriation thereof under the nonmineral public land laws; but in such case a higher degree of proof will be necessary to establish its nonmineral character than is ordinarily required.

*PIERCE, First Assistant Secretary:*

July 12, 1910, Anna Dillon filed application for the preparation of a segregation plat, designating by lot number a certain area said to contain 1.02 acres, situated in surveyed section 35, township 12 north, range 6 west, M. M., Helena, Montana, which she seeks to enter under the soldiers' additional provisions of the homestead law.

The tract, it appears, is wholly surrounded by patented lode mining claims owned by the present applicant, one of which, the Open Door, abuts along a portion of its westerly end upon the tract in question. For this reason the Commissioner of the General Land Office, by decision of November 25, 1910, held that the land was not subject to disposition under the provisions of section 2306 of the Revised Statutes, and accordingly rejected the application. Appeal from this action brings the case here.

The Department is aware of no law or departmental ruling that prohibits the entry of a tract under the nonmineral land laws merely because it is contiguous to the end of a lode claim. The fact that a tract sought to be entered under the nonmineral laws adjoins a patented lode claim on its end would seem to render necessary the submission of a higher degree of proof to establish its nonmineral character than would otherwise be required, but the nonmineral character of such a tract having been satisfactorily established, whatever presumption such contiguity might give rise to would be overcome, and in that event there would seem to be no reason why, in the absence of other objection, it might not be entered under any appropriate agricultural law.

In this particular case the Commissioner will take such steps as under the circumstances may be deemed by him necessary and expedient to determine the actual character of the tract in question, and if it shall be found to be nonmineral, the tract will be designated by a lot number upon the plat, whereupon the application to enter will be given due consideration.

The decision appealed from is accordingly modified as herein indicated.

## FRANK L. CHAMBERS ET AL.

*Decided May 16, 1911:*

## TIMBER AND STONE ACT—PRELIMINARY AFFIDAVIT—PERSONAL INSPECTION.

The regulation of the land department that the preliminary affidavit of an applicant to purchase under the timber and stone act must be based upon personal inspection of the land is a proper and reasonable requirement under the act, and failure to comply therewith is sufficient ground for cancellation of the entry; and a purchaser after final certificate and before patent from an entryman who failed to make such personal examination takes subject to such defect and is not entitled to special consideration as an innocent purchaser.

PIERCE, *First Assistant Secretary:*

May 5, 1906, Frank L. Chambers filed a sworn statement in the local office for the purchase under the act of June 3, 1878 (20 Stat., 89), of the NW.  $\frac{1}{4}$ , Sec. 18, T. 19 S., R. 9 W., Roseburg, Oregon, land district, and April 4, 1907, submitted proof in support thereof, upon which certificate was issued October 5, 1907. The described land is within the Siuslaw National Forest.

August 4, 1909, the Commissioner directed the local officers to proceed against said entry upon charges made by a forest officer, as follows: "That the entryman did not make a personal inspection of the land prior to filing his sworn statement."

September 1, 1909, the entryman filed answer in the nature of a demurrer, admitting that he did not examine the land prior to filing his sworn statement and challenging the sufficiency of the charge. Thereupon the Government filed motion for the cancellation of the entry upon the answer of the entryman. It being discovered that one P. E. Snodgrass was a transferee after certificate, notice of the charge was served upon him.

November 18, 1909, the transferee filed a demurrer to the charge and also set up the allegation that he purchased the land from Chambers for a valuable consideration, without notice or knowledge of any defects in the title or noncompliance with the law on the part of the entryman.

November 29, 1909, the local officers held that "the transferee could take only such right as the entryman himself had in the land, and as the entryman had not complied with the regulations of the Department and his entry must for that reason fail, any alleged interest of the transferee must also fail," citing *Mary M. Shields et al.* (35 L. D., 227). From this action the entryman and the transferee appealed.

August 1, 1910, the Commissioner rendered decision in the case, saying that the claimant and transferee having admitted that the former did not personally examine the land prior to the filing of his

sworn statement, the question was one of law solely. The case of *United States v. Wood* (70 Fed., 485, 486), was cited, wherein it was held that—

it is competent under this statute for the proper officers of the Government, as a regulation in the sale of these lands, to require the affidavit of personal examination and personal knowledge on the part of the applicant.

This view, it was said, is also taken in the case of *Mary S. Ness* (37 L. D., 582), wherein it was said that "the statute requires that the verification shall be by the applicant in person. It cannot be made in his name by an agent or attorney."

As to the claim of the transferee that he was an innocent purchaser after certificate and without notice, it was said that it had been repeatedly held by the Department in similar cases to be without merit.

The decision of the local officers was affirmed and the entry held for cancellation, from which this appeal is prosecuted.

It is urged on behalf of appellants that the requirement that an applicant shall personally inspect the land before filing his sworn statement has resulted, and will continue to result, if insisted upon, in depriving many citizens of the right conferred by Congress. The decision rendered in the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *Hoover v. Salling* (110 Fed., 43), is relied upon with reference to said contention.

The Government relies upon the construction of the act, long recognized, and acted upon by the Secretary of the Interior, the decision of the Court of Appeals of the District of Columbia in the *Ness* case, *supra*, and the case of *United States v. Wood*, *supra*.

While the timber and stone act does not in specific terms require such a regulation, the same is not inconsistent therewith and would seem to be a reasonable requirement in order to carry out the purposes of the act. It is undoubtedly true, as claimed, that very many citizens are not able to avail themselves of the act, under said regulation, but in all of the public land laws conditions are prescribed as precedent to the acquisition of lands thereunder which practically preclude many, probably a majority of the citizens of the United States, from availing themselves of the benefits offered by such laws, by reason of their situation as well as physical and financial condition. This is especially true of the homestead law under its residence and other requirements. While in the timber and stone act the right is conferred broadly upon "any person desiring to avail himself of the provisions of this act," as a matter of fact only such persons can secure public lands under any of the acts providing for their disposition, as are able to comply with the terms thereof and the reasonable regulations established thereunder.

The act under consideration contains a provision requiring the applicant to make oath to his statement "before the register and receiver of the land office within the district where the land is situated." This statutory provision, as well as the departmental regulation requiring personal examination of the land, of necessity renders it impossible for very many citizens to secure public land under that act.

Moreover, it is significant that the matters which the applicant is required by the statute to set forth in his sworn statement are divided into two classes. First, that the land "is unfit for cultivation and valuable chiefly for its timber and stone; that it is uninhabited," etc.; and second, that the land does not contain, "*as deponent verily believes*, any valuable deposits of gold, silver, cinnabar, copper or coal."

The matters set forth in the first division are such as can be readily observed by personal inspection of the land, while those in the second class are not so observable and may be set forth on information and belief.

As to the contention that this transferee is an innocent purchaser, it is sufficient to cite the case of *Hawley v. Diller* (178 U. S., 476), wherein the question was thoroughly considered, and it was held (syllabus):

That an entryman under this act acquires only an equity and a purchaser from him cannot be regarded as a *bona fide* purchaser within the meaning of the act of Congress unless he become such after the Government, by issuing a patent, has parted with the legal title.

The decision appealed from is accordingly affirmed.

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### WILLIAM T. SCHREINER.

*Decided May 16, 1911.*

#### PRACTICE—REHEARING—RULE 83.

Rule 83 of the new Rules of Practice, providing for motions for rehearing, in lieu of motions for review under the old rules, will be administered as nearly as possible in accordance with the rules governing rehearings in courts of justice, and observance of its provisions will be insisted upon.

#### CONSTRUCTIVE RESIDENCE—OFFICIAL EMPLOYMENT—MAIL CARRIER.

Even under the more liberal rule which obtained prior to the instructions of February 16, 1909, with respect to the recognition of absences on account of official employment as constructive residence, absence due to employment under contract to carry the mail is not entitled to be so recognized.

#### PIERCE *First Assistant Secretary:*

January 13, 1911, the Department affirmed decision of the Commissioner of the General Land Office of March 15, 1910, which affirmed the action of the local officers, rejecting final proof submitted

by William T. Schreiner August 3, 1908, on his homestead entry, made August 13, 1902, for the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 18, E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 19, and SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 20, T. 37 S., R. 9 E., W. M., Lakeview, Oregon, land district.

February 21, 1911, by direction of the Commissioner of the General Land Office the register of the district land office advised Schreiner of such action and that "unless a motion for review of said departmental decision is filed within thirty days from notice hereof the said decision will become final and the case will be closed by the Commissioner without further notice." Pursuant to this notice and on March 15, 1911, Schreiner filed what is designated a "motion for review," which, although somewhat informal, would have been entitled to consideration as such under the practice prevailing until February 1, 1911. But, December 9, 1910, which was before said departmental decision of January 13, 1911, and before the register's said notice was issued, and before said motion was filed, the Secretary approved "new rules of practice" effective on and after February 1, 1911, which abolished "motions for review" and in lieu thereof adopted the following procedure:

Rule 83. Motion for rehearing of the decision of the secretary must, together with evidence of service thereof and all papers used in connection therewith, be in writing and filed in the General Land Office or in the local land office, for transmittal through the General Land Office to the secretary, within 30 days after service of notice of such decision. A motion so filed will act as a superseas until further action is taken by the secretary.

Such motion must state concisely and specifically the grounds upon which such rehearing is asked and must be accompanied by argument in support thereof. No matters other than those specified will be considered.

The adverse party will be allowed 15 days in which to serve and file reply to the motion for rehearing; and immediately upon the expiration of the periods allowed herein, the Commissioner of the General Land Office shall transmit the entire record to the secretary, who will consider the same as early as practicable.

Schreiner's motion does not conform to this rule, in that it is not a motion for "rehearing," and in that it is not "accompanied by argument in support thereof." It might therefore be dismissed for technical insufficiency, but inasmuch as it was filed pursuant to and in accordance with the erroneous notice of the register of the district land office, it will hereinafter be considered upon its merits. In this connection, however, it will not be inappropriate and seems needful to say that the Department must insist upon observance of said Rule 83. Motions for further consideration of matters once the subject of departmental decision are allowed only in the discretion of the Secretary of the Interior and in formulating an advisory rule of procedure governing orderly administration, care must be had lest the public business be unnecessarily delayed or the rights of adverse claimants held in abeyance an unreasonable time.

Under the old practice motions for review were considered *ex parte*. They were not, therefore, required to be served upon adverse claimants until "entertained," and in cases where they were entertained they were returned for service. In such cases an unreasonable time elapsed before final action thereon by the Department. Under such practice argument in support of the motion was not required and the Department frequently must reexamine the case without precise information as to grounds of alleged error, thus making the examination cumbersome and difficult and unnecessarily delaying final disposition of the case.

The present rule was intended to cure these defects of procedure and will be administered as nearly as may be in accordance with the rules governing rehearings in courts of justice. Broadly stated, a rehearing is a new hearing in a matter once decided, upon reexamination or re-argument (3 Blackstone's Commentaries, 453). It may involve correction of erroneous statement of facts, erroneous conclusions of law, error in the judgment on the facts found and the law declared or it may involve the consequence of new trial upon newly discovered evidence; but in any event, except in cases provided for by statute, or by rules of courts, rehearings are not granted as matter of right, the allowance thereof resting wholly in the sound discretion of the court. (See Encyclopedia of Pleading and Practice, Vol. 18, Title: Rehearing, and cases cited.)

Section 441 of the Revised Statutes provides:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

\* \* \* \* \*

Second. The public lands including mines.

Section 433 of such Statutes provides:

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government.

Section 2478 of such Statutes, provides:

The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations, every part of the provisions of this title [the public lands] not otherwise specially provided for.

Considering these statutes the Supreme Court of the United States, in the case of *Knight v. United States Land Association* (142 U. S., 171, 177, 178), said:

The phrase, "Under the direction of the Secretary of the Interior," as used in these sections of the Statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and

control the extensive operations of the land department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.

In the same case, the court quoted with approval a decision of the Secretary of the Interior (5 L. D., 494), saying:

The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt.

It is thus seen that in the formulation and promulgation of the rule of practice under consideration the Secretary of the Interior was proceeding under supervisory authority, and that the rule is wholly one within his discretion to make, and does not accord to litigants before this Department a remedy as matter of right. This being true, and in view of the public necessity for such rule, as above stated, it is merely a rule of procedure for the information of litigants and the observance of its provisions will be insisted upon. However, as above stated, under the particular facts as to notice appearing herein, this motion has been considered upon its merits.

It appears that claimant settled upon the land embraced in his entry and built a house thereon in October, 1902, and remained there at that time about thirty days. He dug a well about 12 feet deep. He then left the land and commenced carrying the mail, at which he was engaged until January, 1903, when he returned to the homestead and stayed fifteen or twenty days, clearing at that time about 2 acres of land. He took a subcontract for carrying the mail on a star route and later became an original contractor and continued to carry the mail under said contract during the remainder of the period covered by the proof, except at intervals, when he employed a person to act in his stead, and returned to the land for a week or ten days at a time. He states that this occurred every few months and that he was not absent from the land more than two or three months at a time.

Claimant insists that he had established residence upon the land prior to the time he became engaged in the carrying of mail as a subcontractor under the star route contract with the Government, and that his absences should therefore be accredited as residence because he was compelled to be away to earn support, or that he should be given credit under the rule which formerly obtained as to homesteaders who were elected or appointed to public office after establishment of residence upon their homestead claims. In the decisions heretofore ren-



dered in this case the point has been made against claimant that he had not established *bona fide* residence on the land prior to the time he commenced carrying the mail. It might fairly be inferred from said decisions that if he had established such prior residence, credit could be given for absence caused by the reasons stated. But such is not the case. It is not believed that the Department has ever accredited residence for absence in such cases. In the case of *Burton v. Nix*, decided June 8, 1909, unreported, the Department held, with reference to the rule as to office holders, that—

A contract for carrying the mail is not an office within the meaning of these regulations or in any sense. It is a simple business contract and the mere fact that the Government is a party to the contract will no more absolve the entryman from complying with the homestead law as to residence than if it had been entered into with a private individual. It was optional with claimant whether he would engage in business that would require a residence at a place other than the homestead. If he chose to accept it, it was at his risk.

In view of the above, it is immaterial whether claimant established residence before becoming engaged under the mail contract. The alleged residence consisted merely of periodical visits to the land. He has not resided upon the claim as required by law and his entry must be canceled. He states that he is now living upon the land and has valuable improvements thereon. No reason is seen why he may not, if he should so desire, make a second homestead entry for the same land upon proper application and showing of qualifications under the recent act approved February 3, 1911 (Public No. 340). He should be so advised.

The motion is denied.

The Commissioner will cause a copy of this decision to be furnished to the several local officers for the information of the officials.

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## SECOND HOMESTEAD AND DESERT LAND ENTRIES.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., May 17, 1911.

REGISTERS AND RECEIVERS,

UNITED STATES LAND OFFICES.

SIRS: The following instructions are issued for your guidance in the allowance of second homestead and desert land entries under the act of Congress approved February 3, 1911 (Public—No. 340), a copy of which is hereto attached.

This act allows a second homestead or desert land entry, as the case may be, to any person, otherwise qualified, who, prior to February 3,

1911, has made entry under the homestead or desert land laws, but who, subsequently to such entry, from any cause, shall have lost, forfeited or abandoned the same; but the provisions of the act do not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry. This act allows a second entry of either kind, if the former entry was made prior to February 3, 1911, although it may have been lost, forfeited, or abandoned subsequent to that date.

A person applying to make second homestead or desert land entry under this act must file in the local land office an application to enter a specific tract of public lands, subject to entry under the laws in question, accompanied by his affidavit executed before an officer authorized to administer oaths under the public land laws, stating the description of the former entry by section, township, and range numbers (or the number of the entry and land office where made); date of entry; when he lost, forfeited or abandoned the same; that it was not canceled for fraud; and the amount, if anything, received for abandoning or relinquishing his former entry. This affidavit must be corroborated by the affidavit of one or more persons having knowledge of the facts relative to the abandonment of the claim, or the relinquishment of the former entry, and the consideration received therefor, which corroborating affidavit may be executed before any officer authorized to administer oaths, and having an official seal.

If an application is presented which has not been executed before a proper officer, or which is not corroborated, or which is otherwise formally defective, you will suspend or reject it, subject to the usual right of appeal. If the application is formally correct and the party makes a showing entitling him to the benefits of this act, you will allow the application, endorsing thereon, and on the notice of allowance, the fact that the same is allowed under the act of February 3, 1911.

If the application for second homestead or desert land entry is formally correct, but the applicant does not make a showing entitling him to the benefits of the act of February 3, 1911, you will not reject the application, but will forward it to this office, with appropriate recommendation, as required by the circular of March 29, 1910 (38 L. D., 507).

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

WALTER L. FISHER,  
*Secretary.*

[PUBLIC—No. 340.]

An Act Providing for second homestead and desert-land entries.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person who, prior to the approval of this act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry, from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this act shall furnish a description and the date of his former entry: *Provided,* That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

Approved, February 3, 1911.

### REGIONE v. ROSSELER.

*Decided May 17, 1911.*

#### KINKAID ACT—ADJOINING FARM ENTRY—RESIDENCE.

Where one owning and residing upon a tract of land within the area covered by the Kinkaid Act makes entry of adjoining land under that act which together with the original tract does not exceed 640 acres, and continues to reside upon the original tract, cultivating and improving the entered land, such entry may be considered as and transmuted into an additional or adjoining farm entry and his residence regarded as covering the entire area as one farm unit, notwithstanding a contest against the entry charging failure to reside thereon.

#### PIERCE, *First Assistant Secretary:*

John Rosseler appealed from decision of the Commissioner of the General Land Office of December 14, 1910, canceling his homestead entry for N.  $\frac{1}{2}$  and SE.  $\frac{1}{4}$ , Sec. 22, T. 15 N., R. 54 W., North Platte, Nebraska.

June 28, 1904, Rosseler made entry, against which D. L. Regione filed contest February 16, 1910, charging that Rosseler never established *bona fide* residence, has not maintained residence, his family never resided on the land, he has not cultivated or improved it, but has maintained a home elsewhere. After service of notice and stipulation for taking evidence, plaintiff submitted testimony before a United States commissioner, defendant being present. Whereupon, he moved plaintiff's contest be dismissed for failure to sustain the charge, but requested, if such motion were overruled, that he be allowed to submit testimony. May 14, 1910, the local office overruled the motion and set June 22, 1910, for Rosseler to submit testimony. He appealed from the action of the local office, and did not appear at the adjourned day. June 24, 1910, the local office found that neither Rosseler nor his family had resided on the land, but lived and main-

tained a comfortable home on the SW.  $\frac{1}{4}$  of same section, recommending cancellation of the entry, which the Commissioner affirmed.

The evidence sustains the findings of fact of the local office and the Commissioner. Though it was not conclusive or undisputed, that is the fair conclusion to be drawn from it. Rosseler had a little frame house, meagerly furnished, on his homestead, and he and his daughters, who comprise his family, spent some time thereon, cooking, eating, and working. He had a well there, a shed, cultivated a small tract of about an acre, planted 2000 locust seedlings. The land is enclosed with a fence owned by him and adjoining owners. He has used the land mostly for grazing, to which use it is best adapted. The house was too lightly constructed to be a comfortable one in winter time.

Rosseler owns the SW.  $\frac{1}{4}$  of the same section, where he has a good two-room stone house, comfortably furnished, with substantial outbuildings for storing grain and housing stock. He and his family, though some times on the homestead tract, have been more frequently seen on the deeded quarter section, and all the appearances there indicate it is their home.

Section 2289, U. S. Revised Statutes, as amended by act of March 3, 1891 (26 Stat., 1095), provides, among other things, that—

every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

The Kinkaid Act, April 28, 1904 (33 Stat., 547), provided that homesteads in certain parts of Nebraska therein named might be made of six hundred and forty acres—four times the quantity under the original homestead act. This was *in pari materia* with the original homestead act and all its provisions are to be taken as part of the homestead legislation as a whole. Under this act Rosseler might have entered the whole section of land, living on the SW.  $\frac{1}{4}$ , which he owned and upon which he resided. Had all the land been public, he could have entered it as one unit and resided on the SW.  $\frac{1}{4}$ . As he owned the SW.  $\frac{1}{4}$ , he might have entered the remaining three quarters as additional to his farm and continued his residence there. After his entry, the entire section formed one farm unit or agricultural holding, one-quarter section of which he held by title in fee and the other three-quarter sections by homestead entry. As it was one farm unit and not more than the law permitted had it been all public land, his residence and possession on any part of it extended in law constructively to every part of it and fully complied with the law.

It was a mistake that Rosseler did not make an adjoining farm entry in the first place, as he might properly have done if the south-

west quarter was not acquired under the homestead law. Or, if his southwest quarter was acquired under the homestead law, he might then have made an additional entry to this extent, so that the form of his entry was a mistake of procedure without exceeding his right. Mistakes of procedure or mode of entry are subject to amendment and correction. In *Isaac S. Riggs* (1 L. D., 71), Riggs was allowed to change his entry from an original homestead entry into an adjoining farm entry in a case where he acquired the adjoining land, six acres, as site for a residence subsequent to his original entry of eighty acres as a homestead. This purchase, and living on the adjoining land through the whole period of his entry, was made because there was no good building site on the land entered, and he technically had not complied with the law by living on the land entered.

In the similar case of *Charles B. Francis* (26 L. D., 618), Francis entered one hundred and sixty acres in 1895, and in 1896, fourteen months afterward, applied to relinquish one forty acres and to transmute the other one hundred and twenty acres into an adjoining farm homestead, he having five months after his entry purchased an adjoining forty acres. These two cases were not errors of original procedure, for at the time of the original entry the entryman did not own the adjoining land, purchasing it subsequently. The entrymen could not have made the adjoining farm entries at the time the original entries were made, for they did not own land on which to base an adjoining farm entry. Transmutation of these entries was notwithstanding permitted. Rosseler has a better ground to transmute his entry than existed in these cases, as he owned the southwest quarter of the same section at the time.

In *Picard v. Rehbein* (29 L. D., 166), an entry was transmuted from a homestead to an adjoining farm homestead in the face of a protest by one claiming to be a settler. In this case there was an adverse claim of right fully as strong as the right of a contestant.

Contestant in this case knew that Rosseler was a *bona fide* agricultural holder, using the entire section of land as one farm holding, and so had notice of Rosseler's equitable right to transmute his entry from one requiring residence on it to one not requiring residence on it. Rosseler has substantially complied with the law and his right under the law must be protected. The decision is reversed, and Rosseler will be permitted to make or transmute his entry into an additional farm entry or an adjoining farm entry as the facts may entitle him to do, notwithstanding the contest, which will be dismissed.

**MATTHIAS P. ZINDORF.**

*Decided May 18, 1911.*

**SECOND DESERT ENTRY—ACT OF MARCH 26, 1908.**

The act of March 26, 1908, does not authorize second desert entry by one who has received patent on a former entry, notwithstanding the land so patented has become worthless by reason of destruction of the reclamation project upon which irrigation thereof was dependent.

**PIERCE, *First Assistant Secretary:***

This case is before the Department upon the appeal of Matthias P. Zindorf from the decision of the Commissioner of the General Land Office rendered January 28, 1911, concurring in the rejection by the local officers of his desert land application tendered January 31, 1910, for the NE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 32, T. 6 N., R. 29 E., Walla Walla, Washington, land district.

It was shown by Zindorf in his affidavit accompanying the application that he had on August 29, 1896, made desert land entry for 40 acres, Waterville series, upon which final certificate was issued to him June 4, 1898, and patent on November 11, 1898, and it was alleged that he made said former entry in good faith and expended about \$1,000 in bringing water upon the land, but that "after he had secured title from the Government" the water was diverted therefrom by the bursting of the reservoir, which could not be rebuilt; that by reason thereof he had been unable to pay the taxes and otherwise improve the land and that the same having become worthless and so lost to him through no fault of his, he asked to be allowed to make a new entry as applied for.

The local officers' rejection of said application was upon the ground that applicant had received patent under a former desert land entry. The Commissioner in approving such action said in effect that the provisions of the second desert land act of March 26, 1908 (35 Stat., 48), applied solely to the case of a party "whose entry was lost, forfeited or abandoned," and not to a case where title had been acquired under said entry; and that notwithstanding the apparent worthlessness of the land patented to Zindorf, there was no authority for allowing him another entry.

It would appear from the affidavit of Zindorf that about \$200,000 had been expended upon an irrigation project which was intended to furnish water for a large body of lands including the lands involved, but that after the bursting of said reservoir the project was abandoned, rendering all of the lands tributary thereto practically worthless.

Clearly the land department of the Government is without authority to allow a second desert land entry under the conditions existing

in this case. The act of March 26, 1908, *supra*, does not authorize such entry by a party who has had the benefit of a former entry by the patenting of the land to him, even though the land so entered should through some occurrence become worthless. The application of equitable relief suggested on behalf of Zindorf could, it would appear, only be obtained through congressional action.

The decision appealed from is affirmed.

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**RECLAMATION—UMATILLA PROJECT—PAYMENT.**

**ORDER.**

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., May 16, 1911.*

1. In pursuance of the act of Congress approved February 13, 1911, entitled "An act to authorize the Secretary of the Interior to withdraw public notices issued under section 4 of the reclamation act, and for other purposes," the terms and conditions of the public notices for lands irrigable under the Umatilla Project, Oregon, constructed in pursuance of the reclamation act of June 17, 1902 (32 Stat., 388), issued December 27, 1907, November 12, 1908, April 3, 1909, January 6, 1910, and February 28, 1911, and all orders and notices amendatory thereof or supplementary thereto, insofar as the same relate to the time when installments shall be due and payable for lands designated therein, and shown upon the farm-unit plats accompanying the same, are hereby modified as follows:

2. The installment of the charges for building, operation and maintenance which, under aforesaid notices and orders and notices amendatory thereof or supplementary thereto, are due on December 1, 1911, shall become due on March 1, 1912. The installments of said charges for subsequent years shall be due on March 1 of each year.

3. The terms and conditions of aforesaid public notices and of all orders and notices amendatory thereof or supplementary thereto shall remain in full force and effect except as modified herein.

FRANK PIERCE,  
*Acting Secretary of the Interior.*

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**WARREN BLINN ET AL.**

*Decided May 18, 1911.*

**PROVISO TO SECTION 7, ACT OF MARCH 3, 1891—PROCEEDING BY GOVERNMENT.**

The action of the land department withdrawing lands on account of their supposed coal character, with a view to classification thereof, and ordering

an investigation of desert-land entries covering the same, within two years from the issuance of final receipt thereon, of which the entryman had due notice, constitutes a protest within the meaning of section 7 of the act of March 3, 1891, and bars the operation of that statute.

**SURFACE PATENTS—GOOD FAITH—ACT OF MARCH 3, 1909.**

In determining whether an applicant is entitled to the benefits of the act of March 3, 1909, providing for the protection of surface rights of nonmineral entrymen, it is competent for the land department to inquire into his good faith and whether there has been a compliance with the requirements of the law under which the nonmineral entry was made; and where it appears applicant has not acted in good faith the land department is without authority to issue surface patent for the land under that act.

*PIERCE, First Assistant Secretary:*

This case is before the Department on the appeal of Warren Blinn from the decision rendered by the Commissioner of the General Land Office January 18, 1911, ordering a hearing in the matter of desert-land entry No. 192, made June 6, 1903, by the said Blinn for the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 7, T. 32 N., R. 5 W., Durango, Colorado, land district, and desert-land entry No. 191, made on the same day by Francis W. Englar for the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of said section 7, final proof having been submitted on both entries August 28, 1906, by Blinn, in his own right as to the entry No. 192, and as the assignee of Englar as to entry No. 191, and final certificates Nos. 73 and 74 were issued thereon.

It appears that the lands embraced in these entries were withdrawn as coal land October 15, and November 7, 1906, and were thereafter, on September 25, 1909, classified as coal land at \$20 per acre; that under date of June 14, 1907, the Commissioner of the General Land Office ordered an investigation of the entries for the purpose of determining whether or not the lands were of coal character; and on October 16, 1908, a special examiner of the General Land Office submitted an adverse report on both entries recommending their cancellation, upon which the General Land Office, on June 25, 1909, directed proceedings against the entries, charging: first, that the entryman never cultivated one-eighth of the land; second, that \$1.00 per acre per year was not expended in the reclamation of the land; and, third, that said land contained a workable deposit of coal.

It is further shown that on May 24, prior to the order directing a hearing, Blinn filed as to both entries his election to accept patents containing a reservation to the United States of the coal contained in the land in accordance with the provisions of the act of March 3, 1909 (35 Stat., 844).

After directing proceedings against these entries, in his letter of June 25, 1909, the Commissioner of the General Land Office requested the Geological Survey to furnish such information as it



might have in its possession tending to show that the land involved in the entry made by Blinn was known to be chiefly valuable for coal at and prior to the time of the making of said entry or at any time prior to the offering of proof in support thereof. The Geological Survey, in reply to the letter from the Commissioner of the General Land Office, reported on August 4, 1910, that it would not be possible for the government to prove that the entryman knew or should have known at the date of making final proof that the land was chiefly valuable for coal, as such information was dependent upon geological knowledge of the country; whereupon the Commissioner of the General Land Office on September 6, 1910, advised the chief of field division at Denver, Colorado, that the entry was clear listed as to the field service division and had been referred to the appropriate adjudicating division for action on Blinn's election to take surface patent. In that letter the Commissioner stated that while the evidence as to noncompliance with the requirements of the law on the part of the claimant was, in the opinion of his office, sufficient to warrant adverse proceedings against the entry, the record in the case failed to show that any protest against the good faith of the entryman was filed within two years from the issuance of final certificate and that charges after that time were barred by the act of March 3, 1891 (26 Stat., 1095). Thereupon the election of Blinn was accepted as to the entry involved and the said entry approved for patenting under the proviso to the seventh section of said act of 1891. Patent, however, was not issued for the following reason:

It appears that upon receipt of the letter from the Commissioner of the General Land Office of June 25, 1909, directing proceedings against the two entries, the register and receiver ordered a hearing, which was set for September 19, 1910, on which date the government appeared by special agent and the entryman by his attorney. Before the introduction of any testimony a motion was made on behalf of the entryman to dismiss the case upon the ground that the proceedings were barred by the act of March 3, 1891, in that two years had elapsed since the making of final proof and before the bringing of any contest or charges against the entry. Inasmuch as it appeared that proceedings as to the entry made by Blinn had already been dismissed by the Commissioner of the General Land Office, by his letter of September 6, 1910, addressed to the chief of field division, and the two cases being similar in all respects, the local officers entertained the motion to dismiss the proceedings against the entry held by assignment and the record was transmitted to the General Land Office by letter of December 17, 1910.

Upon receipt of the report of the local office the Commissioner again considered the cases, and on January 18, 1911, rendered a de-

cision holding that the government was not precluded from proceeding on the special agent's report and remanded the cases for hearing in accordance therewith. From that action the claimant, Blinn, has appealed to the Department.

After the record of the case was transmitted from the General Land Office there was filed a petition to intervene by W. T. Darlington, who claims that on November 23, 1906, after final proof was made and final certificates were issued on these entries, he entered into a contract for the purchase of the land from Blinn, paying part of the consideration in cash and agreeing to pay the balance upon the performance of certain conditions; that the terms and provisions of the contract have not as yet been performed in full but the petitioner is ready and willing to comply with his part thereof at such time as Blinn fulfills the conditions imposed upon him.

It is urged in support of the appeal that the government is now precluded from proceeding against these entries upon the charge of noncompliance with the requirements of the desert-land act, and that the coal question is eliminated by the election of Blinn to accept surface patent under the provisions of the act of March 3, 1909, *supra*.

It appears from the record that final receipts were issued on these entries August 28, 1906, and that on June 14, 1907, less than one year from the issue of the receiver's final receipt, the Commissioner of the General Land Office directed the proper field officer to make an examination in accordance with the rule obtaining and to submit prompt report. This order of investigation was based upon the fact that in October and November following the issue of final receipts in August, the lands had been withdrawn as coal lands, to the end that they might be appropriately classified.

That the action of the land department in withdrawing the lands on account of their supposed coal character and in ordering an investigation of the entries, was a protest against said entries within the meaning of the seventh section of the act of March 3, 1891, there can be no doubt. It was in fact a charge that the lands were coal lands, and, if true, constituted at that time an insurmountable obstacle to the acquisition of any title under the desert-land laws. That the entryman, Blinn, was advised of the intention of the General Land Office to investigate these entries is shown by the fact that in reply to his personal communication he was advised on February 4, 1908, that it was necessary to have an examination made of the entries by a special agent because the township in which the lands were located had been withdrawn from entry by the Department's order of October 15, and November 7, 1906, owing to reports made by the Geological Survey that the lands contained workable deposits of coal.

The investigation made later by the Geological Survey showed that the previous report as to the coal character of these lands was correct, as the lands have been classified as coal land at \$20 per acre, and the entryman, by electing to take surface patents, has acquiesced in that finding.

The entryman claims, however, that he is entitled to patents for the surface of the lands embraced in these two entries by reason of the proviso to the seventh section of the act of March 3, 1891, *supra*, and the act of March 3, 1909, for the protection of surface rights of entrymen. He claims that no charge of failure to comply with the law was made against his entry within two years after the issue of the final receipts and that it is now too late for any such charge to be filed, or for any proceedings to be had on any charge of that nature heretofore made but made after two years from the date of the issue of the final receipts.

That the proviso to the act of 1891 did not operate upon these entries is clearly shown by the fact that they were protested within a few months after the issue of the final receipts and the entryman had due notice thereof. He admits the correctness of the charge then made that the lands were not subject to entry because of their coal character, and at the same time he invokes the benefits of the surface-right act of March 3, 1909. That act, however, provides that any person who has "in good faith" located, selected or entered under the nonmineral land laws lands which are subsequently classified, claimed, or reported as being valuable for coal, may, upon making satisfactory proof of compliance with the law under which his entry is made, receive patent which shall contain a reservation to the United States of all the coal in the land. In determining whether or not this applicant is entitled to the benefits of the remedial act of 1909, it is entirely competent for the land department to inquire into his good faith, to know whether or not there has been a compliance with the requirements of the general law under which the nonmineral entry was made.

The report of the special examiner of the General Land Office, if true, requires the cancellation of the entries, and in the face of the allegations contained in that report the Department is not authorized to allow the claimant to receive surface patents for the lands involved.

That the intervener, Darlington, was not a purchaser in entire good faith is shown by the fact that on September 23, 1908, at the time of the investigation of the entries, he made an affidavit before the special examiner of the General Land Office in which, after referring to his agreement to purchase the lands, he stated that he refused to pay the second installment of \$500 at the time of the agreement, for the reason that he was in doubt as to Blinn's ever being able to secure patent and

title from the government on the improvements he had made in his efforts to reclaim the land, and because of his failure to cultivate and raise a crop on at least one-eighth of the land, as required by law.

The action of the General Land Office is affirmed and the hearing ordered will be had, notice of which should be issued to Darlington, as intervener.

### LITTLE CHIEF.

*Decided May 18, 1911.*

#### INDIAN ALLOTMENT—DECEASED ALLOTTEE—SUCCESSION.

Under section 6895, Wilson's Statutes of Oklahoma (1903), governing descent, succession is cast directly upon the lineal descendants, and where decedent left surviving no children, but grandchildren, and great-grandchildren issue of deceased grandchildren, the right of representation begins with the rank of the nearest living descendants—that is, the grandchildren—the great-grandchildren taking, by representation, the shares of their deceased parents.

#### PIERCE, *First Assistant Secretary:*

May 1, 1911, decision was rendered in distribution of the estate of Little Chief. For errors therein apparent, the Department of its own motion has recalled and reconsidered the case.

Little Chief was a Ponca Indian, of Indian Territory, who died in 1899 possessed of an allotment, leaving a widow, Betsy Little Chief. No children survived him. His nearest kin were grandchildren, issue of his daughters Comes At Rain, Appearing Moon, and Runner.

Comes At Rain had surviving at her father's death three children—Mike Roy, Frank Roy, Mary Little Standing Buffalo—and descendants of a deceased daughter, Josephine Roy Washington, who died September 23, 1895, before her grandfather, leaving a husband, Robert Washington, and a daughter, Alice G. Pappan.

Appearing Moon had surviving at her father's death a daughter, Breeze Roy, who died July 4, 1904, leaving her father, Antoine Roy, now living. Another daughter of Appearing Moon, Hannah R. Smith, died in 1904, leaving a husband, Edward L. Smith, and four sons, John, George, Leonard, and Zach L. John died December 31, 1908.

Runner left a daughter surviving at her father's death, Anna De Lodge Ironthunder, who died in 1900, leaving her husband, David Crazy Arrow, and her daughter, Haydee Ironthunder, surviving.

There were other children of Little Chief, and other grandchildren and great-grandchildren, but their deaths without issue make it unnecessary to consider or mention them.

The law governing this descent is section 6895, Wilson's Statutes of Oklahoma, 1903, which, so far as here material, is:

If the decedent leave a surviving husband or wife, and more than one child living, or one child living, and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the lawful issue of any deceased child, by right of representation; but if there be no child of the decedent living at his death, the remainder goes to all his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation. If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living, and the issue of the deceased child or children by right of representation.

\* \* \* \* \*

Seventh. If the decedent leave several children, or one child and the issue of one or more children, and any such surviving child dies under age, and not having been married, all the estate that came to the deceased child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation.

Under this statute Betsy Little Chief, widow of decedent, is entitled to one-third of the estate.

Whether descendants of the three daughters take per capita as to all grandchildren living and by representation as to descendants of grandchildren who died before Little Chief; or whether all descendants take by representation of their mother, depends upon construction of the phrase "if all the descendants are in the same degree of kindred to the decedent they share equally, otherwise they take according to the right of representation." Is representation to begin at the rank of nearest living descendants, or at the rank of decedent's children who left descendants, when all children are dead and the more remote descendants are not all in the same degree? On reconsideration, the Department decides that succession is cast directly upon the lineal descendants. The nearest in degree living at Little Chief's death were his surviving grandchildren. Those living took, not by representation through their mother, but by force of the statute itself, as descendants. They did not take by representation or *per stirpes*, for it was settled by the common law, carried by the colonies to this country, that succession to the title is immediate from him last actually seized or vested with it. Kent's Commentaries, Vol. IV, 12th Ed., 394 (\*386). Respecting lineals in unequal degree, Kent, *Ib.*, 400 (\*390), says:

Those who are in the nearest degree take the shares which would have descended to them had the descendants in the same degree, who are dead leaving

issue, been living; and the issue of the descendants who are dead, respectively, take the share which their parent, if living, would have received.

At his death Little Chief's nearest living descendants were six grandchildren—Mike Roy, Frank Roy, Mary Little Standing Buffalo, Breeze Roy, Hannah R. Smith, Anna De Lodge Ironthunder—and descendants of one other grandchild, Josephine Roy Washington. This divides the estate into three parts, of which the widow takes one; the remaining two-thirds is divided into seven parts, of which the six living grandchildren and the descendants of the deceased grandchild, collectively, succeeded to two twenty-first parts.

Josephine Roy Washington left a husband, who took nothing, as his wife died before any estate vested in her. She left a daughter, Alice G. Pappan, who by representation succeeded to her mother's two twenty-first parts.

Breeze Roy died July 4, 1904, unmarried, without issue, leaving her father, Antoine Roy, surviving. Her age at her death is not shown by the record. If she was a minor at the time of her death, her interest passed to her sister Hannah Roy Smith under the seventh canon of descent. If, however, she was of full age, her interest passed to her father, Antoine Roy. Antoine Roy, husband of Appearing Moon, took nothing as surviving husband, as no estate vested in his wife, Appearing Moon, during her life.

Hannah R. Smith died August 17, 1909, leaving a husband, Edward L. Smith, and four children—John, George, Leonard, and Zach L. The husband succeeded to one-third of two twenty-first parts of the estate, or two sixty-thirds. The four children succeeded to one sixty-third each. The son, John Smith, died December 21, 1908, unmarried, without issue, a minor, aged seventeen years, and his estate, being ancestral, inherited from his mother, was cast by the seventh canon of descents upon his remaining three brothers, to exclusion of his father, making at this time the interest of his three brothers—George, Leonard, and Zach L. Smith—four one hundred eighty-ninth parts.

Anna De Lodge Ironthunder died in 1900, leaving surviving her David Crazy Arrow, her husband, and Haydee Ironthunder, who each took one twenty-first part of the estate, thus disposing of the entire estate.

As noted above, the record fails to show whether Breeze Roy died before reaching mature age. In case she was an infant, the interests of the heirs of Hannah R. Smith would be correspondingly increased. The facts in the record do not permit certain disposal of the interest of Breeze Roy. The estate will be distributed in accordance with this decision when the facts respecting the two twenty-first parts of Breeze Roy are ascertained.

The decision of May 1, 1911, is recalled and vacated.

## SVETOZAR IGALI.

*Decided May 22, 1911.*

## ISOLATED TRACT—EFFECT OF WITHDRAWAL ON ORDER FOR SALE.

While an order of the Commissioner of the General Land Office authorizing the sale of an isolated tract, noted upon the records of the local office, segregates the land from other entry or disposition under the public land laws, it will not prevent withdrawal of the land by competent authority from all forms of entry or disposal; and where the local officers, notwithstanding such withdrawal, proceed to offer and sell the land in pursuance of the original order, such sale is unauthorized and of no effect in face of the withdrawal.

*PIERCE, First Assistant Secretary:*

Svetozar Igali has appealed from the decision of the Commissioner of the General Land Office of February 16, 1911, setting aside and vacating his purchase, under the act of June 27, 1906 (34 Stat., 517), of an isolated tract, being the NW.  $\frac{1}{4}$  SW.  $\frac{3}{4}$ , Sec. 33, T. 24 S., R. 15 E., M. D. M., Oakland, California, land district, and holding for cancellation his purchase and entry thereof.

From the record it appears that the Commissioner, on January 21, 1910, upon the application of one Franklin W. Maule, ordered into market as an isolated tract the land above described. Thereupon, the local officers caused notice to be given under date of January 27, 1910, of such sale to take place March 15, 1910, on which day claimant Igali appeared, and having bid \$2.80 per acre for the land was declared to be the purchaser, and thereupon receipt was issued and his entry, No. 03818, was allowed.

The W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of said section 33, together with other tracts, was, on February 2, 1910, embraced in temporary petroleum withdrawal No. 12, said order being in part as follows:

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the following list are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and report.

Said tracts were also embraced in executive order of withdrawal of July 2, 1910, and included in petroleum reserve No. 2 for California. That order of withdrawal is in the following terms:

It is hereby ordered that those certain orders of withdrawal made heretofore:

\* \* \* \* \*

on February 2, 1910, and described as temporary petroleum withdrawal No. 12,—in so far as the same include any of the lands hereinafter described, be, and the same are hereby, ratified, confirmed, and continued in full force and effect; and subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases,"

approved June 25, 1910, there is hereby withdrawn from settlement, location, sale, or entry and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, all of those certain lands of the United States set forth and particularly described.

While it is true that the Department has held (*Erikson v. Harney*, 38 L. D., 483, syllabus)—

Isolated tracts do not become segregated upon application for sale until the order of the Commissioner authorizing such sale has been noted upon the records of the local office—

nevertheless the segregation mentioned is merely the withholding of the lands from entry under the general public land laws, and does not constitute a segregation or appropriation of the land entitling the applicant for the sale or any other person to have the land sold, where, prior to actual sale and entry, the tract has been withdrawn by competent authority from all forms of entry or disposal.

Igali's rights, if any, and his claim did not arise until his purchase, on March 15, 1910, which was long subsequent to the departmental order. The terms of that withdrawal are specific, and such order was paramount to and superseded the Commissioner's order directing the sale of the tract. The local officers' actions in continuing the proceeding looking toward the sale, in offering the land, and in purporting to make the sale, were unauthorized. The purchaser thereby secured no rights which he is entitled to assert in the face of such withdrawal. This is particularly true in view of the Presidential ratification and confirmation of the departmental order of withdrawal.

It accordingly follows that Igali's purchase and entry were improperly and irregularly allowed, and that the Commissioner's order holding the same for cancellation was correct.

The decision appealed from is accordingly affirmed.

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### CURRY v. VREEDENBURG.

Motion for rehearing of departmental decision of February 3, 1911, 39 L. D., 488, denied by First Assistant Secretary Pierce, May 22, 1911.

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### FLOSSIE FREEMAN.

*Decided May 23, 1911.*

#### REPAYMENT—VOLUNTARY RELINQUISHMENT OF ENTRY.

The mere fact that an entry was voluntarily relinquished will not absolutely bar repayment under the act of June 16, 1880, in the absence of fraud or bad faith in the making of the entry, if the relinquishment was made for good



and sufficient cause and under such conditions and circumstances as would entitle the person relinquishing to make a second entry as though the first had not been made.

PIERCE, *First Assistant Secretary*:

Flossie Freeman appeals from a decision of the General Land Office rejecting her application for repayment of the purchase money paid by her upon her desert land entry, made January 13, 1910, for lots 2, 3 and 4 and SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 4, T. 24 N., R. 53 E., Glasgow, Montana, which was voluntarily relinquished.

Her application was rejected for the reason that the act of June 16, 1880 (21 Stat., 287), authorizes repayment only where the entry has been canceled for conflict or has been erroneously allowed and can not be confirmed; neither of which conditions is found in this case.

Appellant states that she was wrongfully located on the tract described; that her entry was made in good faith, with the intention of complying with the requirements of law, but, upon further examination, it was found that the tracts entered are not those she originally examined; that the entry is high and rough and not susceptible of irrigation, and that it is impossible to comply with the requirements of law as to the irrigation of said tracts.

The act of March 26, 1908 (35 Stat., 48); provides that purchase moneys and commissions paid under any public land law shall be repaid in all cases where the entry, application, or proof "has been or shall hereafter be rejected and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application."

The mere fact that the entry was voluntarily relinquished will not absolutely bar the applicant from right of repayment under said act in the absence of fraud or bad faith in the making of the entry, if the relinquishment was made for good and sufficient cause and under such conditions and circumstances as would entitle the person relinquishing to a second entry as if the first entry had not been made. In such cases a relinquishment of an entry that can not be completed from cause not due to any fault on the part of the entryman is tantamount to a rejection of the entry, but the *bona fides* of the entryman should be apparent from all the facts and circumstances attending the entry and throughout the entire transaction. Marie Steinberg (37 L. D., 234); Joseph Gibson (Ib., 338); Margaret E. Scully (38 L. D., 564).

In this case applicant has failed to show why she did not seek to have her entry amended so as to embrace the tract she intended to enter and to have her payments transferred to said land. Nor has she submitted any proof to show that the relinquishment was made

under such conditions and circumstances as would have entitled her to a second entry.

Upon the showing made, the decision of the General Land Office must be affirmed.

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A. G. STRAIN.

*Decided May 24, 1911.*

FOREST LIEU SELECTION—TAXATION OF BASE LANDS SUBSEQUENT TO SELECTION.

Upon approval of an application to make forest lieu selection the title of the Government to the lands relinquished as base therefor attaches, under the doctrine of relation, as of the date the selection was perfected and entitled to be approved; and the relinquished lands are not, subsequent to that date, subject to taxation by the State; and the selector will not be required to make any showing as to whether or not taxes have been assessed against the relinquished lands after the date the selection was completed.

PIERCE, *First Assistant Secretary:*

William M. Falconer, attorney in fact for A. G. Strain, December 12, 1904, filed selection under act of June 4, 1897 (30 Stat., 36), for W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 13, T. 7 N., R. 33 E., W. M., Walla Walla, Washington, in lieu of S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 16, T. 3 N., R. 11 W., S. B. M., in San Gabriel Forest Reserve, Los Angeles, California, relinquished to the United States.

Suspecting fraud in obtaining title from the State to this school land relinquished as base, the selection was suspended for investigation. January 10, 1910, Special Agent Percy F. Smith submitted a favorable report that A. G. Strain purchased the base tract September 13, 1898, from the State of California, and certificate of purchase issued to him March 2, 1903, and patent issued the same day in his name. The agent found Strain had ample means to make such purchase, made it for his own use, and was plaintiff in suit against Josie Pursley and J. S. Standler, involving his right to purchase the base land from the State, in which suit decree was rendered in Superior Court, Los Angeles County, September 14, 1908, in his favor. He is now dead. The agent satisfied fully of these facts, recommended proceedings against the selection for fraud in acquiring title to the base be dismissed and patent issue upon the selection. The Commissioner dismissed the proceeding against the selection.

November 3, 1910, the selection was examined with view to its acceptance or rejection. The Commissioner required a certificate from the proper taxing officers showing that all taxes levied or assessed against the base tract have been paid; in default whereof, the selection would be canceled without further notice. From that action Falconer appealed.

It is assigned as error in the requirement that "taxes levied or assessed against any base land after it has been surrendered to the United States is not a lien upon the land or an impairment of the right to use the same as a basis of lieu selection." The brief argues that this is an old story, which has been many times tried in the land department, and was set at rest January 17, 1906, by decision of the Secretary in protests of the county clerks, Harry C. Hibben and A. F. McAllister, of Coconino and Navajo Counties, Arizona, claiming that lands relinquished to the United States were subject to taxation until the title was examined and accepted by the United States.

Counsel err as to the scope of that decision. It was applicable only to lands relinquished within the Territory of Arizona and was based wholly on the decision of the Supreme Court of Arizona in suit of the Territory *ex rel. Devine v. Edward B. Perrin*, decided November 18, 1905 (83 Pac., 361; 9 Arizona, 310). The Department held:

The land department in determining the condition of title to lands relinquished to the United States in the forest reserves in Arizona, as respecting taxability and tax liens, will be governed by the decision of the Supreme Court of Arizona Territory in case of Coconino County *v. Edward B. Perrin*.

This holding was limited in application to the Territory of Arizona and based solely on the decision of the Supreme Court of the Territory in the case cited. The ruling made by the General Land Office is according to regular practice heretofore subsisting. This practice is based upon the holding that equitable title to the relinquished land does not vest in the United States until the title offered by the relinquisher has been examined and accepted.

In *C. W. Clarke* (32 L. D., 233) a second selection had been made after rejection of the first, and the question arose whether the abstract of title should be extended to the date of the second selection. The Department held:

Some states claim the right to exercise the taxing power against lands the naked legal title to which is in the United States where the complete equitable right has passed, and the court has upheld such power. *Wisconsin Central R. R. Co. v. Price County* (133 U. S., 496); *Northern Pacific R. R. Co. v. Patterson* (154 U. S., 130, 132); *Carroll v. Safford* (3 How., 441). These were cases wherein equitable title passed from the United States and legal title remained in the government as a mere trustee to the grantee of the United States. No adjudication has been found of a case where title was passing in the converse direction from private holders to the United States. The imposition of a tax is at least an assertion by the state authority imposing it that the ownership or the equitable right of property is in him to whom it was assessed and against whom a tax was levied, and of a power to impose a tax upon it. . . .

Under such circumstances, and until the court decides that lands which have been of record conveyed to the United States, but have not been promptly exchanged for public lands, are not taxable and have passed wholly beyond the grantor's power, prudent administration justifies the requirement of your office that the abstract of title should be extended so as to show whether or not adverse claims have arisen, and to require their removal if they have arisen.

Same rulings were made in *Mary E. Coffin* (34 L. D., 564, 566), and *Thomas F. Arundell* (33 L. D., 76).

These were cases where the selection then being considered was not that made at or about the time of the relinquishment, but was a second selection made after some lapse of time and rejection of the first.

In the present case we have a selection which was made immediately after the relinquishment and was good in form. It was entitled to be accepted at the time it was made, but owing to unfounded suspicion of fraud was held for investigation for nearly seven years. The question then arises, is the selector liable for taxes that may have been levied, or may have been attempted to be levied, by the State upon lands relinquished to the United States during this time. The case is one to which the doctrine of relation is peculiarly applicable. The selector at invitation of the United States recorded his deed to the United States, yielding all possession and control of the land. Under the act of June 4, 1897, he selected in lieu thereof land vacant and open to settlement, which the United States by the act promised to convey him in exchange. In *United States v. Anderson* (194 U. S., 394) there was a similar condition. A railroad indemnity selection was made in 1887, which, for reasons not necessary here to set out, was not approved until 1896. In the meantime, trespass was committed upon the selected lands, for which the United States sued for damages and recovered the sum of \$15,000. When this sum had been received by the United States, the selector claimed the damages recovered properly belonging to him, as it was the fruit of trespass upon his land. Suit was brought in the Court of Claims, which awarded the damages to him as a proper claim against the United States. The United States appealed to the Supreme Court, which held:

This results because on this record the rights of third parties are not involved, since the controversy concerns only the right of the United States to retain as against its grantees the proceeds recovered by it as the result of a trespass upon land after an application for the selection of such land and pending action thereon by the proper officers of the Government. Under these circumstances the case is one for the application of the fiction of relation, by which, in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land. Many cases illustrating the doctrine in various aspects have been determined in this court.

Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly imported that at the time of the application for selections the land in question was rightfully claimed by the applicant.

Here as we have seen the grantee had exercised his right to apply for selections within the indemnity limits and had in legal form requested the approval of the same by the Government. Everything therefore which the grantee was required by law to do to obtain the legal title had been performed. These facts bring this case within the principle decided in *Heath v. Ross*, 12 Johns. 140, and *Musser v. McRae*, 44 Minnesota, 343, referred to in the opinion of the

court in the Loughrey case (p. 218) as not being inconsistent with the principle there applied. *Heath v. Ross* was an action of trover for timber cut between the application for and date of a patent from the State, and its ensealing and delivery by the Secretary of the State. The title was held to relate back to the first act, so as to entitle the plaintiff to maintain an action against a mere wrongdoer, for the value of the timber cut and carried away in the meantime. *Musser v. McRae* was an action brought to recover the value of timber cut by trespassers from indemnity lands selected by the agent of certain railroad companies, intermediate the application for selection and the patenting of the lands. To permit a recovery, it was held that the title evidenced by the patent related back at least to the date of the application for selection. It was declared that the doctrine of relation was properly applied to the case, "for the advancement of justice, and to give full effect to the grant it was intended to have."

The selection being one that should have been approved, title must be held to relate to the date of the selection, and all that is necessary for the selector to show is that his land was free of tax liens at that date.

Were it otherwise, he would be rendered liable for a double tax for the same property—one by the State of California upon the base land and one by the State of Washington upon the land selected, both States claiming right to tax land where the ownership is merely equitable, and not complete.

Examination of the abstract, however, shows that the tax certificate was not good. The auditor's certificate, Los Angeles County, annexed to the abstract of title, dated August 20, 1904, is that:

There are no unredeemed tax sales, or outstanding tax deeds, against the south half of the north east quarter of Section Sixteen (16) in Township Three (3) North of Range Eleven (11) west S. B. M., as shown by the official records of my office.

This falls short of what is necessary to be shown respecting taxes. It does not exclude taxes levied or statutory liens for taxes not extended, which have not matured into tax sales or tax deeds.

The certificate should show that no tax liens existed against the property at the time it was given. In California taxes are a lien from the first Monday of March (Section 3717, Political Code, Deering's Codes and Statutes of 1886). Tax for the then current year, 1904, was a lien. The certificate should exclude the existence of any tax lien whatever—not merely those which had passed to tax sale, or had resulted in tax deed.

The decision is therefore technically affirmed, but the selector will be permitted to show that no tax liens existed on the land at the time of completion of the selection, or if such existed, that they have since been paid and do not longer exist. Taxes after 1904 will be regarded immaterial, because title will vest on approval of the selection in the United States as of the day of selection by relation, and the property of the United States is not subject to tax.

**TODD v. STATE OF WASHINGTON.**

Motion for review of departmental decision of April 1, 1910, 38 L. D., 518, denied by First Assistant Secretary Pierce, May 26, 1911.

**SKINNER v. FISHER.****HIRSHFELD v. CHRISMAN.**

*Decided May 26, 1911.*

**OIL LOCATIONS—DISCOVERY—SOLDIERS' ADDITIONAL APPLICATIONS.**

Mere paper locations, under the placer laws, of lands alleged to contain oil, upon which no discovery of oil has been made and upon which the mineral claimants are not prosecuting with diligence the work for making a discovery of oil, do not prevent appropriation of the land by location of soldiers' additional rights.

**SOLDIERS' ADDITIONAL APPLICATIONS—EQUITABLE TITLE.**

Equitable title under soldiers' additional applications made for lands covered by such paper locations vests when the applicants have done all that they are required to do, unless the lands are at that time known to be oil lands.

**SOLDIERS' ADDITIONAL APPLICATIONS—CHARACTER OF LAND—EVIDENCE.**

In determining the oil or nonoil character of the lands covered by the soldiers' additional applications, evidence as to the discovery and development of oil in adjacent lands, and as to their geological formation, and the relation of the tracts in question to known oil fields, may be admitted and considered.

**PIERCE, *First Assistant Secretary:***

The above-entitled cases involve five soldiers' additional homestead entries, all based upon recertified rights in the Visalia, California, land district and all in T. 32 S., R. 25 E., M. D. M., as follows: 02280 for the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 30; 02281 for the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 30; 02282 for the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 30; 02294 for the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 20; 02295 for the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 20. The first three were presented to the local land office March 3, 1910, and the latter two on March 8, 1910. The register and receiver issued a final certificate in each application on the day of presentation. This was done without publication of notice or posting of notice on the land and in the local land office, required by circular of February 21, 1908 (36 L. D., 278), and the endorsement of "Protest" or "No Protest" by the proper Chief of Field Division, as required by circular of April 24, 1907 (35 L. D., 682). Thereafter, however, publication of notice and posting were duly had, the publication being complete April 10, 1910, and proof thereof filed in the local land office April 14, 1910. During the period of publication a brief, uncorroborated, informal protest was filed by one Skinner, which

simply stated that the land was embraced in mining claims. The Chief of Field Division also returned the notice endorsed "Protest," but no formal report has been received from him. By decisions of September 14, 1910, the Commissioner of the General Land Office held that the final certificates were irregularly issued before any publication or return of notice from the Chief of Field Division and held them for cancellation. The only additional protests were two telegrams, addressed to the Commissioner, one by R. W. Skinner and the other by I. Hirshfeld, protesting against the issuance of patent. Upon appeal, the Department, by its decisions of December 29, 1910, reversed the action of the Commissioner on the ground that, although the final certificates were irregularly issued, still, there being no valid protests and no formal report from the Chief of Field Division, such final certificates could be permitted to stand unless subsequent action should develop facts warranting the cancellation thereof. In other words, to cancel the final certificate might simply result in the issuance of another certificate in its place. With the appeal additional protests were filed, but the allegations in these protests were vague and indefinite. At the best they disclosed that the lands in section 30 were embraced in placer locations made in September, 1909, the exact description of the lands embraced in such locations not appearing. They also alleged that the mineral claimants had dug a reservoir and sump on the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of section 30 at an expense of \$800 in September and October, 1909. As to the lands in section 20 it was averred that they were embraced in a placer location made in May, 1909, and that in January, 1910, an agreement was made with I. Hirshfeld who was to do the development work for drilling for oil thereon. Nowhere was it alleged that there had been an actual discovery of oil on any of the tracts, and the allegations of possession by the mineral protestants were exceedingly vague and indefinite. It also appears that in August, 1910, a suit to quiet title was brought by the nonmineral claimants against the mineral protestants as to the lands in section 20, and an action for injunction and to quiet title as to the lands in section 30.

March 18, 1911, the Department entertained a motion for review, after oral arguments by counsel for all the parties, and the motion and its accompanying papers have now been served and the answer thereto, with accompanying affidavits, has been filed. With the motion there were filed numerous affidavits relating to the character of the land and its known condition at the time the soldiers' additional applications were filed.

Upon the record, as presented by the appeal, it is clear that the Department's decision was correct. In fact the case is on all fours with that of *McLemore v. Express Oil Company* (112 Pac. Rep., 59),

decided by the Supreme Court of California November 17, 1910. There, a mineral claimant claiming under a so-called placer location upon which no discovery had been made, the location having been attempted in January, 1906. April 12, 1907, the plaintiff made homestead entry of the land, which was followed by possession and establishment of residence the following October. The mineral claimant had constructed a cabin on the land, marked its boundaries and built some bits of road, which it was claimed was in excess of the amount required for assessment work. The court, however, held that no vested right was initiated prior to the discovery of oil, and that while a mining locator, who was actually in possession of the land and diligently prosecuting his efforts to make a discovery of oil, would be protected from any clandestine or fraudulent entry by another, this diligent prosecution of the work did not mean the doing of assessment work or the pursuit of capital to prosecute the work, or any attempt at holding the land by means of cabin, lumber pile, or unused derrick. The court said that it meant diligent, continuous prosecution of the work with the expenditure of whatever money might be necessary to the end in view. In the present case it is apparent that nothing had been done upon the land in section 20 at the time the soldiers' additional applications were filed. As to those, in section 30, it was the contention of the mineral claimants that they had constructed a reservoir and sump hole; but there is nowhere any allegation that they were in the prosecution of any work tending to a discovery of oil. On behalf of the soldiers' additional claimants, affidavits were filed with the appeal and with the motion for review tending to show that at the time the nonmineral applications were filed and during the period of posting of notice and publication nothing had been done upon the land. Such mere paper locations, upon which no discovery of oil has been made and upon which the mineral claimants are not prosecuting with diligence the work for making a discovery of oil, do not prevent appropriation by soldiers' additional homestead entry. The character of land which can be taken by such form of entry is nonmineral (section 2302, R. S.), and it is further limited by section 2289, Revised Statutes, viz: it must be unappropriated, public land. In accordance with the above decision of the Supreme Court of California, in which the Department concurs, these lands were unappropriated, public lands at the time the recertified rights were presented at the local land office.

In the case of *Leonard v. Lennox* (181 Fed. Rep., 760), the Circuit Court of Appeals for the Eighth Circuit, in a case involving the attempted acquisition of coal lands under the soldiers' additional homestead law, held:

When the right to a patent under such a law as the soldier's additional homestead law depends upon whether the land is agricultural or is known to be



chiefly valuable for coal, that question must be determined according to the conditions existing at the time when the applicant complies with all the requirements of the statute and the authoritative regulations. If at that time the land is not known to be chiefly valuable for coal, he acquires a right to a patent which will not be disturbed by a subsequent change in the conditions; but, if before such compliance it is discovered that the land is thus valuable for coal, nothing that he subsequently may do will give him a right to a patent, because land known to be of that character is not subject to acquisition under such a law, but only under the coal land law.

At page 764 the court said:

The appellant insists that the action of the officers of the Land Department in respect of this evidence was right, even if the appellee had done all that he was required to do to entitle him to a patent because his application had not been allowed or passed to entry. This insistence cannot prevail. It not only is opposed to the settled rule that the character of the land—whether agricultural or known to be chiefly valuable for coal—must be determined according to the conditions existing at the time when the applicant does all that he is required to do to entitle him to a patent, but is grounded in a misapprehension of the authority and duty of the officers of the Land Department in respect of such an application. Whilst it undoubtedly is subject to examination and consideration by them, this is not that they may elect whether or not they will consent to its allowance, but that they may ascertain whether or not the applicant has acquired a right to its allowance—a right which is acquired, if acquired at all, at that point of time when the applicant has done all that he is required to do in the premises instead of at the time of its recognition by them.

Accordingly when, in the present case, the posting of notice upon the land and the publication had been completed and the proof thereof filed in the local land office it is clear that the equitable title to the land vested in the soldiers' additional claimants and the final certificates may well be taken as of date when publication and proof thereof were completed.

With the motion for review, however, there were numerous affidavits, some by geologists, filed, the substance of the allegations being that, upon geological evidence, the land was oil land and that it was known to be oil land at the time the soldiers' additional filings were made and during the period of publication, that the lands were worthless for any other purpose than oil development, and that the soldiers' additional applications were made for the purpose of securing oil lands. The question presented, therefore, is whether the Department should order a hearing upon such an allegation, in the absence of any allegation of an actual discovery of oil upon the land.

In the case of coal lands, the Department accepts geological evidence to prove their known character. It appears also that, while the character of lands as oil cannot be ascertained with the same accuracy by geologists as coal, the Department nevertheless has indicated that it will accept such evidence and also evidence as to the discovery and development of such mineral in adjacent lands. In the case of *Kern Oil Company v. Clotfelter* (30 L. D., 583), fifth para-

graph of the syllabus, the Department, having ordered a hearing, states—

The evidence bearing upon the character of the selected lands will not be restricted to the discovery or development of mineral therein and to their geological formation but may extend to the discovery and development of mineral in adjacent lands and to their geological formation.

In the unreported case of *Jamison et al. v. Santa Fe and Pacific Railroad Company et al.*, decided October 16, 1909, the Department, in directing a hearing upon a forest reserve lieu selection in order to ascertain the oil or nonoil character of the land, stated:

Particular attention should be directed to fixing the exact location of the oil wells upon adjoining lands, their depth, the characteristic strata encountered therein, and the quantity of oil produced, in order that the geological conditions, and relation of the tract to the known oil field may be intelligently considered.

The Department is of the opinion that a hearing should be ordered to determine whether the lands were oil lands and were known to be oil lands at the time the proof of publication and posting of notice were completed, at which time the rights of the soldiers' additional applicants vested. (See *Harkrader et al. v. Goldstein*, 31 L. D., 87.) The matter is therefore remanded for a hearing in accordance with the above, at which the Chief of Field Division may, if found expedient, offer testimony on behalf of the Government. In the meantime the final certificates will be held intact, to be canceled in the event the above charges are sustained.

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#### STATE OF WASHINGTON v. MACK.

Motion for review of departmental decision of December 9, 1910, 39 L. D., 390, denied by First Assistant Secretary Pierce, May 26, 1911.

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#### ANNA M. WRIGHT.

*Decided May 29, 1911.*

#### PRACTICE—APPEALS FROM RECLAMATION FIELD OFFICERS.

The instructions of June 27, 1910, providing for appeals to the Director of the Reclamation Service and the Secretary of the Interior successively, from adverse action of project engineers, are applicable only to cases involving questions which properly rest for decision within the jurisdiction of the Reclamation Service.

#### RECLAMATION HOMESTEAD—DEATH OF ENTRYMAN—RIGHT OF WIDOW.

The fact that a widow who under section 2291, Revised Statutes, succeeds to the right of her husband in an unperfected homestead entry within a reclamation project has previously secured water from the project for reclama-

tion of land held by her in private ownership in no wise affects her right to acquire water under the project for completion of such entry under the reclamation act.

PIERCE, *First Assistant Secretary*:

May 8, 1911, the Director of the Reclamation Service transmitted for consideration and action by the Department the application of Anna M. Wright, widow of Henry S. Wright, for water right for farm unit "B" (W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ ), Sec. 15, T. 9 N., R. 4 E., B. H. M., Bellefourche Project, South Dakota, containing an area of 80 acres.

October 16, 1903, Henry S. Wright made homestead entry for the NE.  $\frac{1}{4}$  of said section 15, subject to the provisions of the reclamation act, and on February 5, 1910, his widow, Anna M. Wright, filed an application for adjustment of said entry to the said farm unit "B". The said widow filed a water right application for the said farm unit which, on May 13, 1910, the supervising engineer of the Reclamation Service refused to approve for the reason that it was shown by said application that she had already been granted a water right for lands within said project to the area of 143 acres of irrigable land, and also for the further reason that said application, while stating said fact, did not purport to be an application for a water right for the land of said deceased entryman and was simply signed Anna M. Wright, without any designation as widow of the deceased entryman. After rejection of the said water right application by the engineer, the same was not offered for filing at the local land office at Bellefourche, but an appeal was taken direct to the Secretary of the Interior, who transmitted said appeal to the Commissioner of the General Land Office, who thereupon referred it to the Reclamation Service, said appeal being signed by appellant as widow of Henry S. Wright.

The entry was conformed to farm unit "B" on November 15, 1910. It is stated that the widow does not desire to dispose of the land she holds in private ownership and for which she has been granted a water right, because that is her home. In order for her to perfect the present entry it is necessary for her to acquire a water right and comply with the provisions of the reclamation act. The Director refers to an opinion of the Assistant Attorney General for the Interior Department, approved by the Secretary on June 25, 1906, not published, to the effect that where water is furnished to any one person who is a member of the Water Users Association, either for public land or in private ownership or both, the maximum amount which can be held by any one person must not exceed 160 acres. He said that in view of said opinion it did not appear proper to approve said water right application. However, in order that final disposi-

tion of the case might be made without undue delay, he submitted same to the Department for consideration and action.

In the first place it is deemed important to discuss briefly the questions of procedure here presented. It appears from the action taken herein that the idea has obtained that this case should be controlled by the circular of instructions of June 27, 1910 (39 L. D., 51), which provides for appeal to the Director of the Reclamation Service and to the Secretary successively, from adverse action of a project engineer in certain cases. The said circular was based upon departmental decision of June 4, 1910, in the case of the Williston Land Company (39 L. D., 2). The question involved in that case was an alleged mistake in the plat as to the irrigable area of certain tracts, the applicant claiming that the area should be reduced as indicated in the water right application, while the project engineer of the Reclamation Service refused to approve the application not made in accordance with the approved farm unit plat. The local land office officials rejected the application because of the lack of approval of same by the project engineer, whereupon appeal was taken to the Commissioner of the General Land Office, and upon adverse action by the Commissioner, further appeal was taken to the Secretary. The Department held that:

Under the regulations the land office can grant water rights only upon approval of the project engineer. So there was no error in the action of the local office or of your office. Neither the local office nor general land office can review the action of the project engineer. That can be done only by appeal to the Director of the Reclamation Service, and further from his action to the Secretary of the Interior—supervising head of the Reclamation Service.

In that case the question was one peculiarly within the province of the Reclamation Service to decide, and it was intended by the said instructions to confine the procedure therein provided for to cases involving questions which properly rest for decision within the jurisdiction of the Reclamation Service. This is not such a case. The question here is whether the applicant is legally qualified under the law to take and hold a water right for this tract of land. This is a question properly for consideration by the officials of the land department. The engineer should have approved the application, if no objections thereto within his jurisdiction to decide, appeared. He should, however, have made known to the local land officers any questions which might have occurred to him as to the legality of the application. Such suggestion or recommendation would have been merely advisory and not controlling. The land officials should then have taken appropriate action upon the application. The proper procedure in such cases is clearly indicated in the circular of May 31, 1910 (38 L. D., 620). See sections 55 and 56 thereof. It would be entirely proper and advisable for the engineer to file a protest in any

case against the action of the land officials, if their action be considered improper. The controversy could then be decided by the Commissioner, or upon further objection, by the Secretary.

Passing to consideration of the merits of the case, it appears that the rejection of the application upon its merits was based upon the opinion above referred to which reads in part as follows:

While there appears to be no restriction in the act upon the right of a homesteader to the use of water for land owned by him to the extent of area allowed to any one landowner, it has been deemed advisable to administer the law through the instrumentality of water users associations which are organized by the owners of lands within the project. By the contracts heretofore made with such association by the Secretary of the Interior, only those who are or may become members of such associations will be accepted as entrymen or applicants for the right to the use of water which may be impounded or controlled by the works of such project.

Under the articles of incorporation and by the laws of such association, which are part of every contract, every member or shareholder of the association, whether he be the owner of lands or an entryman of public lands, is restricted in his holding to 160 shares of stock, one share being allowed to each acre or fraction thereon. So that, the Secretary of the Interior, by entering into a contract with such associations, has fixed 160 acres as the limit of the right to the use of water by any one person, whether the land irrigated is entered as public land or is held in private ownership, or under both rights.

Said opinion may be fairly construed as holding that the amount of 160 acres is the maximum of acreage for which water rights may be acquired by any one person under any Government reclamation project. The limit may even be placed at a lower figure, as has actually been done in some projects. It is well to state, however, to avoid misunderstanding, that the above rule does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right, through the works constructed by the Government under appropriate regulations and charges. See section 45 of said regulations of May 31, 1910.

The only provision in the reclamation act with reference to the limit of acreage in private ownership for which water may be sold, is found in section 5 and reads as follows:

No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.

It will be observed from the above that the Government is not obliged to sell water at all for the use of lands in private ownership. It may furnish water for such lands to the maximum limit of 160 acres to any one owner, or it may refuse to sell any water at all for

such purpose. There is nothing in the law to prevent the Government from selling water for the use of lands in private ownership to the limit of 160 acres to any one owner and also permit the same individual to make and perfect a homestead entry under the act for one farm unit even though the acreage for which water rights are sold would aggregate more than 160 acres. It could do this in all cases, but it has laid down the general rule as to most projects that the aggregate limit shall be 160 acres, and as to some projects it has been deemed advisable to fix even a lower limit. In this particular project the limit has been placed at 160 acres as to lands in private ownership, and under the ruling above cited this is considered the aggregate limit where water rights are sought in part for lands in private ownership and in part for lands embraced in an unperfected homestead entry.

The only further question for consideration is whether this applicant should be governed by the general rule. She succeeds to the rights of her husband in his homestead entry under section 2291, R. S. In order to complete the entry it is not necessary that she should have the qualifications of a homestead entryman. She is not required to live upon the land. She must cultivate same for the required time and reclaim one-half thereof and pay the charges prescribed under the reclamation act.

The entry when made was subject to all the conditions and restrictions of the reclamation act including the obligation to pay the water charge apportioned against the entry as finally fixed. In succeeding to the entry she assumed this charge.

The unperfected claim came to her by operation of law, and she is entitled to complete it to the same extent and upon the same terms as were required of her husband. Under these circumstances the fact that she may have previously secured water from this project for reclamation of land held by her in private ownership in nowise affects her right to complete the entry of her husband.

The action below is accordingly reversed, and the case is remanded to the Director of the Reclamation Service for action as here indicated.

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### CROW EAGLE.

*Decided May 3, 1911.*

#### INDIAN ALLOTMENT—HEIRS—PARTITION—PATENT—ACT OF JUNE 25, 1910.

Upon the death of an Indian allottee before expiration of the trust period and before issuance of a fee simple patent, without having made a will, the Secretary of the Interior is authorized by the act of June 25, 1910, to ascertain his heirs and, if competent to manage their own affairs, to issue to them a patent in fee; but, if one or more of the heirs are incompetent,

the land may be sold and the proceeds paid to such as are competent and held in trust for the use and benefit of such as may be incompetent, according to their respective interests; or, where one or more of the heirs are competent, their shares may, upon petition by them, be set aside and patents in fee issued to them, the shares of the incompetent heirs remaining subject to the trust declared in the patent to the deceased allottee.

PIERCE, *First Assistant Secretary*:

The Department has received your letter of April 5, 1911, relative to the partition under the act of June 25, 1910 (36 Stat., 855), of the estate of Crow Eagle, or Thomas Sand, Jr., deceased, an Indian of the Cheyenne River Reservation, South Dakota.

The allotment of Crow Eagle, or Thomas Sand, Jr., appears on a schedule approved October 9, 1906, and covers the E.  $\frac{1}{2}$  of Sec. 36, T. 15 N., R. 29 E., B. H. M., South Dakota, upon which first or trust patent issued January 30, 1907:

The act of June 25, 1910, *supra*, provides in section one thereof:

That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. 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; if he shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find the lands of the decedent are capable of partition to the advantage of the heirs he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor . . . upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: *Provided*, That the proceeds of the sale of inherited lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, as their respective interests shall appear.

The evidence adduced at a hearing to determine the heirs of Crow Eagle, or Thomas Sand, Jr., shows that Louise Four Bear, wife, and Thomas Sand, father, are the sole heirs of the decedent. In the petition for partition Louise Four Bear requested that trust patent issue to her for the NE.  $\frac{1}{4}$  of Sec. 36, and to Thomas Sand for the SE.  $\frac{1}{4}$  of said section. You ask to be advised whether *trust* patents will be issued upon the partition of an estate under the provisions of the act of June 25, 1910, *supra*.

It will be observed that the act provides for the setting aside of the shares of only such heirs as are competent and to them it is provided that patents in fee shall issue. There is nothing to show, as the case is presented here, whether the heirs of Crow Eagle, or

Thomas Sand, Jr., are both competent or whether either of them is competent.

It is further provided in the act of June 25, 1910, that where the heir or heirs are found to be competent to manage their own affairs, a patent in fee shall issue to such heir or heirs for the allotment of the decedent; but if it shall be found that one or more of the heirs are incompetent, the land may be sold and the proceeds of the sale shall be paid to such heir or heirs as may be competent, and "held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent," in accordance with their respective interests.

From the foregoing it is clear that as to competent heirs there is no occasion for issuing trust patents upon partition of the decedent's estate, nor is such course demanded or authorized by the act, as in such cases the issuance of patents in fee is specifically directed. Consequently, where one or more of the heirs are competent, their shares of the decedent's allotment may upon their petition be set aside and patents in fee issued to them accordingly. Where one or more of the heirs are incompetent, there is no occasion for the issuance to them of a new instrument, as their shares will continue to be held subject to the trust declared in the first or trust patent issued for the land covered by the decedent's allotment, but proper note of the partition will be made on the records of the General Land Office.

### RECLAMATION—SHOSHONE PROJECT.

#### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., May 20, 1911.*

Pursuant to the provisions of section 4 of the reclamation act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

1. Water will be furnished from the Shoshone Project, Wyoming, under the provisions of the reclamation act in the irrigation season of 1911 for the irrigable lands in the third unit shown on farm-unit plats of township 55 north, range 99 west, and townships 54 and 55 north, range 100 west, sixth principal meridian, approved December 10, 1910, by the Secretary of the Interior and on file in the local land office at Lander, Wyoming.

2. Homestead entries, accompanied by applications for water rights and the first installment of the charges for building, operation and maintenance, may be made on and after June 23, 1911, beginning at 12 o'clock m., under the provisions of said act for the farm units



shown on said plats. Water-right applications may also be made for lands heretofore entered and for lands in private ownership, and the time when payments will be due therefor is hereinafter stated.

3. Warning is hereby expressly given that no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun prior to July 15, 1911, on any lands shown on said plats; provided however, that this shall not interfere with any valid existing rights obtained by settlement or entry while the land was subject thereto.

4. The limit of area per entry, representing the acreage which in the opinion of the Secretary of the Interior may be reasonably required for the support of a family on the lands entered subject to the provisions of the reclamation act, is fixed at the amounts shown on the plats for the several farm units. The limit of area for which water-right application may be made for lands in private ownership shall be 160 acres of irrigable land for each landowner.

5. The charges which shall be made for each acre of irrigable land in the said entries and for lands heretofore entered or in private ownership are in two parts, as follows:

(a) The building of the irrigation system, \$47 per acre of irrigable land, payable in not more than ten annual installments, each payment not less than \$4.70, or some multiple thereof, per acre. Full payment may be made at any time of any balance of the building charge remaining due, after certification by the Commissioner of the General Land Office that full and satisfactory compliance has been shown with all the requirements of the law as to residence, cultivation and réclamation.

(b) For operation and maintenance for the irrigation season of 1911 and annually thereafter until further notice, \$1.00 per acre of irrigable land, whether water is used thereon or not. As soon as the data are available the operation and maintenance charges will be fixed in proportion to the amount of water used, with a minimum charge per acre of irrigable land whether water is used thereon or not.

6. All entries made hereafter for any of the lands described, whether for lands not heretofore entered or for lands covered by prior entries which have been cancelled by relinquishment or otherwise, shall be accompanied by applications for water rights in due form, and by the first installment of the charges for building, operation and maintenance, not less than \$5.70 per acre of irrigable land, except where payments have been duly made by the prior applicants and credits therefor duly assigned in writing. The second installment shall become due on December 1 of the following year. Subsequent instalments shall become due on December 1 of each year thereafter until fully paid. For lands in private ownership and for lands

heretofore entered the first instalment of the said charges shall become due on December 1, 1911. The second instalment shall be due on December 1, 1912. Subsequent instalments shall be due on December 1 of each year thereafter until fully paid.

7. Entries and water-right applications filed in 1912 and subsequent years must, in addition to one full instalment of the charges, be accompanied by an amount equal to the portions of the instalments of prior years for operation and maintenance which would have been payable had the entry and water-right application been made in 1911.

8. All instalments of the charges for all irrigable areas shown on these plats, whether or not water-right application is made therefor or water is used thereon, shall be due and payable as herein provided.

9. On some of the farm units in township 54 north, range 100 east, additional areas (shown on the plat enclosed in a square) will be irrigated at a later date by the construction of the high-line canal, at which time water-right applications will be required therefor.

10. The regulation is hereby established that no water will be furnished in any year until the portions for operation and maintenance of all instalments then due shall have been paid. Accordingly, no water will be furnished for the irrigation season of 1912 for any lands unless the portion for operation and maintenance of the instalment due on December 1, 1911, has been paid, and in like manner no water will be furnished in any subsequent irrigation season until payment has been made of the portions of the instalments for operation and maintenance beginning with the year 1911 then remaining due and unpaid.

11. Failure to pay any two instalments of the charges when due, whether on entries made subject to the reclamation act or on water-right applications for other lands, shall render such entries and the corresponding water-right applications, if any, or the water-right applications for other lands, subject to cancellation with the forfeiture of all rights under the reclamation act, as well as of any moneys already paid.

12. All charges must be paid at the local land office at Lander, Wyoming. The charges may, however, for the convenience of applicants, be paid to the special fiscal agent of the United States Reclamation Service assigned to the Shoshone Project, for transmission to the register and receiver of the local land office on or before the date specified for payment at the local land office, but in case this privilege is availed of the necessary charges for the transportation of the cash, as determined by the special fiscal agent, must accompany the payment of the water-right charges.

WALTER L. FISHER,

*Secretary of the Interior.*

**PACIFIC GAS AND ELECTRIC COMPANY.**

*Decided June 5, 1911.*

**APPLICATION FOR RIGHT OF WAY—RECOGNITION OF APPLICANT.**

No company will hereafter be recognized as a beneficiary under the provisions of the act of March 3, 1891, granting rights of way over the public lands and reservations to canal and ditch companies organized for the purposes of irrigation, until the formal presentation of an application for a specific right of way.

**SHOWING TO ACCOMPANY APPLICATION FOR RIGHT OF WAY.**

An application for right of way by a company claiming to own existing rights of way must be accompanied by a showing of the uses made of such rights of way, and intended to be made of the additional right of way applied for, sufficient to enable the department to determine whether the purposes of the company are properly within the intendment of the act of March 3, 1891, as amended by the act of May 11, 1898.

**ADAMS, *First Assistant Secretary:***

Under date of August 21, 1910, the Commissioner of the General Land Office submitted to the Department, recommending favorable action thereon, the application of the Pacific Gas and Electric Company to file its articles of incorporation and proofs of organization, to the end that said company might be recognized and designated as a beneficiary under the provisions of the act of March 3, 1891 (26 Stat., 1095).

Upon examination of the articles of incorporation, it was found that the main purpose for which the company was organized was that of generating gas and electricity for lighting purposes, in view of which it was held by the Department in its decision of September 6, 1910, that the company was not entitled to recognition as a beneficiary under the said act of 1891, because of the uniform ruling of the Department that a right of way under that act might be acquired only by a company formed for the purpose of irrigation.

September 23, 1910, the Commissioner of the General Land Office directed the register and receiver at Sacramento, California, to advise the company of the action of the Department of September 6, 1910. The action of the Commissioner was regarded as a decision by him, and an appeal was taken to the Secretary of the Interior. The company has since asked that this appeal be treated as a motion for review of the Department's decision of September 6, as the action of the Commissioner was merely a promulgation of that decision.

In support of the motion it is urged that the decision was erroneous in holding that a corporation is not entitled to avail itself of the benefits granted by sections 18 to 21 of the act of 1891, unless the main purpose for which it was organized is that of irrigation, and that the decision was further erroneous in holding that the main purpose for which the company was incorporated was the generating

and distribution of power and the generating of gas and electricity for lighting purposes.

It is shown by the articles of incorporation that the first purpose for which the company is formed is to engage in and conduct the business of manufacturing, generating, buying, selling, distributing, and otherwise disposing of gas, to be used for light, heat, etc.; the second purpose is to engage in and conduct the business of manufacturing, generating, buying, selling, renting, distributing, and otherwise disposing of electricity, to be used for light, heat, power, and all lawful purposes, and in particular for operating mines, quarries, railroads, etc.; the third purpose is to engage in and conduct the business of buying, selling, renting, storing, diverting, distributing, and otherwise utilizing and disposing of "water for power, mining, irrigating, domestic, and all lawful purposes, and in particular for supplying counties, cities, cities and counties, villages, towns, and other localities and places in the State of California and the inhabitants thereof with water for all said purposes."

While a number of other purposes are mentioned as those for which the company was organized, the foregoing contained under the third subdivision are the only ones relating to irrigation.

In connection with the motion the company has filed affidavits of two of its officers, in which it is alleged that ever since the latter part of January, 1908, the company has, under and pursuant to an arrangement with the South Yuba Water Company, actually been engaged in the business of operating an extensive irrigation system in Placer County, California, and in distributing and selling water to private land owners for the purpose of irrigation; that the ownership of the irrigation system from the latter part of January, 1908, until the last of December, 1910, was vested in the South Yuba Water Company, a corporation organized under the laws of the State of New York; that on the 31st day of December, 1910, the South Yuba Water Company accepted an offer which had theretofore been submitted to it by the Pacific Gas and Electric Company for the purchase of the said irrigation system and certain other property, and the water company executed and acknowledged a deed of conveyance, conveying said irrigation system and other property to the Pacific Gas and Electric Company, said deed being held in escrow in the State of New York pending the adjustment of divers matters connected with the application for the purchase of the said irrigation system; that the Pacific Gas and Electric Company having purchased and acquired the aforesaid irrigation system consisting of lands, water rights, reservoirs, canals, and ditches, intends to continue to operate and use the same for the purpose of selling and distributing water to private land owners for the purpose of irrigation; that the principal sources of water supply of said irrigation system are the

South Yuba River in Nevada County, and the Bear River in Placer County, and certain lakes and reservoirs situated in said county and tributaries to the said rivers. A portion of the water stored in said lakes and reservoirs, and appropriated and diverted from said rivers, is used in mining, municipal, and domestic purposes; another portion for the generation of electricity, and another for the purpose of irrigation; that the engineers of the Pacific Gas and Electric Company are of the opinion that the reservoirs, which are absolutely essential for use in connection with the irrigation system, have a storage capacity exceeding 350,000,000 cubic feet; that the ditches, canals, etc., essential for use in said connection exceed, in the aggregate, 400 miles in length; that part of the water conveyed by means of said ditches, canals, and flumes is sold for domestic and municipal purposes to consumers in the towns of Auburn, Roseville, Lincoln, Newcastle, Colfax, Rocklin, and Loomis in said Placer County, and substantially all of the rest of such water is sold to consumers in Placer County for use in irrigating lands for the production of grass, fruit, grain, and vegetables; that affiant is informed and believes that during the year 1909 more than 1,700 miners' inches of water were sold and distributed by means of the aforesaid irrigation system for irrigation purposes, and more than 15,000 acres of tillable lands were irrigated as a result thereof; that the actual receipts derived from the sale and distribution of water by means of the aforesaid system during the year 1909 exceeded \$75,000, and the receipts from the sale of water for the purpose of irrigation during the year 1910 were approximately the same; that the value of the canals, ditches, flumes, reservoirs, rights of way, etc., constituting this system and used mainly and primarily for the distribution of water for irrigation purposes exceeds \$1,500,000; that there is no other practical source of water supply for irrigating the tillable portion of lands situated in Placer County, and that according to the best of affiant's knowledge and belief it will be necessary for said Pacific Gas and Electric Company to acquire from time to time additional water rights and rights of way for reservoirs, canals, ditches, and flumes, some of which will be upon public lands of the United States, in order that it may furnish an adequate supply of water to its present and prospective consumers for the purpose of irrigation, which is one of the principal purposes for which it was formed.

From this presentation of the company's case the Department is unable to determine the principal use to be made of the rights of way which the company may hereafter attempt to acquire if the recognition now sought should be granted. The company has not made application for any specific right of way, and its alleged purpose in filing its articles of incorporation is to secure recognition as a company entitled to the benefits of the act of 1891, *supra*, which

grants rights of way over the public lands and reservations to canal and ditch companies organized for the purpose of irrigation.

While it has heretofore been the practice to accept for filing articles of incorporation of companies apparently entitled to the privileges of the act of 1891, thereby recognizing such companies as grantees under the act, in advance of the presentation of an application for any particular right of way, the Department, after careful consideration, is of the opinion that in the interests of good administration, such practice should be discontinued. Until application for a specific right of way is presented, accompanied by a proper showing of the applicant company's qualifications as then existing, the Department is not in a position to determine whether or not the company is entitled to a grant under the act.

It is, therefore, ordered that hereafter no company will be recognized as a beneficiary under the act of 1891, in the absence of an application formally presented for a specific right of way; and where in a case like this a company claims to own existing rights of way, the Department must be furnished with a full showing of the uses made of such rights of way, and the intended uses to be made of the rights of way sought in connection with those alleged to have been previously acquired, to the end that the Department may determine whether the purposes of the company are properly within the intentment of the act of 1891 as amended by the act of May 11, 1898 (30 Stat., 404).

The motion for review is accordingly denied.

### F. M. GRAHAM ET AL.

*Decided June 5, 1911.*

#### MINING CLAIM—FINAL CERTIFICATE AND PATENT—DEATH OF APPLICANT.

As a general rule, final certificate and patent for a mining claim should issue to the applicant in whose name the patent proceedings were initiated and prosecuted; and in the event of his death, certificate and patent should nevertheless issue in his name, and not to his heirs or devisees.

*Tripp v. Dunphy*, 28 L. D., 14, no longer followed in this regard.

*ADAMS, First Assistant Secretary:*

F. M. Graham and B. F. Suiter, who, on May 19, 1909, filed their application, and on October 16, 1909, made entry for the Auto placer claim, embracing the SE.  $\frac{1}{4}$ , Sec. 7, T. 11 N., R. 23 W., S. B. M., Los Angeles, California, land district, have appealed from the decision of the Commissioner of the General Land Office of November 19, 1910, in which their entry was in part held for cancellation.

First it is to be observed that the Commissioner, finding that the record suggested the death, on October 16, 1909, of F. M. Graham,

one of the applicants, leaving a last will and testament, in which he disposed of his property, ordered that unless objection was interposed the final certificate, in accordance with the practice, would be amended so as to read "the heirs and devisees of F. M. Graham, deceased," instead of "F. M. Graham."

Under the views now entertained by the Department this order is not necessary.

In the case of *Woodman v. McGilvary* (39 L. D., 574) it was held (syllabus) :

As a general rule final certificate and patent for a mining claim should issue to the applicant in whose name the patent proceedings were initiated and prosecuted; and in the event of his death, certificate and patent should nevertheless issue in his name, and not to his heirs.

This ruling is based upon the provisions of section 2448 of the Revised Statutes, in connection with the directions contained in paragraph 71 of the mining regulations, to the effect that transfers made subsequent to the filing of the application will not be considered, but entry will be allowed and patent issued in all cases in the name of the applicant for patent, the title conveyed by the patent, of course, in each instance inuring to the proper transferee or successor of the applicant.

In this regard the case of *Tripp v. Dunphy* (28 L. D., 14), wherein it was held that the final certificate on a mineral entry should issue in the name of the heirs of the applicant, where it is known at the date of its issuance that the applicant died prior to the submission of final proof and making entry for the land, will not be considered controlling or be hereafter followed.

From the record it appears that the Auto placer mining claim was located January 1, 1908, by an association of eight individuals. By deeds bearing date February 8 and June 8, 1908, all interests thereunder were transferred to F. M. Graham and B. F. Suiter, the applicants herein. In an additional showing called for by the Commissioner as to the precise date of the discovery of oil, it is shown that the oil well upon the land was commenced December 22, 1908, and was completed to a depth of 1840 feet on or about May 25, 1909, and that this is a producing well.

The Commissioner, finding that an actual discovery for the location was not made until after the claim had been transferred to the two applicants, held the present entry for cancellation to the extent of 120 acres, allowing the claimants to retain the 20-acre tract containing the oil well and another 20-acre tract contiguous thereto.

The recent act of Congress of March 2, 1911 (36 Stat., 1015), provides as follows:

That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum,

mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: *Provided, however*, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.

In view of the provisions of said act the case is remanded to the Commissioner of the General Land Office for consideration and readjudication upon the entire record, and for further appropriate action in the premises.

### JAYNE RESERVOIR.

*Decided June 6, 1911.*

#### PRACTICE—APPEAL—SPECIFICATION OF ERROR.

The mere filing of a "notice of appeal" as provided by Rule 76 (Rules of Practice of 1910) is not of itself sufficient to invoke consideration by the Secretary of the Interior upon the merits of the case; but there must be filed therewith, or within twenty days after service of such notice, "brief and specification of error," as provided by Rules 50 and 80.

#### ADAMS, *First Assistant Secretary*:

E. J. Dockery, on behalf of B. G. Jayne, has proffered an appeal from a decision of the Commissioner of the General Land Office of March 9, 1911, rejecting Jayne's application, under the act of March 3, 1891 (26 Stat., 1095), for reservoir right of way in T. 5 S., R. 6 E., T. 5 S., R. 5 E., T. 5 S., R. 4 E., and T. 6 S., R. 6 E., Boise land district, Idaho.

Such proffered appeal was filed under Rule 76 of the Rules of Practice of this Department approved December 9, 1910, effective February 1, 1911, which rule is as follows:

Rule 76. Notice of appeal from the commissioner's decision must be served upon the adverse party and filed in the office of the register and receiver or in the General Land Office within thirty days from the date of service of notice of such decision.

The "notice of appeal" prescribed by this rule was filed in the local land office within thirty days from date of service of notice of the Commissioner's decision and such appeal notice being so regularly filed it removed the case from the jurisdiction of the Commissioner; but it transpired that no further steps were taken by or on behalf of Jayne to perfect the appeal, and under date of May 27, 1911, the Commissioner transmitted the papers in the case for departmental consideration, calling attention to the fact that the appellant had not within the time prescribed by a further rule, No. 80, of such Rules of Practice, or at all, filed "brief and specification of



error, as provided by Rule 50." The Rule 50, referred to in quotation from Rule 80, relates particularly to appeals from decisions of the local office to the Commissioner but is by Rule 80 made applicable to appeals from the Commissioner to the Secretary of the Interior, and is in full as follows:

Rule 50. Such notice of appeal must be in writing, and set forth in clear, concise language the grounds of the appeal; if such appeal be taken upon the ground of insufficiency of the evidence to justify the decision, the particulars of such insufficiency must be specifically set forth in the notice, and, if error of law is urged as a ground for such appeal, the alleged error must be likewise specified.

Upon failure to serve and file notice of appeal as herein provided the case will be closed.

The full text of Rule 80 is as follows:

Rule 80. The appellant will be allowed 20 days after service of notice of appeal within which to serve and file brief and specification of error, as provided by rule 50, the adverse party 20 days after service of such within which to serve and file reply thereto; appellant will be allowed 10 days after service of such reply within which to serve and file response: *Provided, however,* That if either party is not represented by counsel having offices in the city of Washington, 10 days in addition to each period above specified will be allowed within which to serve and file the respective briefs.

The Department must insist upon an observance of these rules. "Notice of appeal," as provided by Rule 76, is not by itself sufficient to invoke consideration by the Secretary of the Interior upon the merits of the case. The notice of appeal from the decision of the local officers must of itself "set forth in clear, concise language the grounds of the appeal." But while such notice of appeal from the decision of the Commissioner need not of itself set forth the grounds of appeal, yet "brief and specification of error" upon such appeal must be filed with the notice, or thereafter, within 20 days after service of such notice. This may be filed with the Commissioner, or with the Secretary of the Interior if the record shall have been transmitted, but the rule is mandatory and there would seem to be no ground in this case for waiving this requirement.

The appeal is therefore dismissed.

## INSTRUCTIONS.

### PRACTICE—TIMBER AND STONE SWORN STATEMENT—RETURN OF FEES.

Where an application under the timber and stone act is properly received and failure to offer proof thereon is the fault of the applicant, he thereby forfeits the right to return of the fee required to be paid at the time of the presentation of the sworn statement; but where for any reason other than the fault of the applicant the application is rejected, the fee is not earned and the applicant is entitled to repayment thereof.

### PREVIOUS INSTRUCTIONS MODIFIED.

Instructions of March 17, 1911, 39 L. D., 573, modified.

*First Assistant Secretary Adams to the Commissioner of the General Land Office, June 6, 1911.*

The Department is in receipt of your communication of April 7, 1911, referring to departmental decision in the case of Eliza Denton, and asking further instructions concerning directions given by the Department under date of March 17, 1911, involving the question of returning the \$10 fee required of applicants under the timber and stone act.

You present the view, in accordance with your practice prior to the date of said instructions, that the fee is earned at the time the local officers pass upon the sworn statement, whether same be rejected or not. The Department can not concur in this view.

Application of your view is seen in a case recently before the Department on appeal, wherein the claimant's application was rejected by the local officers because the land applied for in the sworn statement was not within their district. He applied for return of said fee, which application for repayment your office denied. The Department is clearly of opinion that the fee was not earned in said case.

It may be that the law of 1878 did not contemplate the payment of the fee until payment was made for the land, which was to follow offer of proof under the application to purchase.

The Department has, however, exacted that the fee shall be filed with the application, presumably as an evidence of good faith, and where the application is properly received and the failure to offer proof thereon is the fault of the claimant, it may fairly be held that the applicant thereby forfeits his right to the return of the fee. In such a case repayment should not be allowed, but where, for any reason other than the fault of the applicant, the application must be rejected, the fee is not earned and section 2 of the act of March 26, 1908 (35 Stat., 48), furnishes ample authority for its return.

The previous decision is adhered to and the instructions of March 17, 1911 (39 L. D., 573), are modified only to the extent herein indicated.

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### FELICITA CAROLINA DE BAUW.

*Decided June 6, 1911.*

#### TIMBER AND STONE APPLICATION—APPRAISEMENT—PRICE OF LAND.

Although section 19 of the regulations of November 30, 1908, gives an applicant under the timber and stone act, in cases where the government fails to appraise the land within nine months from the date of application, the right to purchase the land applied for at his appraised price (provided this is not less than \$2.50 per acre), nevertheless, if the government ap-

praisal at a higher price is actually filed before the applicant exercises such right, he must thereafter pay such higher price, notwithstanding the expiration of the nine months period.

AMENDMENT OF TIMBER AND STONE REGULATIONS.

Paragraph 19 of the regulations of November 30, 1908, 37 L. D., 289, amended.

ADAMS, *First Assistant Secretary*:

March 7, 1910, Felicita Carolina De Bauw filed her sworn statement under the timber and stone act for the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 11, T. 3 N., R. 9 W., Portland, Oregon, land district, stating that the land in its present condition had no value exclusive of the timber and that the timber thereon was worth \$400.

The local officers state that a copy of the application was forwarded to the chief of field division on March 8, 1910, and that the time for making appraisement under section 19 of the regulations of November 30, 1908 (37 L. D., 289), expired on December 8, 1910, that immediately thereafter the applicant called at the local land office and stated her intention to make payment at her own estimate but lacking a few dollars deferred payment; that on December 15, 1910, the record of appraisal was received from the chief of field division, dated December 14, 1910, in which it was recommended that the application be rejected as to the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, the land being valued at \$200 and the timber at \$60 upon that subdivision. The other three subdivisions were given a total valuation in the appraisement of \$650, the land being valued at \$1 per acre, while the timber on said subdivisions was valued from \$4 to \$5 per acre. According to the appraisement, therefore, three subdivisions are subject to entry under the timber and stone act because the land is chiefly valuable for its timber. The SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, however, is not subject to entry under the said act for the reason that the land exclusive of the timber in its present condition is considered as of greater value than the timber thereon.

On January 6, 1911, the applicant appeared at the local land office and tendered the sum of \$400 in payment for the land, which the local officers refused to accept. Said tender was made within thirty days from the expiration of the nine months period.

By decision of January 23, 1911, the Commissioner of the General Land Office held that the said appraisement could not be accepted as to the price of the land because same has not been filed in the local land office within nine months from the date of the application. It was further held, however, that applicant should not be allowed to enter the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, because of the report that same was not subject to entry under the timber and stone law. It was accordingly directed that the applicant be allowed sixty days from notice

within which to show cause why her sworn statement should not be canceled as to that tract. It was directed further that the applicant should be allowed to enter the remaining 120 acres at her own valuation of \$2.50 per acre. The applicant has appealed from said decision as to that portion refusing to accept the application as to the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2. Said appeal is supported by a number of affidavits purporting to show that said tract is chiefly valuable for its timber. Section 19 of the said regulations of November 30, 1908, reads as follows:

Unless the land department, as hereinbefore provided or, otherwise, as directed by the Secretary of the Interior, shall appraise any lands applied for under these regulations within nine months from the date of such application, the applicant may, without notice, within thirty days thereafter, deposit the amount, not less than \$2.50 per acre, specified in his application as the reasonable value of the land and the timber thereon, with the receiver, and thereupon will be allowed to proceed with his application to purchase as though the appraisement had been regularly made. The failure of the applicant to make the required deposit within thirty days after the expiration of the nine months' appraisement period will terminate his rights without notice.

While said section affords opportunity to the applicant to make payment at the price stated in his application, if not less than the minimum price per acre, after the expiration of nine months from the date of his application in case there has been no appraisement, it does not follow that he may purchase at that price, if, before he makes the necessary deposit, the Government has appraised the land at a higher figure; and furthermore, a protest or adverse report may be lodged against an application or entry at any time within two years from the issuance of the final receipt, and a hearing should be had upon any such protest or adverse report, if adequate reason therefor appears. In this case the Government appraised the land before the applicant had made deposit of the minimum price for the same. Therefore the three subdivisions returned as subject to entry under the act can be entered only at the appraised price unless said subdivisions are reappraised as provided for in the regulations. As to the subdivision returned as not subject to entry under the act because it is not chiefly valuable for the timber thereon, a hearing should be ordered to determine the issue as to the character of that subdivision in view of the showing made in the affidavits in support of the appeal.

The decision appealed from is accordingly modified to meet the views above expressed, and the case is remanded for action as indicated.

In order that said section 19 of the regulations may not be misunderstood, it is hereby amended to read as follows:

Unless the land department, as hereinbefore provided or, otherwise, as directed by the Secretary of the Interior, shall appraise any lands applied for under these regulations within nine months from the date of such applica-

tion, the applicant may, without notice, within thirty days thereafter, deposit the amount, not less than \$2.50 per acre, specified in his application as the reasonable value of the land and the timber thereon, with the receiver, if appraisal has not been filed prior to such deposit, and thereupon will be allowed to proceed with his application to purchase as though the appraisal had been regularly made. The failure of the applicant to make the required deposit within thirty days after the expiration of the nine months' appraisal period will terminate his rights without notice.

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**CHARLES H. HEAD ET AL.**

*Decided June 6, 1911.*

**PLACER LOCATION—PATENT EXPENDITURE.**

An expenditure of \$500 in labor or improvements to be available as a basis for patent to a mining claim must have been made upon or for the benefit of the location for which patent is sought; and work performed upon and for the benefit of a 20-acre placer location is not available as a patent expenditure for the benefit of a maximum location of 160 acres by eight persons embracing the 20-acre location and 140 acres of entirely new ground.

**PLACER LOCATION—AMENDMENT.**

A placer location for twenty acres can not by means of an amended or supplemental location be enlarged to cover forty acres, as such amendment would constitute in effect a new location.

*ADAMS, First Assistant Secretary:*

Charles H. Head and John Randolph, applicants for patent for the Skelly Gulch placer mining claim, have appealed from the decision of the Commissioner of the General Land Office of December 27, 1910, requiring the applicants, on pain of rejection of their application, within sixty days either to appeal or to apply for a special mineral survey of their placer location, and—

to show other and sufficient improvements, made on or for the benefit of the claim, succeeding the location thereof and prior to the expiration of the period of publication; or to show cause why the application should not be rejected, as to all of the area, except that embraced in the original area located by Randolph, in 1887, and on which the improvement is located, and enough contiguous ground to make a maximum area, for the location, of 40 acres.

From the papers accompanying the application it appears that the Skelly Gulch location embraces 156.82 acres and is described in terms of legal subdivisions as follows: S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 34, T. 11 N., R. 5 W.; south 20 acres of lot 1, southeast 10 acres of lot 2, southwest 20 acres of lot 2 (being 1,320 feet north and south and 660 feet east and west), north 37.78 acres of lot 3 and northeast 9.04 acres of lot 4, Sec. 3, south 20 acres of lot 4 and the southwest 20 acres of lot 3 (being 1,320 feet north and south and 660 feet east and west), Sec. 2, T. 10 N., R. 5 W., Helena, Montana, land district.

The claim as described was located September 21, 1908, by applicants Head and Randolph and six others. The location certificate bearing a verification dated September 22 was filed on September 25. On that day the six locators other than applicants Head and Randolph conveyed all their interests to the latter for the stated consideration of \$2.

In their application the improvement claimed as the basis for patent is described as an excavation 900 feet long, averaging 100 feet in width and 2 to 15 feet in depth, valued at \$2,000, and it is averred this excavation was made by the applicants and their grantors. The application for patent was verified September 30, 1908, and was filed in the local office October 3, 1908.

In his decision the Commissioner, among other things, finds as follows:

It is manifest that this improvement was not made within the limited period of twelve days intervening between the location of the Skelly Gulch placer, September 21, 1908, and the date of filing application for patent, October 3, 1908.

From the record, it appears that a portion of the area embraced in the Skelly Gulch placer, presumably the portion containing the placer excavation, was located as a placer by John Randolph, April 4, 1887. Considerable development work was done by him. He lived on the claim and cultivated all the suitable land. It further appears that Head grubstaked him with money and supplies from time to time. It is stated that Head gave Randolph \$300, and a half interest in the Skelly Gulch placer claim in consideration for Randolph's old placer claim, containing improvements made by Randolph thereon for the benefit thereof.

So far as the application papers themselves reveal, the only location involved and relied upon is that of September 21, 1908, for the Skelly Gulch claim. The facts found by the Commissioner, above quoted, as to the Randolph location of 1887 are gleaned from several reports accompanying the record.

So far as the case made by the applicants is concerned their showing as to improvements is clearly insufficient. In their argument on appeal they contend that the \$2,000 excavation is available under their location, and cite the case of *Clark v. Taylor* (20 L. D., 455) in that connection. That case held (syllabus):

The fact that a part of the work required by law on a placer claim is performed prior to the location of the claim, and while said claim is held as agricultural land, does not call for the cancellation of the entry, where the full amount of work required by law is performed prior to entry, and good faith is apparent, and no adverse claim exists.

For the purposes of the present case it is sufficient to point out that in the case mentioned Taylor was seeking to apply to his 20-acre placer claim mining work done thereon prior to its location but while the ground was claimed by him as a part of his homestead; while here it is apparently sought to apply the work done by Randolph

(or possibly by Randolph and Head) upon the former Randolph location of 20 acres exclusively for the benefit and development of that claim to the later Skelly Gulch location, embracing approximately 160 acres: or, in other words, it is attempted to utilize work performed under and for the benefit of the 20-acre location as a patent expenditure for the benefit of a maximum location by eight persons, in which is included the old area, together with some 140 acres of entirely new ground. This can not be done and is clearly an evasion of the requirement of the statute to the effect that \$500 in labor or improvements shall be expended upon or for the benefit of the location for which patent is sought. The Department can not countenance any such attempted perversion of the mining laws.

Upon the record presented by the applicants the Skelly Gulch location can not be regarded or treated other than as a new and independent location, it not being claimed, and in fact could not be properly claimed, as an amendatory or supplemental location of the old Randolph claim. The Randolph location of 1887, so far as is made to appear, was made by one locator for about 20 acres, and any amendment of such a location for the purpose of effecting conformity to the public-land surveys, or for any other purpose, could not include a greater area than 20 acres, whether the amendment was attempted by one or more claimants, in accordance with the principle announced in the case of Garden Gulch Bar Placer (38 L. D., 28, 31), where the Department said:

It is clear that the Garden Gulch Bar location, having been made by four persons for the maximum quantity of ground that that number of persons could lawfully embrace in a single location, could not be amended by them so as to include a larger area. *A fortiori*, it could not be so amended by one person. Nor is there any authority for an owner of two or more contiguous placer mining locations to substitute therefor a single location, under the guise of amending one of them, as was attempted to be done with respect to a portion of the land involved in this case. Indeed, it would seem that such a substitution could lead to no result of any substantial benefit to an owner of several locations so attempted to be consolidated, other than to enable him to maintain a possessory right to, and obtain title for, the area embraced therein, upon making annual and patent expenditures sufficient in value to satisfy legal requirements as to but one location, a result that would be in direct contravention of the plain terms of the placer mining laws, which require that expenditures of the amounts named therein shall be made upon or for the benefit of each separate location upon which, in possessory or patent proceedings rights of claimants or applicants are sought to be predicated. For these reasons the so-called Garden Gulch Bar location must be held to be of no effect for any purpose whatsoever.

In reaching the conclusions above set forth, the Department finds it unnecessary at this time to pass upon the question as to the necessity of a special mineral survey of the tracts described. Having in mind, however, the practice prevailing in relation to Indian allotments, small holding claims, and homesteads within national forests

in relation to the subdivision of 40-acre tracts or rectangular lotted tracts into smaller areas, the Department is inclined to consider a special survey of the land to be unnecessary.

With that portion of the Commissioner's decision which calls upon the claimant to show cause why the application should not be rejected as to all of the ground included therein, except the original area located by Randolph and enough contiguous ground to make 40 acres, the Department does not agree, for the reason that Head and Randolph could not by an amended or a supplemental location enlarge Randolph's 20-acre location so as to cover 40 acres; if this were attempted, the result would be essentially another and a new location. This portion of the Commissioner's order is therefore reversed.

That portion of the Commissioner's decision which holds for rejection the pending application, unless other and sufficient improvements for the Skelly Gulch location shall be shown, is clearly correct, and is hereby affirmed.

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#### RECLAMATION—MINIDOKA PROJECT—PAYMENT.

##### ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, D. C., June 8, 1911.*

In pursuance of the provisions of the reclamation act of June 17, 1902 (32 Stat., 388), and the provisions of the act of February 13, 1911 (Public No. 353), the following order is issued for the gravity unit of the Minidoka Project, Idaho, pending the preparation of a public notice providing for the future plan of payment:

1. A considerable number of water-right applicants under public notices and orders heretofore issued have not made payment of the portion of the instalment for operation and maintenance which is required as a condition of the delivery of water during the irrigation season of 1911. It is reported that a number of those who have not made this payment desire to secure water for the irrigation of their lands and the raising of crops during the present season and will promptly make payment of all charges for building, operation and maintenance which should have been paid on or before April 27, 1911, as soon as they are financially able to do so. The interests of the project as a whole, in order to secure continuous development of the agricultural possibilities, and the unusual conditions now existing justify the adoption of some plan to permit the delivery of water for the present irrigation season under such conditions as will secure early payment of the charges which should have been paid at or before the beginning of the irrigation season.



2. The passage of the act of February 13, 1911, and the necessity of issuing orders thereunder to meet conditions then existing, as a temporary plan preliminary to the preparation of a public notice, have made it impracticable to announce definitely at this time the charges to be required in the future so that the water users might be informed as to the obligations to be assumed by those who may desire to amend their present contracts. Accordingly the adoption of a plan for the furnishing of water for the present irrigation season is considered necessary as a temporary expedient, and such plan will not be regarded as a precedent for any future year.

3. Water will be furnished for the irrigation of lands in the irrigation season of 1911 in all such cases where payment of the operation and maintenance charge now due has not been made, upon the filing at the project office of a statement by the water-right applicant showing that he has heretofore complied in good faith with the requirements of the reclamation act, except as to the payments required thereunder, and that he will pay all charges for building, operation and maintenance which should have been paid on or before April 27, 1911, as soon as he is financially able to do so, not later than December 1, 1911. Such statement must be vouched for by the directors of the voluntary association of water users on the project, known as the Minidoka Water Users' Association, which has been organized as preliminary to the association provided for under the terms of section 6 of the reclamation act. Applicants rejected by the directors of the water users' association may appeal to the supervising engineer, who may order that water be delivered.

4. This order shall not be construed as a stay of proceedings for any water-right application or homestead entry now subject to cancellation under the provisions of the reclamation act, but is intended to provide a temporary expedient for the delivery of water to those not now financially able to make payment of the charge for operation and maintenance.

WALTER L. FISHER,  
*Secretary of the Interior.*

## RECLAMATION—WATER-RIGHT APPLICATIONS.

### REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

*Washington, June 16, 1911.*

REGISTERS AND RECEIVERS,

*United States Land Offices.*

SIRS: The forms of water-right applications (form 4-020 and form 4-021) adopted by the Department for use in accordance with para-

graphs 50 to 59, inclusive, of the circular approved May 31, 1910 (38 L. D., 620), have been revised, and on January 30, 1911, the Secretary of the Interior approved new forms [39 L. D., 532], which may be obtained from the Department by requisition under the same numbers previously in use. You will be governed in your action on the new forms by the paragraphs of the circular of May 31, 1910, above cited, and the following regulations supplemental and amendatory thereto.

Form B (4-020) is intended for use by owners of private land and entrymen whose entries were made prior to the withdrawal of the land within reclamation projects in entering into contracts with the United States for the purchase of a water right, and must, as stated at the bottom of the third page, be signed and sealed in duplicate and acknowledged before a duly authorized officer in the manner provided by local law. A space is provided on the blank for evidence of the acknowledgment, which should be in exact conformity to that required by the statutes of the state in which the lands covered by the contract lie for the execution of mortgages or deeds of trust. When so executed both originals must be filed in your office together with three complete copies, either in person or by mail, and if you find the application regular and sufficient in all respects, duly approved by the Project Engineer, as required by paragraph 55 of the circular of May 31, 1910, and bearing the certificate of the secretary of the local water users' association, and accompanied by the proper payments required by the provisions of the public notices issued in connection with the local reclamation project, the register will accept the same by filling out the blank provided at the bottom of the third page and attach his signature and seal by placing a scroll around the word "Seal."

Your attention is especially called to Secs. 3743 to 3747, inclusive, of the Revised Statutes, relative to the deposit and execution of public contracts. These sections are printed at the end of this circular and you are directed to comply strictly with the provisions of law set forth therein so far as they are applicable to these contracts. The register will therefore, immediately after execution of the contract, execute the oath of disinterestedness required by Sec. 3745, Revised Statutes, before a duly authorized officer on the blank form provided on the last page of the water-right contract. No funds are available for the payment by the Government of any fees in connection with this oath and the register should therefore take such oath before the receiver of public moneys, who is precluded by Sec. 2246, Revised Statutes, from charging or receiving directly or indirectly any compensation for the administering of such oath. In the event that it becomes necessary to take this oath before any other authorized officer, the fee due such officer must be paid to him by the water-right

applicant, and you are authorized to refuse to accept the water-right application on failure of the applicant to make such payment.

Sec. 3744, Revised Statutes, makes it the duty of a public officer executing a contract on behalf of the United States to file a copy of the same in the Returns Office of this Department as soon as possible and within 30 days after the making of the contract, and you will therefore forward to that office one of the original copies of each contract as soon as possible after the execution of the same. The provision of said section requiring that all papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return, does not apply to the contracts for the purchase of water rights, because of the fact that only one paper is used.

As stated in the instructions for the execution of the blank upon the third page thereof, the contract must be duly recorded in the records of the county in which the lands are situated, and therefore you will immediately upon execution of the contract return the second original copy to the applicant and require him to have the contract duly recorded by the proper recording officer, at his own expense, allowing a period of 30 days for compliance with such requirement and the return of the contract to your office, in default of which you will make report to this office and the contract will be canceled by this office without further notice for failure to comply with the regulations.

Upon return of the original copy of the contract to your office bearing certificate at the bottom of the last page, executed by the recording officer showing the recordation of the instrument, you will fill out the same blank on the three copies held by you in your office, signing the name of the recording officer with the word "signed" in parenthesis, preceding such name. The second original copy, when thus completed, is to be forwarded by you to the Auditor of the Treasury Department for the Interior Department, and one of the other copies will be forwarded to the applicant, one to the project engineer and the last copy must be forwarded to this office with your regular monthly returns. The certificate of filing water-right application heretofore issued by you in connection with all water-right applications will not be issued in connection with the new form B (4-020), inasmuch as the acceptance of the contract is equivalent to such certificate. You will treat the copy of the contract to be forwarded to the project engineer in the same manner as is provided by Secs. 58 and 59 of the circular of May 31, 1910, for the treatment of certificates of water-right application.

The new form of water-right application for use by reclamation homestead entrymen, form A (4-021), will be governed in its use

by the regulations previously adopted by the Department. No new forms of water-right application carrying assignments of credit (4-020a and 4-021a) have been prepared, and you will discontinue the use of the old forms bearing these numbers, and where application is filed by an assignee either of an entryman under the Reclamation Act or a private landowner, you will require the use of the new forms 4-020 or 4-021, and at the bottom of the last page, without the use of any additional papers, require the prior applicant to execute the following form, either written in ink or typewritten:

I, \_\_\_\_\_, for value received, hereby sell and assign all my right, title and interest in and to any credits heretofore paid on water-right application No. \_\_\_\_\_ for the above-described land, together with all interests possessed by me under said application.

\_\_\_\_\_  
Assignor.

\_\_\_\_\_  
Witness.

Your action on cases bearing such assignment will be the same as on other cases, except that you should determine that the assignment may be properly accepted under the provisions of existing public notices and departmental regulations.

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved:

WALTER L. FISHER,  
*Secretary of the Interior.*

REVISED STATUTES.

SEC. 3743. All contracts to be made, by virtue of any law, and requiring the advance of money, or in any manner connected with the settlement of public accounts, shall be deposited promptly in the offices of the Auditors of the Treasury, according to the nature of the contracts: Provided, That this section shall not apply to the existing laws in regard to the contingent funds of Congress.

SEC. 3744. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return.

SEC. 3745. It shall be the further duty of the officer, before making his return, according to the preceding section, to affix to the same his affidavit in the following form, sworn to before some magistrate having authority to administer oaths:

"I do solemnly swear (or affirm) that the copy of contract hereto annexed is an exact copy of a contract made by me personally with \_\_\_\_\_, that I made the same fairly without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said \_\_\_\_\_, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided."

SEC. 3746. Every officer who makes any contract, and fails or neglects to make return of the same, according to the provisions of the two preceding sections, unless from unavoidable accident or causes not within his control, shall be deemed guilty of a misdemeanor, and shall be fined not less than one hundred dollars nor more than five hundred, and imprisoned not more than six months.

SEC. 3747. It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior, to furnish every officer appointed by them with authority to make contracts on behalf of the Government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible.

## INSTRUCTIONS.

### ENLARGED HOMESTEAD—ADDITIONAL ENTRY.

One who, under the general homestead law, makes entry of lands designated as within the provisions of the enlarged homestead act may, under section 3 of said act, and subject to other provisions thereof, enter additional lands contiguous to his former entry, which, together with the lands in the original entry, will not exceed 320 acres.

### CIRCULAR WITH RESPECT TO ADDITIONAL ENTRY MODIFIED.

The last clause of the first paragraph of section 52 of the circular of September 24, 1910, 39 L. D., 232, 251, abolished.

*Secretary Fisher to the Commissioner of the General Land Office,  
June 23, 1911.*

In a communication to the Secretary of the Interior, May 10, 1911, Hon. Frank W. Mondell protests against the construction placed by the land department upon section three of the act of February 19, 1909 (35 Stat., 639), as expressed in the first paragraph of section 52 of the circular of September 24, 1910 (39 L. D., at page 251).

The act in question, entitled "An act to provide for an enlarged homestead," provides by said section three:

That any homestead entryman of lands of the character herein described upon which final proof has not been made shall have the right to enter public lands subject to the provisions of this act, contiguous to his former entry, which shall

not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

The paragraph in question of said circular reads as follows:

Homestead entries under the provisions of section 2289 of the Revised Statutes for 160 acres or less may be made by qualified persons within the States and Territories named upon lands subject to such entry whether such lands have been designated under the provisions of these acts or not. But those who make entry under the provisions of these acts can not afterwards make homestead entry under the provisions of the general homestead law, nor can an entryman who enters under the general homestead law lands designated as falling within the provisions of these acts afterwards enter any lands under these acts.

Mr. Mondell submits that the last portion of this paragraph beginning with the words "nor can an entryman," etc., is in conflict with the provisions of the law above quoted and makes some pertinent observations upon the public necessity of abolishing this clause of said paragraph.

Upon a most careful and more mature consideration of this question I have to advise you that the Department erred in this matter. Section one of said act provides that "any person who is a qualified entryman under the homestead laws of the United States," may enter in the States and Territories named "three hundred and twenty acres or less" of public lands which have been designated by the Secretary of the Interior as not being in his opinion susceptible of successful irrigation, at a reasonable cost, from any known source of water supply. Section five of the act provides in terms that nothing therein contained shall be held to affect the right of a qualified entryman to make homestead entry in the States named, under section 2289 of the Revised Statutes, which, in effect, is a declaration that such lands shall be subject to entry under said section as though said act had never been passed.

It is obvious from a critical examination of these portions of the act in question that the Department erred in attempting to exclude from its benefits by the circular in question an entryman who enters lands designated under said act as falling within its provisions.

It is clear, first, that any person who is a qualified entryman under the homestead laws of the United States may enter lands so designated, not to exceed 320 acres, which means, of course, that he may enter a less quantity if he so desires. It is clear, too, that any qualified entryman may make homestead entry of lands so designated under section 2289 of the Revised Statutes, but such an entry would be restricted to 160 acres as the maximum. Now, with these premises established, section three of the act will admit of but one interpretation. It provides, as has been seen, "that any homestead entryman of lands of the character herein described, upon which

final proof has not been made, shall have the right to enter public lands subject to the provisions of this act, contiguous to his former entry," which, together with the original entry, shall not exceed 320 acres. This provision just as surely refers to a person who has made homestead entry under section 2289, as to one who has made homestead entry under the provisions of this act for less than 320 acres. Such is the letter of the law. Moreover, an examination of the debates of Congress upon the several bills which were introduced, culminating in the act in question, tends to show that this interpretation is in accord with the intention of the law makers. Section three of the bill as introduced in, and as passed by, the Senate, limited the additional right therein provided for to homestead entrymen "now occupying" lands of the character therein described. The House and Senate having disagreed on certain amendments to these bills the amendments went to conference and as reported from conference to both Houses this provision remained. The House refused to accept the conference report, and while there was no particular discussion of this feature of the section the House voted to insist upon the House bill, and as finally enacted section three thereof had been changed to read as above quoted, giving the right of additional entry to any homestead entryman of lands of the character described, rather than to entrymen then occupying lands of such character. The letter of the law and the apparent intention of the law makers agreeing upon this controlling feature of the question, and both being in accordance with the public policy suggested by Mr. Mondell, it is hereby directed that the last clause of the paragraph in question be stricken from the regulations governing the administration of the act.

It may, and probably will, transpire that further complications may arise under these regulations as changed, especially with reference to questions of residence and cultivation. It is intended at this time to make further suggestion as to these contingent questions but they will be dealt with as they arise and made to conform as near as may be to the law.

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### ROSA ALHEIT.

*Decided June 24, 1911.*

#### PRACTICE—MANNER OF CONDUCTING SALE OF ISOLATED TRACT.

The requirement of the regulations that the sale of isolated tracts shall be kept open for one hour after the time mentioned in the public notice is not met by postponing the sale until the hour has almost expired and then concluding the sale as soon as the tracts are disposed of, the regulations contemplating that in all cases the sale shall be kept open for the term of one hour.

## PAYMENT FOR ISOLATED TRACT.

While a check can not be accepted by the receiver in payment for an isolated tract, yet, where the highest bidder for a tract is surprised by having the check tendered by him refused for the mere technical reason that it is not cash, he should be allowed a reasonable time to convert the same into money which the receiver is authorized to accept.

## MISTAKE IN BIDDING FOR ISOLATED TRACT.

Where a bidder at a sale of isolated tracts, in perfect good faith, because of some mistake or misunderstanding, bids for one tract when he intended to bid for another, he should be allowed within the time of sale to correct his bid to cover the tract intended, and the other tract should be reoffered.

ADAMS, *First Assistant Secretary*:

Rosa Alheit appeals from the decision of the General Land Office, setting aside sale, SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 10, T. 6 N., R. 37 E., made at the Walla Walla local land office, Washington, December 9, 1910, as an isolated tract, under an order of the Commissioner of the General Land Office. The tract in question and the SE.  $\frac{1}{4}$  SW.  $\frac{1}{2}$ , Sec. 2, T. 6 S., R. 23 E., were ordered to be sold at 10 o'clock A. M., December 9, 1910, as isolated tracts. At that time the local officers announced to the persons assembled that the regulations required that "the sale must be kept open one hour, or until 11 o'clock, and that the offering of the tracts would be made shortly before 11 o'clock." They reported that all persons then retired and returned about 15 minutes before 11 o'clock, and that the sale was commenced at 10.55 A. M.

The first tract offered was the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, T. 6 N., R. 23 E., for which August Sorenson bid \$5 per acre, and being the highest bidder was declared to be the purchaser of said tract. He presented a check in payment, which was refused and was advised that he would have to tender the money. While he was absent from the place of sale procuring the money for his purchase, the local officers offered the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 10, T. 6 N., R. 37 E., for which Rosa Alheit bid \$1.25 per acre, and she being the highest bidder was declared to be the purchaser of said tract at said price, and upon payment of the purchase money thereof the sale was declared closed.

After the offer and purchase of said last mentioned tract, Sorenson returned to the local office and asked for a description of the land he had purchased. Upon obtaining that information he stated that he had made an error in bidding for the tract purchased; that he did not intend to bid for that tract but to bid for the tract purchased by Mrs. Alheit. He was told that his purchase had been completed by the payment of the money and if he wanted to get his money back, he would have to file an application therefor, with his relinquishment of his right to the land. At the same time he protested against the sale to Mrs. Alheit of the tract purchased by her and insisted that it be reoffered stating that he intended to bid for



said tract which is reasonably worth from \$10 to \$25 per acre and was prepared to bid as high as \$25 per acre for the same. He was informed that the sale to Mrs. Alheit had been closed.

Final certificates were issued to each purchaser December 9, 1910.

January 3, 1911, Sorenson filed application for repayment of purchase money for the land in said Sec. 2, offering to surrender the final certificate.

Upon the submission of said sales for consideration by the General Land Office, the Commissioner set them aside and held for cancellation the certificates issued to Sorenson and Mrs. Alheit, subject to appeal, for the reason that the same was not conducted in conformity with the regulations covering the sales of isolated tracts; that instead of offering the tracts at 10 o'clock and keeping the sale open for one hour thereafter, the local officers postponed the sale until nearly 11 o'clock and closed the sale within a few minutes thereafter.

The regulations governing the sale of isolated tracts [39 L. D., 10] provide that—

At the time and place fixed for the sale, the register and receiver will read the notice of sale, offer each body of land separately, and allow all qualified persons an opportunity to bid. \* \* \*

The sale will be kept open for one hour after the time mentioned in the public notice. After the expiration of the hour, and after all bids have been offered, the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser, etc.

It was contemplated by the regulations that the sale should be actually opened and held for the term of one hour to enable competitive bidders to make bids. The object of the sale was to obtain for the United States the best price for the land possible on competitive bids. The mere offering of the land or announcement that it would be sold, and then dismissing the bidders to appear shortly before the hour of eleven, was in effect an adjournment of the sale. The sale in this case was open for but fifteen minutes, the actual sale having been adjourned to that time.

The Department will not hold that an adjournment in absence of bidders or in hope to get more bidders is not under proper circumstances justifiable on part of local officers, but, if such adjournment is made, the sale must still continue open for one hour, and before its close the local officers should announce the highest price bid for each tract offered, and ask: "Do I hear any other bid? The sale is about to close," thus giving any one present who may desire an opportunity to offer a larger bid. The object of the regulation is thus secured, to wit: a sale upon competitive bids to the highest responsible bidders.

The offer of a check is not responsive to the notice for sale to the highest bidder for cash. Cash implies legal tender or such current

money as is ordinarily accepted in the usual course of all trade. If, however, a bidder is surprised by having the medium of payment which he tenders refused for a mere technical reason that it is not cash, a reasonable time should be given him to convert the medium offered into money that the officer is authorized to accept.

So, also, if a bidder, as in this case, by some misunderstanding bids upon one tract when he intended to bid upon another, as such mistake is in good faith, which the local officers can generally determine, he should be allowed to correct his bid to cover the tract he intended to bid for, and the other tract should be reoffered, the object to be kept in view being to obtain the best price possible for each tract offered. The proceedings in this case are to say the least suspicious, the premises being sold on an offering for only fifteen minutes, in the absence of one *bona fide* intending to bid, if necessary to acquiring the property, twenty-five times the price at which it was irregularly sold.

The decision is affirmed.

### CYNTHIA MARTHA SWEENEY.

*Decided June 24, 1911.*

#### INDIAN ALLOTMENT—MINOR CHILD—SECTION 4, ACT OF FEBRUARY 8, 1887.

Section 4 of the act of February 8, 1887, authorizes allotment of public lands on behalf of minor children of an Indian only where the parent has settled and made his home upon the public domain.

#### ADAMS, *First Assistant Secretary:*

Appeal has been filed by Kate Sweeney, a White Earth Chippewa Indian, from decision of the General Land Office of February 21, 1911, rejecting allotment application filed by Thomas Sweeney, her husband, on behalf of their minor child Cynthia Martha Sweeney, for one hundred and sixty acres of grazing land, described as the NE.  $\frac{1}{4}$  of Sec. 15, T. 11 S., R. 29 E., La Grande, Oregon.

The application was filed under the provisions of section 4 of the act of February 8, 1887 (24 Stat., 388), as amended by act of February 28, 1891 (26 Stat., 794). Said section reads in part as follows:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.

Section 4 of the act of February 8, 1887, as amended by said act of 1891, differs from the original section only in the first part thereof;

which provides: "That where any Indian entitled to allotment under existing laws shall make settlement," etc. The latter act also provides for allotment thereunder of eighty acres of agricultural or one hundred and sixty acres of grazing land.

The application for allotment herein was denied by the General Land Office for the reason that the parents of this child never made settlement on the public domain as required by the foregoing acts. In the affidavit attached to the allotment application made by the father, Thomas Sweeney, the words "I have made actual *bona fide* settlement upon the lands described in" are stricken out, and from papers in the case it appears that the parents of Cynthia Martha Sweeney, who is now about eleven years of age, are residents of Spokane, Washington. The mother, Kate Sweeney, states in her appeal here that they are unable to move on this land, due to the absence of school facilities and other advantages for the child, and in any event would be unable to make a living on said land. In note 5 on the allotment affidavit filed with this application it is stated:

Minor children are not required to settle on the lands applied for, and if the parent has not settled thereon for the child the words "actual and *bona fide* settlement upon the lands described in" should be stricken out. However, unless the parent has gone on the public domain to make his home his minor children will not be given an allotment.

The persons provided for in section 4 of the act of February 8, 1887, are Indians who make settlement upon public lands. This act was before the Department for construction soon after its passage. It was held at that time (Indian Lands—Allotments, 8 L. D., 647), and the holding has since been followed:

Viewing the act in all its parts, thus gathering all its purposes and its whole scope, it would seem that it must have been the purpose of Congress to allot to Indians, not living on a reservation, or for whom no reservation has been provided, and to the minor children of such Indians, lands to the same extent, in the same manner, under the same restrictions and limitations, *mutatis mutandis*, as were enacted in the case of Indians living upon reservations; with the additional requirement, however, of actual settlement on the tract applied for by the non-reservation adult Indians.

In an opinion (31 L. D., 417), having under consideration the Indian homestead acts and section 4 of the act of 1887, it was said:

The benefits and privileges conferred by these acts are upon Indians as such, and those contemplated are Indians who locate and settle upon the public land and those not living upon a reservation. \* \* \* Separation or living apart from the tribes for the purpose of a settlement upon the public lands to secure a homestead or allotment, is a necessary part of the procedure under the laws authorizing the acquirement of public lands by Indians.

In instructions relative to Indian allotments under section 4 of the act of 1887 (32 L. D., 17) it was said:

Settlement, by the very terms of the act, is a prerequisite to allotment under section 4 of the act of February 8 1887. It is held that said act is, in its

essential elements, a settlement law; and that "to make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement."

In the case of *Mary Eliza McNaughton and Frank Laveash, Jr., v. James R. McKay and Henry Turrish*, assignee, decided by the Department April 21, 1909 (not published), it was held in respect to applications under the 4th section:

The minors were living with their mother on their deceased father's allotment in the Fond du Lac Reservation in Wisconsin. There was no separation of their mother from the tribe or settlement by her on any public land outside the reservation. She and her children were reservation Indians. The general purpose of the act was not to donate to minor children of reservation Indians living in tribal relations tracts of public lands. Its purpose was to induce adult Indians to abandon the tribal relations and settle on public lands with view to becoming land owners and citizens. Neither the mother nor the children had become qualified to claim allotments of public lands.

In that case, as stated, the minor children were living with their mother on their deceased father's allotment on an Indian reservation, whereas the minor child herein of Thomas and Kate Sweeney is living with her parents in Spokane, Washington. But the principle involved is not affected by the difference in the facts of the cases, as in neither case did the parents settle upon public lands. It is true that in "Indian Lands—Allotments," *supra*, it was held that no actual settlement should be required in the case of allotments to minor children under section 4, but it is clear that the actual settlement of the parents on the public domain is to be regarded as the settlement of the minor children on the principle that "it is not to be inferred that Congress intended in this instance to upset well settled law and require that a minor child should have a residence separate and apart from that of his parents."

The act of March 3, 1909 (35 Stat., 781, 782), provided:

That the Secretary of the Interior be, and he hereby is, authorized, under the direction of the President, to allot any Indian on the public domain who has not heretofore received an allotment, in such areas as he may deem proper, not to exceed, however, eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian, such allotment to be made and patent therefor issued in accordance with the provisions of the act of February eight, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, three hundred and eighty-eight).

This provision, however, was expressly repealed in the act of June 25, 1910 (36 Stat., 855, 859-60), and section 4 of the amendatory act of February 28, 1891, was amended in respect to the amount that may be allotted thereunder to Indians on the public domain, reference being had to the character of the land allotted—whether irrigable or grazing.

The decision of the General Land Office herein rejecting the allotment application filed on behalf of Cynthia Martha Sweeney is affirmed.

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**ROUTE v. McCOY.**

**PRACTICE—ORAL ARGUMENT—FIXING OF DATE.**

Counsel desiring oral argument in a contested case pending before the Department should confer with all parties with a view to agreeing upon a date therefor, and on such agreed date, if consistent with other plans of the Department, argument will be heard; but where the parties can not agree upon a date, the Department will entertain a motion by any party, after notice to all parties, to fix a date, and when such motion comes up, the questions whether argument should be allowed, and if so when, will be settled.

*First Assistant Secretary Adams to Samuel Herrick, Washington, D. C., July 8, 1911.*

The Department is in receipt of your letter of July 7, 1911, requesting that the above-entitled case, pending here on motion for rehearing, be set down for oral hearing.

I have to advise that, while the Department is inclined to permit oral argument in contested cases pending before it, yet, counsel should confer with all parties with a view to reaching an agreeable date. Arguments will be heard on such date, if consistent with other plans. If such a stipulation cannot be had, the Department will entertain a motion for oral argument by any party, after notice to all parties. When such motion comes up, the questions of whether an argument should be allowed, and if allowed, when, will be settled.

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**OPENING FORT BERTHOLD LANDS.**

BY THE PRESIDENT OF THE UNITED STATES.

**A PROCLAMATION.**

I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Act of Congress approved June 1, 1910 (36 Stat., 455), do hereby prescribe, proclaim and make known that all the non-mineral, unallotted, unreserved lands within the Fort Berthold Indian Reservation in the State of North Dakota which have been classified under said Act of Congress into agricultural land of the first class, agricultural land of the second class, and grazing land shall be disposed of under the general

provisions of the homestead laws of the United States and of said Act of Congress, and be opened to settlement and entry, and be settled upon, occupied and entered in the following manner, and not otherwise:

1. All persons qualified to make a homestead entry may, on and after August 14, 1911, and prior to and including September 2, 1911, but not thereafter, present to James W. Witten, Superintendent of the Opening, at the City of Minot, North Dakota, by ordinary mail, but not in person or by registered mail or otherwise, sealed envelopes containing their applications for registration, but no envelope must contain more than one application; and no person can present more than one application in his own behalf and one as agent for a soldier, sailor, or for the widow or minor orphan child of a soldier or sailor as hereinafter provided.

2. Each application for registration must show the applicant's name, postoffice address, age, height and weight, and be sworn to by him at either Bismarck, Plaza, Ryder, Garrison, or Minot, North Dakota, before some Notary Public designated by the Superintendent.

3. Persons who were honorably discharged after ninety days' service in the Army, Navy or Marine Corps of the United States, during the War of the Rebellion, the Spanish-American War, or the Philippine Insurrection, or their widows or minor orphan children, may make their applications for registration either in person or through their duly appointed agents, but no person can act as agent for more than one such applicant, and all applications presented by agents must be signed and sworn to by them at one of the places named and in the same manner in which other applicants are required to swear to and present their applications.

4. Beginning at 10 o'clock a. m. on September 6, 1911, at the said City of Minot, and continuing thereafter from day to day, Sundays excepted, as long as may be necessary, there shall be impartially taken and selected indiscriminately from the whole number of envelopes so presented such number thereof as may be necessary to carry into effect the provisions of this Proclamation, and the applications for registration contained in the envelopes so selected shall, when correct in form and execution, be numbered serially in the order in which they are selected, beginning with number one, and the numbers thus assigned shall fix and control the order in which the persons named therein may make entry after the lands shall become subject to entry.

5. A list of the successful applicants, showing the number assigned to each of them, will be conspicuously posted and furnished to the press for publication as a matter of news, and a proper notice will be promptly mailed to each person to whom a number is assigned.

6. Beginning at 9 o'clock a. m. on May 1, 1912, and continuing thereafter on such dates as may be fixed by the Secretary of the Interior, persons holding numbers assigned to them under this proclamation will be permitted to designate and enter the tracts they desire as follows:

When a person's name is called, he must at once select the tract he desires to enter and will be allowed fifteen days following date of selection to complete entry at the proper local land office. During that period of fifteen days, he must file his homestead application at the proper local land office, accompanying the same with the usual filing fees and commissions and in addition thereto one-fifth of the appraised value of the tract selected. To save expense incident to an additional trip to the land and to return to the local land office, he may, following his selection, execute his homestead application for the tract selected within the proper land district and file same in the proper local land office, where it will be held awaiting the payment of the fees and commissions and one-fifth of the appraised value of the land. In that event, the payment must be made within the fifteen days following the date of selection. Payments can be made *only* in cash or by post-office money orders made payable to the receiver of the proper local land office. These payments may be made in person, through the mails or any other means of agency desired, but the applicant assumes all responsibility in the matter. He must see that the payments reach the local office within the fifteen days allowed, and where failure occurs in any instance where the application has been filed in the local office without payment, as herein provided for, the application will stand rejected without further action on the part of the local officers.

In case of declaratory statements, allowable under this opening, the same course may be pursued, except that the filing fees must be paid within the fifteen days following date of selection, the party having six months after filing within which to complete entry. Soldiers or sailors or their widows or minor orphan children, making homestead entry of these lands must make payments of fees and commissions and purchase money as is required of other entrymen. All persons making homestead entry of these lands must pay the remaining four-fifths of the purchase money in five equal installments. These payments will become due at the end of two, three, four, five and six years after the date of entry, unless the entry is commuted. If commutation proof is made, all the unpaid installments must be paid at that time. If any entryman fails to make any payment when it becomes due, all his former payments will be forfeited and his entry will be canceled.

No person can select more than one tract or present more than one application to enter or file more than one declaratory statement in his own behalf.

7. If any person fails to designate the tract he desires to enter on the date assigned to him for that purpose, or if, having made such designation he fails to perfect it by making entry or filing and payments as above provided, or if he presents more than one application for registration or presents an application in any other than his true name, he will forfeit his right to make entry or filing under this proclamation.

8. None of the lands opened to entry under this proclamation shall become subject to settlement or entry prior to 9 o'clock a. m. on October 1, 1912, except in the manner prescribed herein; and all persons are admonished not to make any settlement prior to that hour on lands not covered by entries or filings made by them under this proclamation. At 9 o'clock a. m. on October 1, 1912, all of said lands which have not then been entered under this proclamation will become subject to settlement and entry under the general provisions of the homestead laws and the said Act of Congress.

9. The Secretary of the Interior shall make and prescribe such rules and regulations as may be necessary and proper to carry this proclamation and the said Act of Congress into full force and effect.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty-ninth day of June, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

[SEAL.]

WM. H. TAFT.

By the President:

P. C. KNOX, *Secretary of State.*

## OPENING FORT BERTHOLD LANDS.

### REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., June 29, 1911.*

JAMES W. WITTEN,

*Superintendent of Opening and Sale of Indian Lands.*

SIR: Pursuant to the Proclamation of the President issued June 29, 1911, for the opening of the classified lands within the Fort Berthold Indian Reservation, the following rules and regulations are hereby prescribed:

1. Applications for registration and powers of attorney for the appointment of agents by soldiers or sailors or their widows or minor



orphan children must be made on blank forms prescribed by the Superintendent.

2. No notary public shall be designated for the purpose of administering oaths to applicants for registration who was not appointed prior to July 1, 1911, and on that date a resident of the county in which he shall act, and the Superintendent is hereby authorized and directed to prescribe such plans, rules and regulations governing the action of such notaries public and in relation to the registration, as may in his judgment be necessary.

3. Envelopes used in presenting applications for registration should be three and one-half inches wide and six inches long, and they must all be plainly addressed to "James W. Witten, Superintendent, Minot, North Dakota," and the words "Registration Application" must be plainly written or printed across the front and at the left end of the envelope.

4. Blank forms of application for registration and addressed envelopes to be used in forwarding applications to the Superintendent will be furnished to each applicant by the Superintendent, through the notaries public before whom the applicants are sworn. Blank powers of attorney to be used by soldiers or sailors, or their widows or minor orphan children, in the appointment of agents, may be obtained from the Superintendent at Washington, D. C., prior to August 10, 1911, and after that date from him at Minot, North Dakota.

5. No envelope should contain more than one application for registration or contain any other paper than the application. Proof of naturalization and of military service, and other proof required (as in case of second homestead entries), will be exacted before the entry is allowed, but should not accompany the application for registration.

6. *Method of receiving and handling applications.*—As soon as the Superintendent of the Opening receives an envelope addressed to him, with the words "Registration Application" endorsed thereon, he will (if such envelope bears no distinctive marks or words indicating the name of the person by whom it was presented) deposit it in a metal can set apart for the reception of such envelopes. The cans used for this purpose must be so constructed as to prevent envelopes deposited therein from being removed therefrom, without detection, and they must be safely guarded by representatives of the Government until they are publicly opened on the day when the selections authorized by the Proclamation are to be made. All envelopes which show the name of the person by whom they were mailed will be opened as soon as they are received by the Superintendent, and the applications therein will be returned to the applicants.

7. *Method of assigning numbers to applicants.*—On September 6, 1911, the cans containing the applications for registration will be

publicly opened and all envelopes contained therein will be thoroughly mixed and distributed preparatory to the selection and numbering thereof in the manner directed by said Proclamation.

8. Numbers will not be assigned to a greater number of persons than will be reasonably necessary to induce the entry of all the lands subject to entry in said Reservation under said Proclamation. The applications for registration presented by persons to whom numbers are not assigned will be carefully arranged and inspected, and if it is found that any person has presented more than one application for registration in his own behalf and one application as agent, or presented his own application in any other than his true name, or in any other manner than that directed by said Proclamation, he will be denied the right to make entry under any number assigned him.

9. When an application for registration has been selected and numbered, as prescribed by said Proclamation, the name and address of the applicant and the number assigned to him will be publicly announced, and the application will be filed in the order in which it was numbered.

10. All selected applications which are not correct in form and execution will be stamped "Rejected—Imperfectly Executed," and filed in the order in which they were rejected.

11. Notices of numbers assigned will be promptly mailed to all persons to whom they are assigned, and to the agents, in cases where numbers are assigned to soldiers who registered by agents, at the post-office address given in their applications for registration, but no notice whatever will be sent to persons to whom numbers are not assigned.

12. Notice of the time and place of making entry will be mailed to such number of persons holding numbers as may be reasonably necessary to induce the entering of all the lands desirable for entry, and if any person who receives such a notice either notifies the Superintendent that he does not intend to make entry, or fails to make entry on the day assigned him for that purpose, the person holding the lowest number to whom no date for entry has been assigned will be at once notified that he will be permitted to make entry on a date named in such notice, after all persons holding numbers lower than his have had opportunity to make entry.

13. *Time and method of making entries or filings and payments.*—Persons who receive notice of their right to make entry must select and enter the tracts they desire as follows: The persons holding numbers from 1 to 50 inclusive must appear at the land office when their names are called on May 1, 1912; the persons holding numbers from 51 to 100 inclusive must appear when their names are called on May 2, 1912; the persons holding numbers 101 to 200 inclusive must appear when their names are called on May 3, 1912; and so on, at the rate of one hundred on each succeeding day, Sundays and legal holi-

days excepted, until the persons holding the first one thousand numbers have been given opportunity to make their selections, and after that the persons holding numbers above one thousand may similarly appear at the rate of one hundred and fifty daily. When a person's name is called, he must at once select the tract he desires to enter and will be allowed fifteen days following date of selection to complete entry at the proper local land office. During that period of fifteen days, he must file his homestead application at the proper local land office, accompanying the same with the usual filing fees and commissions and in addition thereto one-fifth of the appraised value of the tract selected. To save expense incident to an additional trip to the land and to return to the local land office, he may, following his selection, execute his homestead application for the tract selected within the proper land district and file same in the proper local land office, where it will be held awaiting the payment of the fees and commissions, and one-fifth of the appraised value of the land. In that event, the payment must be made within the fifteen days following date of selection. Payments can be made *only* in cash or by postoffice money orders made payable to the receiver of the proper local land office. These payments may be made in person, through the mails, or any other means of agency desired, but the applicant assumes all responsibility in the matter. He must see that the payments reach the local office within the fifteen days allowed, and where failure occurs in any instance where the application has been filed in the local office without payment, as herein provided for, the application will stand rejected without further action on the part of the local officers. In the case of declaratory statements, allowable under this opening, the same course may be pursued, except that the filing fees must be paid within the fifteen days following date of selection, the party having six months after filing within which to complete entry. Soldiers or sailors or their widows or minor orphan children, making homestead entry of these lands must make payments of fees and commissions and purchase money as is required of other entrymen. All persons making homestead entry of these lands must pay the remaining four-fifths of the purchase money in five equal installments. These payments will become due at the end of two, three, four, five and six years after the date of entry, unless the entry is commuted. If commutation proof is made, all the unpaid installments must be paid at that time. If any entryman fails to make any payment when it becomes due, all his former payments will be forfeited and his entry will be canceled. All entries must, as far as possible, embrace only lands listed and appraised as one tract, and no applicant will be permitted to omit any unentered part of a listed tract from his application and include therein, in lieu of the omitted tract, a part of another or different listed tract; but where a listed tract embraces less than a quarter section it and a part of another and different listed tract

may be embraced in the same entry. In cases where an applicant desires to enter less than a quarter section, he may apply for any legal subdivision, or subdivisions, of a listed tract, and where a part of a listed tract has been entered the remaining part and a part of another adjacent listed tract may be embraced in the same entry.

14. If any person who has been assigned a number entitling him to make entry fails to appear and make his selection when the number assigned him is reached and his name is called, his right to select will be passed until after all other applicants assigned for that day have been disposed of, when he will be afforded another opportunity to make his selection on that day. If any person fails to make his selection on the date assigned him for that purpose or if, having made a selection fails to perfect it by making entry or filing and payments as above provided, he will be deemed to have abandoned his right to make entry prior to October 1, 1912, but will not thereby exhaust his homestead rights.

15. If any person holding a number dies before the date on which he is required to make entry, his widow or any one of his heirs, may appear and make a selection, in her or his own individual right, under his number on that date, and thereafter make entry within fifteen days.

16. *Proof required at time of filing.*—At the time of appearing to make entry, each applicant must, by affidavit, show his qualifications to make a homestead entry. If an applicant files a soldier's declaratory statement, either in person or by agent, he must furnish evidence of military service and honorable discharge. All foreign-born persons must furnish either the original or proper certified copies of their declaration of intention to become citizens or the original or proper certified copies of the order of the court admitting them to full citizenship. If persons who were not born in the United States claim citizenship through their fathers' naturalization, while they were under twenty-one years of age, they must furnish a proper certified copy of the order of the court admitting their fathers to full citizenship, and evidence of their minority at that time.

17. *Applicants will not be required to swear that they have seen or examined the land,* before making application to enter, and the usual nonmineral and nonsaline affidavits will not be required with applications to enter made prior to October 1, 1912, but evidence of the nonmineral and nonsaline character of the lands entered before that date must be furnished by the entrymen before their final proofs are accepted.

18. *Proceedings on contests and rejected applications.*—When the Register and Receiver of the land office at which these lands will become subject to entry for any reason reject the application of any person claiming the right to make entry, under any number assigned

him, they will at once advise him of the rejection, and of his right of appeal, and further action thereon shall be controlled by the following rules, and not otherwise:

a. Applications either to file soldier's declaratory statement or to make homestead entry of these lands must, on presentation in accordance with these regulations, be at once accepted or rejected, but the local land officers may, in their discretion, permit amendment or defective applications during the day only on which they are presented. If properly amended on the same day, entry may be permitted after the numbers for the day have been exhausted, in their numerical order.

b. No appeal to the General Land Office will be allowed or considered unless taken within one day (Sundays excepted) after the rejection of the application.

c. After the rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that his application, if allowed, will be subject to the disposition of the prior application, upon appeal if any be taken from the rejection thereof, which fact must be noted upon the receipt issued him and upon the application allowed.

d. When an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will at once be carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

e. Applications filed prior to October 1, 1912, to contest entries allowed for these lands will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior, with proper recommendations, when the matter will be promptly decided.

f. These regulations will supersede, during the period between May 1, 1912, and October 1, 1912, any Rule of Practice or other regulation governing the disposition of applications with which they may be in conflict, in so far as they relate to the lands affected by these regulations, and will apply to all appeals taken from actions of local officers during that period affecting any of these lands.

Very respectfully,

FRED DENNETT,  
*Commissioner*

Approved June 29, 1911.

WALTER L. FISHER,  
*Secretary.*

## ACT OPENING FORT BERTHOLD LANDS.

An Act To authorize the survey and allotment of lands embraced within the limits of the Fort Berthold Indian Reservation, in the State of North Dakota, and the sale and disposition of a portion of the surplus lands after allotment, and making appropriation and provision to carry the same into effect.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, authorized and directed to cause the unsurveyed part of the Fort Berthold Indian Reservation, in the State of North Dakota, to be surveyed, and to sell and dispose of, as hereinafter provided, all the surplus unallotted and unreserved lands within that portion of said reservation lying and being east and north of the Missouri River, and he shall cause an examination to be made of said lands by the Geological Survey; and if there be found any lands bearing coal or other mineral, the Secretary of the Interior is hereby authorized to reserve them from allotment or other disposition until Congress shall provide for their disposal: *Provided,* That any Indians to whom allotments may have been made within the area described herein may, in case they elect to do so before said lands are offered for sale, relinquish the same and select allotments in lieu thereof, within the area in which the additional allotments hereinafter provided for are to be made.

SEC. 2. That the Secretary of the Interior be, and he is hereby, authorized to cause an allotment of one hundred and sixty acres of agricultural land or three hundred and twenty acres of grazing land to be made from the lands of the Fort Berthold Indian Reservation to each member of the several tribes belonging to and occupying said reservation now living, such allotment to be in addition to any allotments heretofore made or which may be made under existing law: *Provided,* That all allotments made under this Act shall be made on that part of the reservation lying west and south of the Missouri River, or in townships one hundred and fifty north, of ranges ninety, ninety-one, ninety-two, and ninety-three west; townships one hundred and forty-nine north, of ranges ninety and ninety-one west; townships one hundred and forty-eight north, of ranges eighty-eight, eighty-nine, ninety, and ninety-one west; and townships one hundred and forty-seven north, of ranges eighty-seven, eighty-eight, eighty-nine, and ninety west, lying east and north of the Missouri River: *Provided further,* That all allotments of land in the townships specifically described and lying north and east of the Missouri River shall be made prior to a date to be fixed by the Secretary of the Interior, which date shall be not less than six months from and after the date of approval of this Act.

SEC. 3. That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions shall be maintained thereon for the benefit of said Indians; and he is hereby authorized to set aside and reserve such tracts in sections thirty and thirty-one, in township one hundred and forty-seven north, range eighty-seven west, and section thirty-six, in township one hundred and forty-seven north, range eighty-eight west of the fifth principal meridian as he may deem necessary to preserve the ruins of the old Fort Berthold Indian village and the Indian burial grounds adjacent thereto.

SEC. 4. That the Secretary of the Interior is hereby authorized to set aside and reserve such tracts as may be deemed necessary, not to exceed six hundred and forty acres in the aggregate, for the purpose of establishing and maintaining a farm for the benefit of the members of the several tribes of Indians on the

Fort Berthold Indian Reservation; and there is hereby appropriated, out of any money in the Treasury to the credit of the said Fort Berthold Indians, or which shall be placed to their credit from the proceeds of the sale of the lands disposed of as provided herein, not otherwise appropriated, the sum of twenty-five thousand dollars, or so much thereof as may be necessary to pay for the construction of the necessary buildings on said lands and for the purchase of necessary live stock, machinery, and equipment, and also to defray the expenses of operating said farm. The management and control of said farm shall be under the supervision of the Commissioner of Indian Affairs.

SEC. 5. That the Secretary of the Interior is hereby authorized to set aside and reserve from location, entry, sale, allotment, or other appropriation such tracts as are found to be chiefly valuable for power sites or reservoir sites: *Provided*, That the Secretary of the Interior is hereby authorized to cancel, after notice and a hearing, all trust patents issued to Indian allottees for allotments within any such power or reservoir site: *Provided further*, That the Secretary of the Interior shall report to Congress all lands so withdrawn for power or reservoir sites.

SEC. 6. That before any of the land is disposed of, as hereinafter provided, and before the State of North Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen and thirty-six, or any portions thereof, by reason of allotment thereof to any Indian or Indians, the Secretary of the Interior is authorized to set aside and reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause the same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town site; and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes, to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct; and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses or other public buildings or improvements in the town sites in which such lots are located. The net proceeds derived from the sale of such lots, less the amounts expended in the construction of schoolhouses or other public buildings or improvements, as hereinbefore provided, within the town sites aforesaid, shall be credited to the Indians as hereinafter provided.

SEC. 7. That the President of the United States shall appoint a commission, consisting of three persons, to inspect, classify, appraise, and value all of the lands described in section one of this Act that shall not have been allotted in severalty to said Indians or granted or reserved by the terms of this Act, said commission to be constituted as follows: One of the commissioners shall be a person holding tribal relations with said Indians, one a representative of the Interior Department, and one a resident citizen of the State of North Dakota. That within twenty days after their appointment said commissioners shall meet and organize by the election of one of their number as chairman. The said commissioners shall then proceed to personally inspect and classify and appraise, in one hundred and sixty acre tracts, all of the remaining lands described in section one of this Act, except sections sixteen and sections thirty-six. In making such classification and appraisal said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural

land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection and classification of said lands and necessary expenses, exclusive of subsistence, to be approved by the Secretary of the Interior; such inspection and classification to be completed within six months from the date of the organization of said commission.

SEC. 8. That when said commissioners shall have completed the classification and appraisal of all of said lands and the same shall have been approved by the Secretary of the Interior, the lands shall be disposed of under the provisions of the homestead, mineral, and town-site laws of the United States, except as hereinafter otherwise provided and excepting sections sixteen and thirty-six of each township, which sections are hereby granted to the State of North Dakota for school purposes; and in case either of said sections or parts thereof should be lost to the State by reason of the allotment thereof to any Indian or Indians, or otherwise, the governor of the State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to select other unoccupied, unreserved, nonmineral lands, which selections must be made at least thirty days prior to the date fixed by the President's proclamation opening the surplus lands to settlement: *Provided*, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen and thirty-six, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township: *Provided further*, That the United States shall pay to the said Indians for the lands in said sections sixteen and thirty-six, so granted, or the lands within said reservation selected in lieu thereof, the sum of two dollars and fifty cents per acre.

SEC. 9. That said lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in said proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish wars and Philippine insurrection, as defined and prescribed in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said agricultural lands shall be the appraised value thereof as approved by the Secretary of the Interior, and the agricultural lands shall be disposed of under the homestead law and shall be paid for in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal installments, to be paid in two, three, four, five and six years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: *Provided*, That nothing in this Act shall prevent homestead settlers from com-



muting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior be reappraised in the manner provided for in this Act.

SEC. 10. That the Secretary of the Interior is hereby authorized to set aside and reserve as a tribal forest reserve all timber lands, to be used by said Indians under the direction of the Commissioner of Indian Affairs.

SEC. 11. That the net proceeds derived from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States to the credit of the Indians belonging to and having tribal rights on said reservation, which shall draw interest at the rate of three per centum per annum; that all the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be subject to appropriation by Congress for their education, support, and civilization.

SEC. 12. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of North Dakota, and there is hereby appropriated the further sum of one hundred thousand dollars, or so much thereof as may be necessary, for the purpose for making surveys, appraisements, allotments, and classification provided for herein: *Provided*, That the latter appropriation, or any other further appropriations hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribes.

SEC. 13. That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, granted to the State, or otherwise disposed of shall be subject to all laws of the United States prohibiting the introduction of intoxicants into the Indian country until Congress shall otherwise provide.

SEC. 14. That nothing in this Act contained shall in any manner bind the United States to purchase any of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said lands except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this Act shall be construed to deprive said Indians of Fort Berthold Indian Reservation of any benefits to which they are entitled under existing treaties or agreement not inconsistent with the provisions of this Act.

Approved, June 1, 1910 (36 Stat., 455).

**OPENING PINE RIDGE AND ROSEBUD LANDS.**

BY THE PRESIDENT OF THE UNITED STATES.

**A PROCLAMATION.**

I, WILLIAM H. TAFT, President of the United States of America, by virtue of the power and authority vested in me by the Acts of Congress approved May 27, 1910 (36 Stat., 440), and May 30, 1910 (36 Stat., 448), do hereby prescribe, proclaim and make known that all the non-mineral, unallotted, unreserved lands within the Pine Ridge and Rosebud Reservations in the State of South Dakota, which have been classified under said Acts of Congress into agricultural land of the first class, agricultural land of the second class, and grazing land shall be disposed of under the general provisions of the homestead laws of the United States and of said Acts of Congress, and be opened to settlement and entry, and be settled upon, occupied and entered in the following manner, and not otherwise:

1. All persons qualified to make a homestead entry may, on and after October 2, 1911, and prior to and including October 21, 1911, but not thereafter, present to James W. Witten, Superintendent of the Opening, at the City of Gregory, South Dakota, by ordinary mail, but not in person or by registered mail or otherwise, sealed envelopes containing their applications for registration, but no envelope must contain more than one application; and no person can present more than one application in his own behalf and one as agent for a soldier, sailor, or for the widow or minor orphan child of a soldier or sailor, as hereinafter provided.

2. Each application for registration must show the applicant's name, post office address, age, height and weight, and be sworn to by him at either Chamberlain, Dallas, Gregory or Rapid City, South Dakota, before some Notary Public designated by the Superintendent.

3. Persons who were honorably discharged after ninety days' service in the Army, Navy or Marine Corps of the United States, during the War of the Rebellion, the Spanish-American War, or the Philippine Insurrection, or their widows or minor orphan children, may make their applications for registration either in person or through their duly appointed agents, but no person can act as agent for more than one such applicant, and all applications presented by agents must be signed and sworn to by them at one of the places named and in the same manner in which other applicants are required to swear to and present their applications.

4. Beginning at 10 o'clock a. m. on October 24, 1911, at the said City of Gregory, and continuing thereafter from day to day, Sundays excepted, as long as may be necessary, there shall be impartially taken

and selected indiscriminately from the whole number of envelopes so presented, such number thereof as may be necessary to carry into effect the provisions of this Proclamation, and the applications for registration contained in the envelopes so selected shall, when correct in form and execution, be numbered serially in the order in which they are selected, beginning with number one, and the numbers thus assigned shall fix and control the order in which the persons named therein may make entry after the lands shall become subject to entry.

5. A list of the successful applicants, showing the number assigned to each of them, will be conspicuously posted and furnished to the press for publication as a matter of news, and a proper notice will be promptly mailed to each person to whom a number is assigned.

6. Beginning at 9 o'clock a. m. on April 1, 1912, and continuing thereafter on such dates as may be fixed by the Secretary of the Interior, persons holding numbers assigned to them under this Proclamation will be permitted to designate and enter the tracts they desire as follows:

When a person's name is called, he must at once select the tract he desires to enter and will be allowed fifteen days following date of selection to complete entry at the proper local land office. During that period of fifteen days, he must file his homestead application at the proper local land office, accompanying the same with the usual filing fees and commissions and in addition thereto, one-fifth of the appraised value of the tract selected. To save expense incident to an additional trip to the land and to return to the local land office, he may, following his selection, execute his homestead application for the tract selected within the proper land district and file same in the proper local land office, where it will be held awaiting the payment of the fees and commissions and one-fifth of the appraised value of the land. In that event, the payment must be made within the fifteen days following date of selection. Payments can be made *only* in cash or by post-office money orders made payable to the receiver of the proper local land office. These payments may be made in person, through the mails or any other means of agency desired, but the applicant assumes all responsibility in the matter. He must see that the payments reach the local office within the fifteen days allowed, and where failure occurs in any instance where the application has been filed in the local office without payment, as herein provided for, the application will stand rejected without further action on the part of the local officers.

In the case of declaratory statements, allowable under this opening, the same course may be pursued, except that the filing fees must be paid within the fifteen days following date of selection, the party having six months after filing within which to complete entry.

Soldiers or sailors or their widows or minor orphan children, making homestead entry of these lands must make payments of fees and commissions and purchase money as is required of other entrymen. All persons making homestead entry of these lands must pay the remaining four-fifths of the purchase money in five equal installments. These payments will become due at the end of two, three, four, five and six years after the date of entry, unless the entry is commuted. If commutation proof is made, all the unpaid installments must be paid at that time. If any entryman fails to make any payment when it becomes due, all his former payments will be forfeited and his entry will be canceled.

No person can select more than one tract or present more than one application to enter or file more than one declaratory statement in his own behalf.

7. If any person fails to designate the tract he desires to enter on the date assigned to him for that purpose, or if, having made such designation, he fails to perfect it by making entry or filing and payments as above provided, or if he presents more than one application for registration, or presents an application in any other than his true name, he will forfeit his right to make entry or filing under this proclamation.

8. None of these lands opened to entry under this proclamation shall become subject to settlement or entry prior to 9 o'clock a. m. on October 1, 1912, except in the manner prescribed herein; and all persons are admonished not to make any settlement prior to that hour on lands not covered by entries or filings made by them under this proclamation. At 9 o'clock a. m. on October 1, 1912, all of said lands which have not been entered under this proclamation will become subject to settlement and entry under the general provisions of the homestead laws and the said acts of Congress.

9. The Secretary of the Interior shall make and prescribe such rules and regulations as may be necessary and proper to carry this proclamation and the said acts of Congress into full force and effect.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this twenty-ninth day of June, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth

[SEAL.]

WM. H. TAFT.

By the President:

P. C. KNOX, *Secretary.*

## OPENING PINE RIDGE AND ROSEBUD LANDS.

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., June 29, 1911.

JAMES W. WITTEN,

*Superintendent of Opening and Sale of Indian Lands.*

SIR: Pursuant to the Proclamation of the President issued June 29, 1911, for the opening of the classified lands within the Pine Ridge and Rosebud Indian Reservations, in South Dakota, the following rules and regulations are hereby prescribed:

1. *Applications for registration and powers of attorney* for the appointment of agents by soldiers or sailors or their widows or minor orphan children, must be made on blank forms prescribed by the Superintendent.

2. *No notary public shall be designated for the purpose* of administering oaths to applicants for registration who was not appointed prior to July 1, 1911, and on that date a resident of the county in which he shall act, and the Superintendent is hereby authorized and directed to prescribe such plans, rules and regulations governing the action of such notaries public and in relation to the registration, as may in his judgment be necessary.

3. *Envelopes used in presenting applications for registration* should be three and one-half inches wide and six inches long, and they must all be plainly addressed to "James W. Witten, Superintendent, Gregory, South Dakota," and the words "Registration Application" must be plainly written or printed across the front and at the left end of the envelope.

4. *Blank forms of application for registration* and addressed envelopes to be used in forwarding applications to the Superintendent will be furnished to each applicant by the Superintendent, through the notaries public before whom the applicants are sworn. Blank powers of attorney to be used by soldiers or sailors, or their widows or minor orphan children, in the appointment of agents, may be obtained from the Superintendent at Washington, D. C., prior to September 25, 1911, and after that date from him at Gregory or Dallas, South Dakota.

5. *No envelope should contain more than one application* for registration or contain any other paper than the application. Proof of naturalization and of military service, and other proof required (as in case of second homestead entries), will be exacted before the entry is allowed, but should not accompany the application for registration.

6. *Method of receiving and handling applications.*—As soon as the Superintendent of the Opening receives an envelope addressed to him, with the words "Registration Application" endorsed thereon, he will (if such envelope bears no distinctive marks or words indicating the name of the person by whom it was presented) deposit it in a metal can set apart for the reception of such envelopes. The cans used for this purpose must be so constructed as to prevent envelopes deposited therein from being removed therefrom, without detection, and they must be safely guarded by representatives of the Government until they are publicly opened on the day when the selections authorized by the Proclamation are to be made. All envelopes which show the name of the person by whom they were mailed, will be opened as soon as they are received by the Superintendent, and the applications therein will be returned to the applicants.

7. *Method of assigning numbers to applicants.*—On October 24, 1911, the cans containing the applications for registration will be publicly opened and all envelopes contained therein will be thoroughly mixed and distributed preparatory to the selection and numbering thereof in the manner directed by said Proclamation.

8. *Numbers will not be assigned to a greater number of persons than will be reasonably necessary to induce the entry of all the lands subject to entry in said Reservations under said Proclamation.* The applications for registration presented by persons to whom numbers are not assigned will be carefully arranged and inspected, and if it is found that any person has presented more than one application for registration in his own behalf and one application as agent, or presented his own application in any other than his true name, or in any other manner than that directed by said Proclamation, he will be denied the right to make entry under any number assigned him.

9. *When an application for registration has been selected and numbered, as prescribed by said Proclamation, the name and address of the applicant and the number assigned to him will be publicly announced, and the application will be filed in the order in which it was numbered.*

10. *All selected applications which are not correct in form and execution will be stamped "Rejected—Imperfectly Executed," and filed in the order in which they were rejected.*

11. *Notices of numbers assigned will be promptly mailed to all persons to whom they are assigned, and to the agents, in cases where numbers are assigned to soldiers who registered by agents, at the postoffice address given in their application for registration, but no notice whatever will be sent to persons to whom numbers are not assigned.*

12. *Notice of the time and place of making entry will be mailed to such number of persons holding numbers as may be reasonably neces-*

sary to induce the entering of all the lands desirable for entry, and if any person who receives such notice either notifies the Superintendent that he does not intend to make entry, or fails to make entry on the day assigned him for that purpose, the person holding the lowest number to whom no date for entry has been assigned will be at once notified that he will be permitted to make entry on a date named in such notice, after all persons holding numbers lower than his have had opportunity to make entry.

13. *Time and method of making entries or filings and payments.*— Persons who receive notice of their right to make entry must select and enter the tracts they desire as follows: The persons holding numbers from 1 to 50 inclusive must appear at the land office when their names are called on April 1, 1912; the persons holding numbers from 51 to 100 inclusive must appear when their names are called on April 2, 1912; the persons holding numbers 101 to 200 inclusive must appear when their names are called on April 3, 1912; and so on, at the rate of one hundred on each succeeding day, Sundays and legal holidays excepted, until the persons holding the first one thousand numbers have been given opportunity to make their selections, and after that the persons holding numbers above one thousand may similarly appear at the rate of one hundred and fifty daily. When a person's name is called, he must at once select the tract he desires to enter, and will be allowed fifteen days following date of selection to complete entry at the proper local land office. During that period of fifteen days, he must file his homestead application at the proper local land office, accompanying the same with the usual filing fees and commissions and in addition thereto one-fifth of the appraised value of the tract selected. To save expense incident to an additional trip to the land and to return to the local land office, he may, following his selection, execute his homestead application for the tract selected within the proper land district and file same in the proper local land office, where it will be held awaiting the payment of the fees and commissions, and one-fifth of the appraised value of the land. In that event, the payment must be made within the fifteen days following date of selection. Payments can be made *only* in cash or by postoffice money orders made payable to the receiver of the proper local land office. These payments may be made in person, through the mails, or any other means of agency desired, but the applicant assumes all responsibility in the matter. He must see that the payments reach the local office within the fifteen days allowed, and where failure occurs in any instance where the application has been filed in the local office without payment, as herein provided for, the application will stand rejected without further action on the part of the local officers. In the case of declaratory statements, allowable under this opening, the same course may be pursued, except that the filing fees

must be paid within the fifteen days following date of selection, the party having six months after filing within which to complete entry. Soldiers or sailors or their widows or minor orphan children, making homestead entry of these lands must make payments of fees and commissions and purchase money as is required of other entrymen. All persons making homestead entry of these lands must pay the remaining four-fifths of the purchase money in five equal installments. These payments will become due at the end of two, three, four, five and six years after the date of entry, unless the entry is commuted. If commutation proof is made, all the unpaid installments must be paid at that time. If any entryman fails to make any payment when it becomes due, all his former payments will be forfeited and his entry will be canceled. All entries must, as far as possible, embrace only lands listed and appraised as one tract, and no applicant will be permitted to omit any unentered part of a listed tract from his application and include therein, in lieu of the omitted tract, a part of another or different listed tract; but where a listed tract embraces less than a quarter section it and a part of another and different listed tract may be embraced in the same entry. In cases where an applicant desires to enter less than a quarter section, he may apply for any legal subdivision, or subdivisions, of a listed tract, and where a part of a listed tract has been entered the remaining part and a part of another adjacent listed tract may be embraced in the same entry.

14. *If any person who has been assigned a number entitling him to make entry fails to appear and make his selection when the number assigned him is reached and his name is called, his right to select will be passed until after all other applicants assigned for that day have been disposed of, when he will be afforded another opportunity to make his selection on that day. If any person fails to make his selection on the date assigned him for that purpose or if, having made a selection fails to perfect it by making entry or filing and payments as above provided, he will be deemed to have abandoned his right to make entry prior to October 1, 1912, but will not thereby exhaust his homestead rights.*

15. If any person holding a number dies before the date on which he is required to make entry, his widow, or any one of his heirs, may appear and make a selection, in her or his own individual right, under his number on that date, and thereafter make entry within fifteen days.

16. *Proof required at time of filing.*—At the time of appearing to make entry, each applicant must, by affidavit, show his qualifications to make a homestead entry. If an applicant files a soldier's declaratory statement, either in person or by agent, he must furnish evidence of military service and honorable discharge. All foreign-born per-



sons must furnish either the original or proper certified copies of their declaration of intention to become citizens or the original or proper certified copies of the order of the court admitting them to full citizenship. If persons who were not born in the United States claim citizenship through their father's naturalization, while they were under twenty-one years of age, they must furnish a proper certified copy of the order of the court admitting their fathers to full citizenship, and evidence of their minority at that time.

17. *Applicants will not be required to swear that they have seen or examined the land, before making application to enter, and the usual nonmineral and nonsaline affidavits will not be required with applications to enter made prior to October 1, 1912, but evidence of the nonmineral and nonsaline character of the lands entered before that date must be furnished by the entrymen before their final proofs are accepted.*

18. *Proceedings on contests and rejected applications.*—When the Register and Receiver of the land office at which these lands will become subject to entry for any reason reject the application of any person claiming the right to make entry, under any number assigned him, they will at once advise him of the rejection, and of his right of appeal, and further action thereon shall be controlled by the following rules, and not otherwise.

a. Applications either to file soldier's declaratory statement or to make homestead entry of these lands must, on presentation in accordance with these regulations, be at once accepted or rejected, but the local land officers may, in their discretion, permit amendment of defective applications during the day only on which they are presented. If properly amended on the same day, entry may be permitted after the numbers for the day have been exhausted, in their numerical order.

b. No appeal to the General Land Office will be allowed or considered unless taken within one day (Sundays excepted) after the rejection of the application.

c. After the rejection of an application, whether an appeal be taken or not, the land will continue to be subject to entry as before, excepting that any subsequent applicant for the same land must be informed of the prior rejected application and that his application, if allowed, will be subject to the disposition of the prior application, upon appeal if any be taken from the rejection thereof, which fact must be noted upon the receipt issued him and upon the application allowed.

d. When an appeal is taken the papers will be immediately forwarded to the General Land Office, where they will at once be carefully examined and forwarded to the Secretary of the Interior with appropriate recommendation, when the matter will be promptly decided and closed.

*e.* Applications filed prior to October 1, 1912, to contest entries allowed for these lands will also be immediately forwarded to the General Land Office, where they will be at once carefully examined and forwarded to the Secretary of the Interior, with proper recommendations, when the matter will be promptly decided.

*f.* These regulations will supersede, during the period between April 1, 1912, and October 1, 1912, any Rule of Practice or other regulation governing the disposition of applications with which they may be in conflict, in so far as they relate to the lands affected by these regulations, and will apply to all appeals taken from actions of local officers during that period affecting any of these lands.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved, June 29, 1911.

WALTER L. FISHER,  
*Secretary.*

#### ACT OPENING PINE RIDGE LANDS.

An Act To authorize the sale and disposition of the surplus and unallotted lands in Bennett County, in the Pine Ridge Indian Reservation, in the State of South Dakota, and making appropriation to carry the same into effect.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Pine Ridge Indian Reservation, in the State of South Dakota, lying and being in Bennett County and described as follows: Beginning at a point on the eastern boundary line of the Pine Ridge Indian Reservation, in South Dakota, where the same intersects the boundary line between the States of South Dakota and Nebraska; thence north along said eastern boundary line to the township line separating townships thirty-nine and forty; thence west along said township line to the fifth guide meridian; thence south along said fifth guide meridian to the boundary line between the said States of South Dakota and Nebraska; thence east along said state line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: *Provided,* That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation: *And provided further,* That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon, for the benefit of said Indians: *And provided further,* That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority of any religious organization, heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any town-site hereinafter provided

for) as have heretofore been set apart to such organization for mission or school purposes.

SEC. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided*, That prior to said proclamation the allotments within the portion of the said Pine Ridge Reservation to be disposed of as described herein shall have been completed: *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish wars or Philippine insurrection, as defined and described in sections twenty-three [hundred] and four and twenty-three hundred and five of the revised statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

SEC. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe, in accordance with section twenty-three hundred and eighty-one of the Revised Statutes of the United States; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town-site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town-sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in aiding the construction of schoolhouses or other public buildings or in improvements within the town-sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town-sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other public buildings or improvements, shall be credited to the Indians as hereinafter provided.

SEC. 4. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by the appraisal as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior, or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted

lands embraced within that portion of the reservation described in section one of this Act. In making such classification and appraisal said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: *Provided*, That timber lands shall be classified without regard to acreage: *And provided further*, That all lands classified as timber lands shall be reserved for the use of the Pine Ridge Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and appraisal of said lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisal to be completed within six months from the date of organization of said commission.

Sec. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior, and after the completion of the classification and appraisal of all of said land the same shall be subject to the approval of the Secretary of the Interior.

Sec. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal annual installments, to be paid in two, three, four, five, and six years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the land shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: *Provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land, the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

Sec. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of the said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

Sec. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools, and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said

sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen and thirty-six, or both, or any part thereof, within the townships in which the loss occurs, except in any townships where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

SEC. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this Act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisal, classification, and allotment provided for herein: *Provided*, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

SEC. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

SEC. 11. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this Act shall be construed to deprive the said Indians of the Pine Ridge Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, May 27, 1910 (36 Stat., 440).

#### ACT OPENING ROSEBUD LANDS.

An Act To authorize the sale and disposition of a portion of the surplus and unallotted lands in Mellette and Washabaugh counties in the Rosebud Indian Reservation in the State of South Dakota, and making appropriation and provision to carry the same into effect.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Mellette and Washa-

baugh, south of the White River, and being described and bounded as follows: Beginning at a point on the third guide meridian west where the township line between townships thirty-nine and forty intersects the same, thence north along said guide meridian to the middle of the channel of White River, thence west along the middle of the main channel of White River to the point of intersection with the line dividing the Rosebud and the Pine Ridge Indian Reservation, thence south along the boundary line between said reservations to the township line separating townships thirty-nine and forty, thence east along said township line to the place of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: *Provided*, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same, and select allotments in lieu thereof on the diminished reservation: *And provided further*, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school or religious institutions are maintained thereon for the benefit of said Indians: *And provided further*, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other authority, of any religious organization heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any town-site hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

Sec. 2. That the lands shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed in such proclamation: *Provided*, That prior to said proclamation the allotments within the portion of said Rosebud reservation to be disposed of as prescribed herein shall have been completed: *Provided further*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish wars or Philippine insurrection as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes as amended by the Act of March first, nineteen hundred and one, shall not be abridged.

Sec. 3. That before any of the land is disposed of, as hereinafter provided, and before the State of South Dakota shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks, and disposed of under such regulations as he may prescribe; and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any town-site, and patents shall be issued for the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town-sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct, and he shall cause not more than twenty per centum of the net proceeds arising from such sales to

be set apart and expended under his direction in the construction of schoolhouses or other public buildings or in improvements within the town-sites in which such lots are located. The net proceeds derived from the sale of such lots and lands within the town-sites as aforesaid, less the amount set aside to aid in the construction of schoolhouses or other public buildings or improvements, shall be credited to the Indians, as hereinafter provided.

SEC. 4. That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by appraisement, as herein provided. The President shall appoint a commission to consist of three persons to classify, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior, or otherwise disposed of, and excepting sections sixteen and thirty-six or other lands which may be selected in lieu thereof by the State of South Dakota, in each of said townships, said commission to be constituted as follows: One resident citizen of the State of South Dakota, one representative of the Interior Department, and one person holding tribal relations with said tribe of Indians. That within twenty days after their appointment the said commissioners shall meet and organize by the election of one of their number as chairman. The said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining unallotted lands embraced within that portion of the reservation described in section one of this Act. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, but the mineral and timber lands shall not be appraised: *Provided*, That timber lands may be classified without regard to acreage: *And provided further*, That all lands classified as timber lands shall be reserved for the use of the Rosebud Indians. That said commissioners shall be paid a salary of not to exceed ten dollars per day each while actually employed in the inspection, classification and appraisement of such lands, and necessary expenses exclusive of subsistence to be approved by the Secretary of the Interior, such inspection, classification and appraisement to be completed within six months from the date of organization of said commission.

SEC. 5. That said commission shall be governed by regulations prescribed by the Secretary of the Interior; and after the completion of the classification and appraisement of all of said lands the same shall be subject to the approval of the Secretary of the Interior.

SEC. 6. That the price of said lands disposed of under the homestead laws shall be paid in accordance with rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry and the balance in five equal annual installments, to be paid in two, three, four, five, and six years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be again subject to entry under the provisions of the homestead law at the appraised price thereof: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the appraised price, receiving credit for payments previously made. In addition to the price to be paid for the land the entryman shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of land is one dollar and

twenty-five cents per acre, and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence and shall have made all the required payments aforesaid he shall be entitled to a patent for the lands entered: *And provided further*, That all lands remaining undisposed of at the expiration of four years from the opening of said lands to entry may, in the discretion of the Secretary of the Interior, be reappraised in the manner provided for in this Act.

SEC. 7. That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums to which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of the said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization.

SEC. 8. That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections, or parts thereof, are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That in any event not more than two sections shall be granted to the State in any one township, and lands must be selected in lieu of sections sixteen or thirty-six, or both, or any part thereof, within the township in which the loss occurs, except in any township where there may not be two sections of unallotted lands, in which event whatever is required to make two sections may be selected in any adjoining township.

SEC. 9. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of not more than one hundred and twenty-five thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of South Dakota, as provided in section eight of this Act. And there is hereby appropriated the further sum of thirty-five thousand dollars, or so much thereof as may be necessary, for the purpose of making the appraisal and classification provided for herein: *Provided*, That the latter appropriation, or any further appropriation hereafter made for the purpose of carrying out the provisions of this act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe.

SEC. 10. That the lands allotted, those retained or reserved, and the surplus land sold, set aside for town-site purposes, granted to the State of South Dakota, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country.

SEC. 11. That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United



States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this Act shall be construed to deprive the said Indians of the Rosebud Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act.

Approved, May 30, 1910 (36 Stat., 448).

## INSTRUCTIONS.

### INDIAN ALLOTMENTS—SALES OF INTERESTS OF MINOR ALLOTTEES AND HEIRS.

The act of June 25, 1910, taken in connection with the act of May 29, 1908, includes within its operation the States of Minnesota and South Dakota, and excepts therefrom only the State of Oklahoma; and, as to the States first named, said act supersedes or operates as a repeal by implication of the act of May 27, 1902, as to the sales of the interests of minor allottees and heirs.

### SALES OF INTERESTS OF MINOR ALLOTTEES AND HEIRS.

The provisions of sections 1 and 2 of the act of June 25, 1910, are applicable to lands allotted to Indians in the States of Minnesota and South Dakota, and sales of the interests of minor allottees and heirs in said States are to be made in accordance with such provisions and the regulations issued thereunder.

*First Assistant Secretary Adams to the Commissioner of Indian Affairs, July 7, 1911.*

You submit for opinion a question as to the present practice under the rules and regulations of October 12, 1910, governing the sale of the interests of minor Indian allottees or heirs to lands in Minnesota and South Dakota.

The question involved primarily is as to whether the provisions of the act of May 27, 1902 (32 Stat., 245, 275), in respect to such sale, are repealed or modified by the act of June 25, 1910 (36 Stat., 855, 856).

Authority for the sale of allotted and inherited Indian lands, outside of special acts and except lands belonging to the Five Civilized Tribes, is found in the following acts of Congress:

Act of May 27, 1902 (32 Stat., 245, 275), which provides in section 7 thereof:

That the adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction

upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: *Provided*, That the sale herein provided for shall not apply to the homestead during the life of the father, mother or the minority of any child or children.

Act of May 8, 1906 (34 Stat., 182), amendatory of section 6 of the general allotment act of February 8, 1887 (24 Stat., 388):

That hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final.

Act of March 1, 1907 (34 Stat., 1015, 1018):

That any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land so sold, the same as if fee-simple patent had been issued to the allottee.

Act of May 29, 1908 (35 Stat., 444), which provides in section 1 thereof:

That the lands, or any part thereof, allotted to any Indian, or any inherited interest therein, which can be sold under existing law by authority of the Secretary of the Interior, except the lands in Oklahoma, and the States of Minnesota and South Dakota may be sold on the petition of the allottee, or his heirs, on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe; and the lands of a minor, or of a person deemed incompetent by the Secretary of the Interior to petition for himself, may be sold in the same manner, on the petition of the natural guardian in the case of infants, and in the case of Indians deemed incompetent as aforesaid, and of orphans without a natural guardian, on petition of a person designated for the purpose by the Secretary of the Interior. That when any Indian who has heretofore received or who may hereafter receive, an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, 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 said lands; but if he finds them incapable of managing their own affairs, the land may be sold as hereinbefore provided: *Provided*, That the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under

the supervision of the Commissioner of Indian Affairs: *And provided further*, That upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold: *And provided further*, That nothing in section one herein contained shall apply to the States of Minnesota and South Dakota.

Act of June 25, 1910 (36 Stat., 855, 856), which provides in section 1 thereof:

That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. 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; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold: *Provided*, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe.

The acts of May 27, 1902, and March 1, 1907, as quoted, are of general operation, there being no exception of any State or Territory. The act of 1907 provides for approval of conveyances by the Secretary of the Interior the same as provided in the act of 1902. The provisions of the act of May 8, 1906, do not extend to Indians in the Indian Territory; otherwise, the act is of general operation, which is limited, however, as to inherited lands to allotments thereafter made. The act also provides for a different method of conveyance—that is, by the issuance of patents to purchasers—from that contained in the act of 1902.

The first part of section 1 of the act of May 29, 1908, providing for the sale of allotments or any inherited interest therein, is inoperative in Oklahoma, Minnesota, and South Dakota. The second part of the section having reference only to inherited lands, and which is practically the same as the provisions of the act of May 8, 1906, except that it refers to allotments made either before or after the act of May 29, 1908, is operative in Oklahoma, but not in Minnesota and South Dakota. (Joseph Black Bear, 38 L. D., 422.)

Sections 1 and 2 of the act of June 25, 1910, are made inapplicable to Oklahoma; otherwise, they are general in character and operation.

The practice heretofore has been, where later acts for the sale of allotted and inherited Indian lands except certain States from their operation, to make such sale under the existing law in which no such

exceptions are made. The act of May 27, 1902, provides that "in the case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior." The act of May 8, 1906, makes no express mention of minor allottees or heirs, but does provide for the sale *as provided by law* of inherited lands and payment of the proceeds to the heirs or their *legal representatives*.

The act of May 29, 1908, after providing for the sale of such lands, or any inherited interest therein as may be sold under existing law, further provides that "the lands of a minor or of a person deemed incompetent by the Secretary of the Interior to petition for himself may be sold in the same manner [that is to say in the manner thereinbefore provided which is on petition and 'on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe'] on the petition of the natural guardian in case of infants and in the case of Indians deemed incompetent as aforesaid, and of orphans without a natural guardian, on petition of a person designated for the purpose by the Secretary of the Interior." This act provides for a different method in the sale of miners' interests from that provided for in the act of May 27, 1902, and also provides for the issuance of fee simple patents to purchasers the same as provided in the act of 1906. But, as hereinbefore stated, the provisions of this act are not applicable to Indian lands in Oklahoma, Minnesota, and South Dakota.

The act of June 25, 1910, like that of May 8, 1906, makes no direct mention of minor allottees or heirs, but provides that "all sales of lands allotted to Indians authorized by this or any other act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe." In formulating the rules and regulations of October 12, 1910, under the act of June 25, 1910, the foregoing provision was held to include the power to prescribe the method of selling and conveying the interests of minor allottees or heirs, as well as to designate the person to make such conveyance. It was accordingly provided in said rules that the petition for sale shall be signed "by the natural guardian of any minor heir who has such a guardian, and by the disbursing officer in charge of the supervising agency or school on behalf of any orphan minor heir;" and they also provided:

In case there are any minor heirs interested in the land, the superintendent shall designate some competent disinterested person as guardian *ad litem* to act for such minors and represent them at the hearing, and such guardian *ad litem* shall have right to cross-examine witnesses and introduce them on behalf of his ward.

In all such cases the report of the superintendent submitting the case for departmental action shall include a statement showing the appointment of such guardian *ad litem*, and whether or not such guardian was present at the hearing.

It is further stated in said rules:

Inherited lands in Oklahoma can be sold only under the act of May 27, 1902 (32 Stat., 245, 275), which provides that the interests of minor heirs shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, and the amended rules approved, by the Acting Secretary of the Interior September 10, 1907, to govern such sales, are continued in force.

It was thus held in the regulations that as to inherited lands in Oklahoma, the sale of minors' interests therein is controlled by the provisions of the act of May 27, 1902, because the act of June 25, 1910, expressly excepts Oklahoma from the operation of sections 1 and 2 of the act. For the same reason the regulations also provide that the sale and conveyance of the lands of incompetent Indians in Oklahoma can only be made under the act of March 1, 1907, which provides for approval of instruments of conveyance by the Secretary of the Interior and not the issuance of patents to purchasers. In other words, as to Oklahoma sections 1 and 2 of the act of June 25, 1910, are just as if said act had never been passed, leaving the provisions of the act of May 27, 1902, in full force and operation in said State. The act of May 29, 1908, excepting as it did the States of Oklahoma, Minnesota, and South Dakota, was also as to those States as if the act had not been passed, leaving in operation therein the act of May 27, 1902. But the act of June 25, 1910, in sections 1 and 2 thereof excepts only the State of Oklahoma, and the language of the act is broad enough to cover the interests of adult and minor allottees, as well as adult and minor heirs in all other States including Minnesota and South Dakota, the language being: "All sales of lands allotted to Indians authorized by this or any other act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe." It must accordingly be held that Congress intended by the act of June 25, 1910, taken in connection with the act of May 29, 1908, to include within the operation of said act of June 25, 1910, the States of Minnesota and South Dakota, excepting therefrom only the State of Oklahoma. As to the States first named, therefore the act of June 25, 1910, supersedes or operates as a repeal by implication of the act of May 27, 1902. See in this connection case of *Bond v. United States* (181 Fed. Rep., 613).

You are advised that the provisions of sections 1 and 2 of the act of June 25, 1910, are applicable to lands allotted to Indians in the States of Minnesota and South Dakota, and that the sales of the interests of minor allottees and heirs are to be made in accordance with such provisions and the regulations thereunder of October 12, 1910.

**ENLARGED HOMESTEAD—ACTS OF FEBRUARY 19, 1909, AND  
JUNE 17, 1910.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., July 12, 1911.*

REGISTERS AND RECEIVERS,  
*United States Land Offices, Colorado, Idaho, Montana,  
Nevada, Oregon, Utah, Washington, Wyoming, Arizona  
and New Mexico.*

GENTLEMEN: The instructions of December 14, 1909 (38 L. D., 361), under the act of February 19, 1909, (35 Stat., 639), providing for an enlarged homestead in the States and Territories above named, except Idaho, and those of July 18, 1910 (39 L. D., 96), under the act of June 17, 1910 (36 Stat., 531), providing for an enlarged homestead in Idaho, are hereby amended by striking out the last clause of the first paragraph of section 7, reading as follows:

nor can an entryman who enters under the general homestead law lands designated as falling within the provisions of this act afterwards enter any lands under this act.

The effect of this amendment is to permit one who has entered, under section 2289, U. S. R. S., lands designated as subject to entry under the enlarged homestead laws, to make an additional entry subsequently, under section 3 of said laws, in the absence of other objection.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved July 12, 1911:

SAMUEL ADAMS, *Acting Secretary.*

**HAGERMAN VALLEY AND WESTERN RY. CO. \***

*Decided July 12, 1911.*

RIGHT OF WAY—ARTICLES OF INCORPORATION—TERMINI OF ROAD.

The mere filing by a railroad company of its articles of incorporation, which do not show the termini of the road, does not entitle it to recognition as a beneficiary under the act of March 3, 1875, in the absence of an application for a specific right of way.

ADAMS, *First Assistant Secretary:*

This case is before the Department on the recommendation of the Commissioner of the General Land Office that the articles of incor-

\* See 40 L. D., 187.

poration and proofs of organization of the Hagerman Valley and Western Railway Company be approved and said company recognized as a grantee under the act of March 3, 1875 (18 Stat., 482), granting to railroads the right of way through the public lands of the United States.

The act of March 3, 1875, *supra*, provides in section one—

That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road.

Section four of the act provides—

That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after a survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

It has been held both by this Department and the courts that under this law a right of way may be secured by a qualified railroad company in either of two ways: first, by the actual construction of the road, thereby definitely locating the road; or, second, by procuring a title in advance by filing in the Interior Department a profile of the road, to be approved by the Secretary of the Interior. *Dakota Central R. R. Co. v. Downey* (8 L. D., 115); *Jamestown and Northern Railroad v. Jones* (177 U. S., 125).

The articles of incorporation of the applicant-company, certified copy of which has been filed in the Department, have been examined and they fail to show the points to and from which the railroad is to be constructed, it being merely stated that the length of the road is to be seventeen miles. Moreover, while the company is organized for the purpose of constructing and building railroads this is but one of the many and varied purposes for which the company was organized.

Section twenty of the Civil Code of the State of Idaho for the year 1901, issued in the year 1901, provided that the articles of incorporation of any railroad, wagon road, or telegraph organization must state the places from and to which it is intended to be run, and all the intermediate branches. However, this law was amended by the act of March 14, 1907 (Session laws of that year, page 472), by providing that articles of incorporation of railroads, telephone and

telegraph corporations need not specify the points between which the works are to be built nor the intermediate branches thereof, and by section two of the said act of March 14, 1907, all acts and parts of acts in conflict therewith were thereby repealed.

Assuming, for the time being, the validity of the act of March 14, 1907, it would seem that a railroad corporation may be organized in the State of Idaho so as to conform with the laws thereof without specifying the terminals of the road or, indeed, without locating the road in any manner whatever. However, in this connection it is deemed proper to refer to section five of Article XI of the constitutional provisions affecting corporations, which provides that any association or corporation organized for the purpose, shall have the right to construct and operate a railroad "between any designated points within this State." If any meaning at all is to be attached to the word "designated" as used in the constitution, it follows that the points are intended to be designated in the articles of incorporation; otherwise, the same meaning would have been conveyed by providing that a road might be constructed between any points in the State omitting entirely the use of the term "designated."

As above stated, while this Department and the courts have recognized the right of a railroad company to acquire a right of way over the public lands by constructing its road and without first filing a profile of the road in the Department of the Interior, there appears to be nothing in the decisions to that effect authorizing a railroad company to acquire a right of way unless the points to and from which the road is to be constructed are described in the articles of incorporation. If a company organized, as is the present applicant, for general purposes, as well as for railroad purposes, and which does not show in any manner whatever the projected railroad, can acquire any rights whatever by filing a copy of its articles of incorporation, there seems to be no reason either in logic or law for requiring the company to file any articles of incorporation, because no information is furnished the Department beyond the mere fact that there is a company of the given name organized to construct and operate a railroad in a given State.

While it may be that the act passed by the legislature of the State on March 14, 1907, relieving railroad corporations of specifying in their articles of incorporation the terminals of their roads, is valid, and it is not believed to be the province of this Department to determine whether or not a law passed by a State is contrary to the constitution of that State; at the same time it is clearly the duty of this Department to determine whether or not a railroad company seeking the benefits of an act of Congress in relation to the public lands has complied with the requirements of that act.



Having under consideration the question of the right of a railroad company to acquire a right of way under the act of 1875, the Supreme Court of the United States has said that the language of the first section of the act of 1875 plainly means that no corporation can acquire a right of way upon any line not described in its charter or in its articles of incorporation, and that it necessarily follows that no initiatory step can be taken to secure such right of way by survey upon the ground or otherwise. *Washington and Idaho R. R. Co. v. Coeur d'Alene Railway and Navigation Co.* (160 U. S., 77, 99).

The Department, therefore, must decline to recognize the applicant company as a beneficiary under the act of 1875 in the absence of an application for a specific right of way, filed in accordance with the law and the regulations issued thereunder.

### HAGERMAN VALLEY AND WESTERN RY. CO.

*Decided July 15, 1911.*

#### RIGHT OF WAY—ARTICLES OF INCORPORATION—TERMINI OF ROAD.

Milner and North Side Railroad Company, 36 L. D., 488, overruled.

ADAMS, *First Assistant Secretary*:

By its decision of July 12, 1911, in the case of the Hagerman Valley and Western Railway Company, Limited [40 L. D., 184], the Department held that a railroad company whose articles of incorporation do not show the points from and to which the railroad is to be constructed is not entitled to recognition as a beneficiary under the act of March 3, 1875 (18 Stat., 432), in advance of an application for a specific right of way.

My attention has since been informally invited to a decision rendered by the Department June 6, 1908, in the case of Milner and North Side Railroad Company (36 L. D., 488), in which a contrary opinion was expressed. Through inadvertence no reference was made to that case in the Department's decision of July 12, 1911, and to relieve any misapprehension as to the views of the Department it may be stated that upon careful consideration the Department believes that the decision in the Hagerman Valley and Western Railway Company is correct, and the rule laid down in the case of Milner and North Side Railroad Company will be no longer followed.

**HERBERT W. SAVAGE.***Decided July 14, 1911.***SOLDIERS' ADDITIONAL—PRIOR EXERCISE OF RIGHT—RELINQUISHMENT.**

The fact that one who has made a soldiers' additional entry was erroneously required to reside upon and cultivate the land, in accordance with the practice of the land department at that time, exacting residence and cultivation upon soldiers' additional entries in instances where the original entry had been abandoned, will not, upon voluntary relinquishment of such additional entry, entitle him or his successors in interest to again exercise the right, unless it be clearly shown that he was prejudiced by the erroneous requirement under the former additional entry.

Price Fruit, 36 L. D., 486, distinguished.

*ADAMS, First Assistant Secretary:*

Appeal is filed by Herbert W. Savage from decision of January 7, 1911, of the Commissioner of the General Land Office, holding for rejection said Savage's application filed September 22, 1909, under sections 2306 and 2307, Revised Statutes, as assignee of Alanson W. Brist, administrator of the estate of Stephen L. Brist, deceased, to enter the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 32, T. 14 S., R. 10 E., H. M., Montgomery, Alabama, land district, containing 82.50 acres, based upon said decedent's alleged military service for more than ninety days during the war of the rebellion and honorable discharge therefrom, and upon his original homestead entry made August 8, 1865, at La Crosse, Wisconsin, for the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 6, T. 15 N., R. 1 W., containing 79.16 acres, and canceled January 24, 1873, for failure to make proof within the statutory period.

This application was held for rejection because of additional homestead entry made by said decedent on February 14, 1877, at La Crosse, Wisconsin, under said section 2306, Revised Statutes, of the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 10, T. 20 N., R. 3 W., containing 80 acres, relinquished as hereinafter shown, which was held by the Commissioner to have exhausted said decedent's homestead rights except as to .84 of an acre.

This additional entry by the decedent appears to have been made of lands which were within the ten-mile limits of a certain railroad under a grant made by the act of May 5, 1864 (13 Stat., 66), to the State of Wisconsin to aid in the construction of railroads, of every alternate odd-numbered section for ten sections in width on each side of the railroad when located; the map of definite location of the railroad involved in this case being filed June 9, 1865. Said granting act provided also that the lands within said limits reserved to the United States should be sold as double minimum lands.

This additional entry by said Stephen L. Brist was also made "for settlement and cultivation," or subject to residence and cultivation as in original homestead entries, as was required, without authority of

law, by the practice of the land department at that time in cases where the original homestead entry had been abandoned.

Said Stephen L. Brist died in April, 1882, and on June 26, 1882, his widow Julia A. Brist executed the following instrument:

For value received, I, Julia A. Brist, widow of Stephen L. Brist, deceased, of Jackson County, Wisconsin, do hereby remise, release, quit-claim and relinquish unto the Government of the United States, all the right, title, interest, claim or demand which I have as widow of said Stephen L. Brist, deceased, in and to the E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , Sec. 10, Town. 20, Range 3 W., which was homesteaded on February 14th, 1877, by said Stephen L. Brist, also all my interest and claim in and to the homestead receipt granted to said Stephen L. Brist for said land.

Attached to said instrument executed by the widow was a similar instrument executed July 4, 1882, by said decedent's heirs named therein as follows:

We, Alanson Brist, Fillmore M. Brist, Stephen L. Brist, Halbert E. Brist and Rosetta Wilson (nee Brist), children and heirs of Stephen L. Brist, deceased, (we being all his children), who took out homestead of E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 10, T. 20, R. 3 W., about February 14, 1882, do hereby relinquish, and quit-claim unto the Government of the United States, all our right, title, claim and interest that we have in and to said above described land and to the receipt granted unto said Stephen L. Brist, as heirs of said Stephen L. Brist, deceased.

Each of above instruments was witnessed and duly acknowledged by the respective parties as a relinquishment.

Said additional entry by Stephen L. Brist, was canceled April 14, 1883, on such relinquishments; and on the same date one Samuel McGee, living in Black River Falls, Wisconsin, made homestead entry for the same lands.

On May 6, 1906, said Alanson W. Brist, also a resident of Black River Falls, and one of the heirs joining in said relinquishment of the soldiers' additional entry in 1882, was on his petition appointed by the County Court of Jackson County, Wisconsin, administrator of the estate of said Stephen L. Brist, deceased; and on May 8, 1906, he as such administrator assigned to Edwin W. Spalding all right possessed by said decedent under said section 2306, Revised Statutes, at the time of his death; said administrator alleging in his deed of assignment both entries made by said decedent and cancellation of the additional entry, and that said decedent had never exercised, or had the benefit of, or sold or assigned his additional right under said section 2306. Spalding has assigned to Savage, the present claimant.

That the decedent in this case was a soldier possessing an additional homestead right, under said section 2306, to 80.84 acres of land is not questioned and may be assumed.

From the foregoing facts in this case as to the additional entry made by him under such right, it is not an unreasonable assumption that said additional entry was relinquished by his widow and

heirs for a consideration, and that it was, therefore, a satisfaction, *pro tanto*, of said right. While that entry was made subject to conditions not authorized by law and was never, in fact, perfected by proof of performance of such conditions, in accordance with the practice then in force, the entry may have been in fact appropriated to the use and benefit of the entryman's estate, in which the soldiers' additional right vested on his death by a sale of said relinquishments by his widow and heirs.

The facts shown in this case differentiate it from the case of Price Fruit (36 L. D., 486), referred to in the appeal, wherein the Department held that an additional entry under said section 2306 which was made subject to the unauthorized conditions mentioned as to residence and cultivation and was canceled because of failure to reside upon the land does not exhaust or satisfy the soldiers' additional right as involved in such entry; while in this case Brist's additional entry was not canceled for failure to reside upon the land but upon the voluntary relinquishment of the entry. It was incumbent upon those seeking a further right of entry to show wherein the erroneous requirement prejudiced the right of Brist under his former additional homestead entry. This they have failed to do, and upon the record as made the decision appealed from must be and is accordingly affirmed.

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**THOMAS M. TRIPPE.**

*Decided July 17, 1911.*

**MINING CLAIM—NOTICE OF APPLICATION FOR PATENT—PUBLICATION—NEWSPAPER.**

Where two newspapers are published practically the same distance from a tract for which patent is sought under the mining laws, both having a general circulation in the vicinity of the land, the register is intrusted with a discretion to determine which of the two is calculated to afford the widest publicity, in that vicinity, of the notice of the application for patent, and to designate the one so determined to best subserve that purpose, regardless of the fact that the rates of the paper so designated, for publication of the notice, are less reasonable than those charged by the other newspaper.

*ADAMS, First Assistant Secretary:*

Thomas M. Trippe has appealed from the decisions of the Commissioner of the General Land Office of January 11, 1911, and March 7, 1911, affirming the action of the register in refusing to designate the Silverton Standard as a medium of publication of notice of the application for patent to the Avis lode, Survey No. 17807, Durango, Colorado, land district, and designating, instead thereof, for that purpose the Silverton Weekly Miner.

It appears that the Avis application was presented by said Trippe at the local office November 25, 1910, and was accompanied by an

agreement with the Silverton Standard, a newspaper published at the town of Silverton, eighteen miles above the land, for the publication of the notice in that paper, and a request that it be designated as the medium of publication. The applicant seems to have been promptly notified by the register that the Silverton Weekly Miner, a newspaper also published at Silverton, had been designated by him for the publication of the notice, and that an agreement with that paper must be submitted before notice of the application would issue. The applicant thereupon objected to this requirement, basing his objections on one of the provisions of section 2334, Revised Statutes, and the fact that the Silverton Standard was more reasonable in its rates for the publication of such notices than the paper designated by the register. The latter officer, by letter of December 3, 1910, again declined to designate the Standard, and insisted that an agreement with the Weekly Miner be submitted by the applicant.

On appeal from this action, the Commissioner, by the decisions here appealed from, found and held that the matter of the designation of newspapers for the publication of notices of mineral application was one resting in the sound discretion of registers, and that no abuse of that discretion had been shown in this case.

The appellant directs the attention of the Department to section 2334 of the Revised Statutes, wherein it is provided, among other things, that—

the expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey.

It is stated by applicant that the rates of the Standard for the publication of patent notices is 30 per cent. less than those charged by the Weekly Miner, designated by the register in this case, and that the Standard, as well as the Weekly Miner, is a newspaper of established reputation and general circulation in the Durango land district. It is urged that in view of the provisions of the statute above quoted and the situation above disclosed, the register exceeded his authority in designating the Weekly Miner for the publication of the Avis notice, rather than the Standard, with which the applicant had made his agreement.

Section 2325 of the Revised Statutes, under which notices of application for patent to mining claims are required to be published, reads, in part, as follows:

The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim,

In construing this provision, Secretary Noble, in the case of *Condon et al. v. Mammoth Mining Co.* (on review), 15 L. D., 330, said, at page 334:

I am of the opinion that this means that the register shall publish the notice of such application in a paper to be by him designated as being the newspaper published nearest to such claim, not by actual measurement in a direct line between newspaper offices in the same town or city, but in the nearest town or city in which a paper or papers of established character and general circulation is published. Unquestionably, under this statute, when several newspapers are published in the same town or city, the register may designate whichever in his judgment will best subserve the public interests and which will give the widest notice to the public that the entrymen are seeking title to a mine. From these views it follows, that in this matter the register has some discretion in the designation of the newspaper, as to its established character as a newspaper, its stability and general circulation and the like. But it is a legal discretion and in its exercise his act is certainly subject to review and control by your office and the Department, and where it is shown that he has abused such discretion, your office, as well as the Department, has the power to set aside his action in order to avoid injustice or unfair discrimination, or an ignoring of the provisions of the law and the rules and regulations of the Department.

In his instructions to the Commissioner with respect to said provisions, issued February 3, 1898 (26 L. D., 145), Secretary Bliss said, at page 147:

The performance of the register's duty, under the statute, requires the exercise by him of reasonable judgment and discretion, both in determining what is a newspaper and in determining which of several papers is the one published nearest to the claim. He should not act arbitrarily or indifferently in the matter, but should be guided by the purpose of the statute in requiring publication, which is the diffusion of information and notice respecting the application for patent in the vicinity of the claim and among those whose residence or presence in that locality bespeak their interest in the claim or their knowledge thereof.

This was followed by the quotation, with expressed approval, of that portion of *Condon et al. v. Mammoth Mining Co.*, which is above set forth.

In *Pike's Peak and Other Lodes* (34 L. D., 281) the Department said, at page 286:

The register, in the exercise of the judgment and discretion lodged in him, must determine in every instance what is a newspaper, that is, whether of established character and general circulation, where it is actually published, its circulation in the vicinity of the mining claim involved and as compared with the like circulation of other papers of equal standing in other respects, and which among all of them is published nearest the claim according to the distance necessary to be covered by each to reach the neighborhood of the latter—all within the intent and meaning of the statute and to promote to the utmost its object, "which is the diffusion of information and notice respecting the application for patent in the vicinity of the claim and among those whose residence or presence in that locality bespeak their interest in the claim or their knowledge thereof."

From the decisions and instructions above cited, it is clear that in a case like the one at bar, where it appears that two newspapers are published practically the same distance from the tract for which patent is sought under the mining laws, both being papers having a general circulation in the vicinity of the land, the register is intrusted with a discretion to determine which of the two is calculated to afford the widest publicity in that vicinity, of the notice, and to designate the one so determined to best subserve that purpose; and this must be true even though the rates of the paper so designated are less reasonable than those charged by the other paper.

There are no facts here presented from which it can be determined that the publication of the notice of the Avis application in the Silvertown Weekly Miner, the paper designated by the register, would not afford a wider publicity in the vicinity of the claim, of the notice, than would the publication thereof in the Silvertown Standard, which the applicant seeks to have designated. In the absence of such a showing, the Department is unable to find that in this case there has been any abuse of the discretion lodged in the register. No reason appears, therefore, to disturb the decision appealed from, and it is accordingly affirmed.

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### SAAVI STORAASLI.

*Decided July 18, 1911.*

#### ENLARGED HOMESTEAD—QUALIFICATION OF ENTRYMAN.

The right to make enlarged homestead entry under section 1 of the act of February 19, 1909, is confined to persons qualified to make entry under the homestead laws of the United States; and one who acquired title under the general homestead law to a technical quarter-section, even though containing slightly less than 160 acres, is not entitled to make entry under section 1 of the enlarged homestead act.

#### ADAMS, *First Assistant Secretary:*

Saavi Storaasli has appealed from the decision of the Commissioner of the General Land Office, dated February 23, 1911, holding for cancellation his homestead entry 012098, made May 12, 1910, under the enlarged homestead act, approved February 19, 1909 (35 Stat., 639), for lots 1 and 2, E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 18, T. 36 N., R. 56 E., C. M., Glasgow, Montana.

The adverse action taken was incident to an application filed by appellant August 1, 1910, to amend said entry so as to embrace the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , of said section, and rejected on the ground that the land applied for was vacant at the date (May 12, 1910) he made said homestead entry.

Action at same time was taken on said homestead entry and the same held for cancellation as erroneously allowed, it appearing that claimant, on May 18, 1896, made homestead entry No. 313, at Crookston, Minnesota, for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and lots 1 and 2, Sec. 4, T. 151 N., R. 40 W., containing 157.33 acres, on which final certificate No. 493 issued July 17, 1902; that by this entry he had exhausted his homestead right. He was given thirty days to show cause why his entry should not be canceled.

While disclaiming to know the law as to his rights under the enlarged homestead act, *supra*, appellant undertakes to show why his entry should not be canceled by referring to a letter of the Assistant Commissioner of the General Land Office, dated April 30, 1910, answering a letter of inquiry on that question. That letter reads as follows:

MR. F. A. LEONARD,

*Noonan, North Dakota.*

SIR: In response to your letter of March 31, 1910, I have to advise you that a person who has made a homestead entry for 157 acres, and acquired title to the same and has made no other entry, may, if otherwise qualified, make an entry under the act of February 19, 1909, for 320 acres. He could not make an entry for 3 acres and in addition thereto one for 320 acres.

Claimant states in an affidavit that before receiving the letter just quoted and before making the homestead entry 012098, May 12, 1910, he sought advice in the premises, and was given certain information, all of which appears in his affidavit, as follows:

That when the law of February 19th, 1909 (enlarged homestead act), became a law, I was informed by someone that I had a right to file upon another homestead under the provisions of the said law of February 19, 1909, because of the fact that I was still a qualified homesteader to the extent of 2.67 acres. That subsequent to the time of receiving the aforesaid information I made inquiry concerning the matter of two U. S. Commissioners, to wit, Albert R. Chapman of Plentywood, Montana, and Oluf Bergh, of Redstone, Montana. That I also made inquiry at the U. S. Land Office at Minot, North Dakota, from the register and receiver at the said Land Office at Minot, and they also informed me that I had no rights at all any more. That the said U. S. Commissioners at Plentywood and Redstone, Montana, informed me that I may have a right to only 160 acres if I had any rights at all.

Thereupon, on May 12, 1910, he made the entry which has been held for cancellation by the Commissioner. Later, on receiving the letter quoted above, he made application, August 1, 1910, to amend his entry so as to embrace 320 acres.

It thus appears that he was in doubt whether he was a qualified entryman under the enlarged homestead act; he sought advice and information in the matter and was informed and advised by the register and receiver at Minot that he was not, and that his rights had been exhausted; and by two United States Commissioners in



Montana that he "may have a right to only 160 acres if he had any rights at all." Clearly the effect of this information and advice to any prudent man would be that he had no right to enter—that he was not a qualified entryman. Nevertheless, on the face of such advice, he proceeded to make the entry. He moved to the land entered, July 3, 1910, and later, on August 1, 1910, applied to make the additional entry, for 160 acres.

He now complains that he has incurred an expense of some \$500 in establishing himself and family upon the tract entered.

It was of doubtful propriety for the Assistant Commissioner to give the information asked for (a hypothetical question) in the absence of application to enter, but, however this may be, it does not justify this Department, charged with the duty of disposing of the public lands in the manner provided by law, to dispose of them contrary to the express provisions of that law.

Moreover, the record fails to disclose any equities in favor of this entryman. In moving to the land entered and expending money on improvements, he did so in the face of advice that he was not a qualified entryman; and, it will be observed, that the money was expended in connection with an entry made independently of the advice from the Assistant Commissioner. Claimant, therefore cannot escape the responsibility for that loss.

The only question in this case is whether claimant was a qualified entryman at date, May 12, 1910, his entry was allowed; for the right of entry under the enlarged homestead act, *supra*, is confined by section 1 thereof to a person "who is a qualified entryman under the homestead laws of the United States."

The lands subject to entry in the nine states and territories named in the act are supposedly arid or semiarid and "nonirrigable," and must have been designated by the Secretary of the Interior as not, in his opinion, susceptible of irrigation at a reasonable cost from any known source of water supply. Applicants duly qualified are permitted to enter 320 acres or less of such lands, or by section 3 of said act, if one has an existing entry of the character described in the act, upon which final proof has not been made, he may make entry of contiguous lands, which, with lands already entered, shall not exceed 320 acres. It follows, that if appellant herein was a qualified entryman at date of the entry under consideration herein, he is by the very terms of the act entitled to an entry of 320 acres, all other conditions having been met.

But, he had, prior to his application as above observed, made the Crookston, Minnesota, entry for a technical quarter-section of land. He had a five-year residence, submitted final proof, certificate was given and patent duly issued thereafter, June 1, 1903. There is no

claim that he comes under any of the exceptions allowing the right to make second homestead entry.

Section 2306, Revised Statutes, allows what are usually denominated soldiers' additional homestead rights consisting of an acreage of land to make up a deficiency where the soldier, sailor or marine, had made entry for less than 160 acres. These rights are always measured by an exact deficiency in acres and are in no sense analogous to the general homestead right conferred by section 2289, Revised Statutes.

When claimant made the Minnesota entry for a technical quarter-section of land, and after five years' residence thereon obtained title thereto, he exhausted his homestead right. The fact that the land thus patented lacked a little more than two acres of making 160 acres, did not give him the status of a qualified homestead entryman or the right to enter under the enlarged homestead act an additional 320 acres of land.

The action appealed from is affirmed.

### LOUISA WALTERS.

*Decided July 18, 1911.*

INDIAN ALLOTMENT—ACTS OF MARCH 3, 1909, AND JUNE 25, 1910.

Applications for allotment on the public domain filed under the act of March 3, 1909, and not approved at the date of the act of June 25, 1910, repealing the act of 1909, must be rejected.

ADAMS, *First Assistant Secretary*:

Appeal has been filed on behalf of Louisa Walters, minor child of Charlotte K. Sherer, a White Earth Indian, from decision of the General Land Office dated November 12, 1910, rejecting her application, numbered 012779, filed June 8, 1910, for unsurveyed land described as the SE.  $\frac{1}{4}$  of Sec. 15, T. 34 N., R. 33 E., Glasgow, Montana, under the act of March 3, 1909 (35 Stat., 781, 782), which provided—

That the Secretary of the Interior be, and he hereby is, authorized, under the direction of the President, to allot any Indian on the public domain who has not heretofore received an allotment, in such areas as he may deem proper, not to exceed, however, eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian, such allotment to be made and patent therefor issued in accordance with the provisions of the act of February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, three hundred and eighty-eight).

The act of March 3, 1909, was repealed by section 17 of the act of June 25, 1910 (36 Stat., 855, 859), without a saving clause as to previously filed applications.

August 3, 1910, the Department approved a holding of the General Land Office that applications filed under the act of March 3, 1909, and not approved should be rejected. This holding was on the ground that such applications being still inchoate at the date of the act repealing the provisions of law under which they were made, and in the absence of a saving clause in the repealing act, authority no longer existed to allow such applications and applicants were in said holding required to stand on their rights, if any, under the general allotment act.

The action taken in this class of cases is in accordance with well-known canons of statutory construction:

The general rule is that when an act of the legislature is repealed without a saving clause, it is considered, except as to transactions passed and closed, as though it had never existed.—Rights depending on a statute and still inchoate, not perfected by final judgment or reduced to possession, are lost by repeal or expiration of the statute.—Powers derived wholly from a statute are extinguished by its repeal. All acts done under a statute whilst it was in force are good; and if a proceeding is in progress, *in fieri*, when the statute is repealed, and the powers it confers cease, it fails, for it cannot be pursued. [Lewis' Sutherland Statutory Construction, Vol. 1, Sections 282, 283, 285; and *Bond v. United States* (181 Fed. Rep., 613.)]

The decision of the General Land Office herein, rejecting the application of Louisa Walters, is hereby affirmed.

### HARRINGTON ET AL. v. CLARKE.

*Decided July 24, 1911.*

#### PRACTICE—JOINT APPEAL BY SEVERAL CONTESTANTS.

Where there are several independent contestants, without any community of interest, each asserting a separate, distinct, and individual right of contest against a different tract embraced in the same forest lieu selection, and all charging invalidity of the common base upon which the selection as to all the tracts rests, they are not entitled to unite in a joint appeal from rejection of their several applications to contest, but each should file a separate and distinct appeal.

#### CONTEST AGAINST FOREST LIEU SELECTION—PREFERENCE RIGHT.

There is no statutory right of contest against a forest lieu selection under the act of June 4, 1897, and no preference right of entry accrues upon cancellation of such a selection as result of a contest.

#### CONTEST AGAINST FOREST LIEU SELECTION—DISCRETION OF COMMISSIONER.

While the Commissioner of the General Land Office may, in his discretion, avail himself of the aid of a contestant to determine the validity or invalidity of a forest lieu selection, yet his refusal to accept such aid is not the denial of a legal right, and his exercise of discretion in such matter will not be controlled by the Department unless abuse thereof is clearly apparent.

ADAMS, *First Assistant Secretary*:

By letter of May 10, 1911, the Commissioner of the General Land Office transmitted to the Department the joint appeal of William A. Harrington, Milton E. Brilliard and George H. Watrous from the separate decisions of said office rejecting the respective applications of appellants to contest forest lieu selection of the SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  of Sec. 17, T. 6 N., R. 5 E., Vancouver, Washington, made by C. W. Clarke, under the act of June 4, 1897 (30 Stat., 36), in lieu of lands within the Pine Mountain and Zaca Lake forest reserves.

Harrington applied to contest said section 17 as to the SE.  $\frac{1}{4}$ ; Brilliard applied to contest as to the NW.  $\frac{1}{4}$ , and Watrous as to the SW.  $\frac{1}{4}$ . None of the contestants alleges any prior right to the land selected, but each seeks to secure a preference right of entry by securing the cancellation of a part of the selection respectively contested.

There is no community of interests between said contestants. Each is asserting an individual right of contest against a different tract of land. The same ground of contest is alleged in each case, to wit, the invalidity of the base common to said selections. While a decision in one case will necessarily control the decision in the others, the interest of each contestant is independent and distinct from the other, and, for that reason, the joint appeal might be properly dismissed.

But, independent of this, there is no statutory right of contest in such cases and no preference right of entry can be acquired upon the cancellation of the selection made under the act of June 4, 1897, as the result of contest.

Although the Commissioner may avail himself of the aid of a contestant in determining the validity or invalidity of a lieu land selection, his refusal to accept such aid is not the denial of a legal right, and his exercise of discretion in such matters will not be controlled by the Department unless it is clearly apparent that it has been abused.

The decision of the Commissioner is affirmed.

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## STOCK OIL COMPANY.

*Decided July 29, 1911.*

### MINING, CLAIM—PATENT PROCEEDINGS—VERIFICATION OF APPLICATION AND PROOFS.

Even if it be conceded that the act of June 29, 1906, amending section 558 of the Code of the District of Columbia, and declaring "that no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent, or in which he may be

in any way interested before any of the Departments aforesaid," is applicable outside of the District of Columbia, the mere fact that an application for patent to a mining claim, and the affidavit of posting of notice on the land, were verified before a notary public who was one of the attorneys for the claimant in prosecuting the patent proceedings, does not render them absolutely null and void, but voidable only, and, where there is no question as to the fact of notice, they are subject to amendment; and, when amended to conform to the requirements of the law and regulations, entry allowed upon the voidable affidavits may be permitted to stand.

**CONFLICTING DECISION OVERRULED.**

El Paso Brick Co., 37 L. D., 155, overruled, in so far as in conflict.

*ADAMS, First Assistant Secretary:*

This is an appeal by the Stock Oil Company from the decision of the Commissioner of the General Land Office, dated January 10, 1911, holding for rejection its application for patent to the Zeta oil placer mining claim, embracing the NE.  $\frac{1}{4}$ , Sec. 25, T. 40 N., R. 79 W., Douglas, Wyoming, land district, for the reason that the proof of posting upon the land and the application for patent were verified before a notary public who was one of the attorneys for the company in prosecuting its application proceedings, and that new affidavits, duly executed, could not be filed *nunc pro tunc* to cure such defects.

Numerous departmental decisions are cited by the Commissioner in support of his holding, and under such authority the decision rejecting the application is not unwarranted.

In the briefs accompanying the appeal it is contended that the affidavits mentioned were not null and void, but were at most voidable and can be amended and the defect cured *nunc pro tunc*.

In view of the contentions urged by counsel, the Department has been persuaded to enter upon a careful reexamination of the question, notwithstanding the course of the later decisions, with a view to ascertaining whether a more rigid interpretation of the letter of the statute has not been indulged than is warranted by a due regard for the purpose and spirit of the mining laws and the legislative intent expressed therein.

Section 2325 of the Revised Statutes requires that the application for patent for a mining claim shall be under oath, and that the evidence of posting of notice upon the claim shall be "an affidavit of at least two persons that such notice has been duly posted." Section 2335 of the Revised Statutes provides that all affidavits required under the mining laws may be verified before any officer authorized to administer oaths within the land district.

The basis for holding that the attorney for the applicant is disqualified from acting as a notary is found in the act of June 29, 1906 (34 Stat., 622), which is an act amendatory of section 558 of the Code of the District of Columbia, but which is contended to be

applicable in certain of its features to notaries outside of the District of Columbia. The act cited concludes as follows

That no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent, or in which he may be in any way interested before any of the Departments aforesaid.

The position contended for is that the provisions of the mining statute in regard to the verifications in question were mandatory and jurisdictional, and that where the preliminary affidavits were not verified in accordance therewith the defect was fatal and left the land department absolutely without power to entertain or proceed with the patent application.

It may be observed that the mining laws were enacted for the purpose of developing the mineral resources of the public domain. In the construction of statutes, among others, the following principle of interpretation has been laid down by the authorities:

Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by the failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it will still be sufficient, if that which is done accomplishes the substantial purpose of the statute. [Sutherland on Statutory Construction, section 447.]

In general, statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not indispensable to the validity of the proceedings themselves, unless a contrary intention can be clearly gathered from the statute construed in the light of other rules of interpretation. [Endlich on the Interpretation of Statutes, paragraph 437.]

The Supreme Court of Kansas in an early case, *Jones v. State* (1 Kans., 273, 279), said:

In other words, unless a fair construction of the statute shows that the legislature intended compliance with the provision in relation to the manner to be essential to the validity of the proceeding, it is to be regarded as directory merely.

A search among reported cases upon analogous questions has been made and many decisions are found in which the above principle of construction has been invoked and applied. In the case of *Cooper v. Reynolds* (10 Wall., 308, 319), where, in a collateral suit a judgment under which realty had been sold pursuant to constructive notice and attachment was attacked as "void," the Supreme Court said:

If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite

formalities; but the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

So also of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment.

But when the writ has been issued, the property seized, and that property been condemned and sold, we can not hold that the court had no jurisdiction for want of a sufficient publication of notice.

In the case of *Fitzpatrick v. Flannagan* (106 U. S., 648) the court held (syllabus):

Leave to amend the affidavit, by inserting a new ground for an attachment sued out in Mississippi, is not the subject of a valid exception, it not appearing that the defendant was thereby prejudiced.

In the case of *Tilton et al. v. Cofield et al.* (93 U. S., 163, 166), in reference to the judicial power of courts to permit amendments, the Supreme Court of the United States said:

Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually, to permit or refuse, rests in the discretion of the court; and the result in either case is not assignable for error. This subject was fully examined in *Tiernan's Executors v. Woodruff*, 5 McLean, 135. It is there shown, that both in the English and American courts, amendments have been allowed in well-considered cases, for the purpose of introducing into the suit a new and independent cause of action. This was going further than the court went in permitting the amendments made by the appellants. It has also been held, upon full consideration, that "courts have the power to amend their process and records, notwithstanding such amendment may affect existing rights." *Greene v. Cole*, 13 Ired. Law, 425.

Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. Cases of this kind, too numerous to be cited, may be found, in which amendments in the most important particulars were permitted to be made. We refer to some of these adjudications. *McKnight v. Strong*, 25 Arkansas, 212; *Talcott v. Rosenbury*, 8 Abb. Pr. N. S., 287; *Vanderheyden v. Gary*, 3 How. Pr., 367; *Tully v. Herrin*, 44 Miss., 627; *Wadsworth v. Cheeney*, 13 Iowa, 576; *Jackson v. Stanley*, 2 Ala., 326; *Winkle v. Stevens*, 9 Iowa, 264; *Wood v. Squires*, 28 Mo., 397; *Scott v. Macy*, 3 Ala., 250; *Johnson v. Huntington*, 13 Conn., 47.

In the Wisconsin case of *Sueterlee v. Sir* (25 Wis., 357) a judgment was attacked, upon appeal, because no evidence of constructive notice by publication and posting was included in the record when judgment was entered or when the appeal was taken, and it was there said:

It is further claimed, that the record does not contain any legal proof of the publication of the summons. Publication of the summons was in fact legally made, but, through inadvertence, the affidavits of publication and of posting of the summons and complaint were not filed at the time judgment was entered.

The court, upon motion, allowed this proof to be supplied after the appeal was taken, and that those affidavits might be filed as of the day the judgment was entered. We suppose it was entirely competent for the court to supply this omission. . . . The only question is, as to what effect the supplying this proof should have upon the appeal. We think the only effect would be to give the appellant the right to dismiss the appeal without costs. It certainly can furnish no ground for reversing the judgment. The record shows proper publication of the summons, and that the court had acquired jurisdiction.

In *Swearingen v. Howser* (14 Pac., 436) the Supreme Court of Kansas held that the district court erred in ordering the dissolution of an attachment where the attachment affidavit was verified before the plaintiff's attorney acting as notary, the Kansas code providing that the officer before whom depositions (affidavits) are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding, and where at the hearing on motion to dissolve, an amended affidavit, properly verified, was presented. The court held that the attachment affidavit originally filed was at most only voidable and was capable of being amended.

In the case of *Pierce v. Butters* (21 Kans., 124, 129) it was said:

The affidavit of publication and the publication together were sufficient in this case to bring the defendants into court. Such affidavit and publication were at most only voidable; and as the affidavit for publication and the affidavit in proof of publication were both amended and made sufficient before either of the affidavits or the publication was set aside or voided, neither of them will now be set aside or voided. That is, the first affidavit was defective, but not void. The publication of the notice taken by itself was regular and valid, but taken in connection with the affidavit for publication, was irregular and voidable, but not void. The service, therefore, though defective, was sufficient until set aside by some direct proceeding instituted for that purpose. If the first affidavit or the publication of notice had been void, then the proceedings could not have been amended. For where defendants are not brought into court by the original proceedings, then no amendments can be made that will bring them into court, and the proceedings will remain void.

In the case of *Long v. Fife* (45 Kans., 271), an action against a nonresident prosecuted by attachment, the court held that the affidavit for publication might be amended, and, when so amended, related back to the commencement of the action.

In the case of *Harrison v. Beard* (30 Kans., 532) the court said that the affidavit for service by publication was defective and insufficient but not void, and that the plaintiff, even after judgment, was entitled, by leave of the court, to make the affidavit good by sufficient amendment.

In the case of *Burr v. Seymour* (43 Minn., 401) the court held that a defective affidavit of publication of summons might be cured by allowing the proper affidavit of publication to be filed *nunc pro tunc*, saying:

The jurisdiction of the court was acquired by the fact of service and not from the proof of it filed.



In the case of *Johnson v. Puritan M. & M. Co.* (47 Pac., 337, 340) the Supreme Court of Montana held that, under a statute requiring petitions (the initial pleadings) in civil actions to be verified, a judgment by default, in a case where the petition was entirely without verification, was good as against collateral attack, and that the want of such verification was not a jurisdictional flaw and did not render the judgment void.

In bankruptcy proceedings it was held, *In re Donnelly* (5 Fed., 783, 787, 789) :

Jurisdiction does not depend upon the manner or the method of verifying either the petition or proofs of debt.

\* \* \* \* \*

It follows, from this view, that any irregularity in verifying the petition, or the debts of the petitioning creditors, may be amended, *nunc pro tunc*, if any amendment is deemed necessary to make the proceedings regular.

Many other decisions from the courts might be cited wherein the principle of allowing amendment to voidable pleadings has been laid down, but the above are deemed amply sufficient for present purposes.

In this connection, then, it may be observed that in the procedure under the mining laws the "application for patent" bears a close analogy to the initial pleading—declaration, petition, complaint, or otherwise as it may be styled in the several jurisdictions—in a judicial proceeding. Again, the published and posted notice of the application is "process;" and the preliminary affidavit of the posting of the notice and plat upon a mining claim, and proof of the publication and of continuous posting of the notice, correspond in legal effect to the sheriff's or marshal's return where personal service has been had, or to the preliminary affidavits and the proofs of publication, etc., where in appropriate cases substituted service has been resorted to. To refuse to give to the rules governing the elements of a court's jurisdiction the equivalent force and effect with respect to the foundations of the jurisdiction of the land department to entertain and proceed with an application for mineral patent, would be to require in the latter a greater degree of strictness than exists in judicial proceedings. This is deemed both unreasonable and unnecessary.

In his work on Mines, second edition, Mr. Lindley has this to say:

Sec. 680. As the land department is a special tribunal, charged with the administration of the public land laws, exercising not only executive but judicial powers, an application to obtain a patent addressed to that tribunal should recite all facts necessary to show jurisdiction in the Department to convey the particular tract applied for to the particular individual applying for it. . . . A petition or application thus framed presents a foundation for such corroborative evidence as is required by the rules. . . . The proceedings by which its jurisdiction is invoked should be conducted fairly on the line of proceedings *in rem* in courts of common law or equity jurisdiction. . . .

Sec. 713. The proceedings by which the patent for a mining claim is obtained are essentially *in rem*, and are binding upon all the world so far as any un-presented adverse claim is concerned.

They are judicial. The publication and posting of notice of the application for patent is a *process* which brings all adverse claimants into court—a summons to all persons whose interests may be affected by the issuance of a patent to the tract applied for, to appear and file their adverse claims.

An examination of the reported decisions of the Department in regard to entries other than under the mining law discloses the same spirit of liberality as is set forth in the above-cited decisions.

In the case of Fidelo C. Sharp (35 L. D., 179) it was held (syllabus) :

A homestead entry allowed upon an application executed outside the land district wherein the land is located is not for that reason void, but voidable merely.

See also *Cleaves v. Smith* (22 L. D., 486), involving a homestead application.

In the case of *Michael Leahy* (22 L. D., 114) it was held that the preliminary preemption affidavit should be executed within the district in which the land is situated, but where not so made an entry may be equitably confirmed even where such affidavit was not in fact amended. See, also, *Orvis v. Boren* (17 L. D., 90).

In the case of *Daniel C. Boomer* (18 L. D., 364) the same principle was applied to desert-land application papers executed outside of the county where the land was situated and outside the land district. In regard to a timber-culture entry in the case of *Brox v. Tobias* (17 L. D., 400), where the preliminary affidavit was executed outside the district and the State, the same was held to be not void but voidable, and amendment was permitted.

In the case of *Johnston v. Bane* (27 L. D., 156) it was held (syllabus) :

The failure of an applicant for the right of entry to sign his application is not a fatal defect, where the accompanying affidavits are properly executed; and the local office in such a case should suspend action on the application, and allow the applicant a reasonable time within which to cure the defect.

In the case of *Bright v. Elkhorn Mining Co.* (9 L. D., 503, 505), one which is substantially on all fours with the case at bar, Secretary Noble, among other things, in his decision of October 26, 1889, said :

It is claimed by counsel for the protestants in their brief, that the affidavit of A. F. Bright and J. L. Smith, as to the posting of such plat and notice filed in the local office in obedience to the requirement of section 2325 of the Revised Statutes, was void and without legal effect, because made before a notary public (one John H. Shober), who, it is alleged, was at the time of taking the same attorney for the company, and also interested pecuniarily in the claim. \* \* \*

Conceding that at the date of said affidavit Shober was interested pecuniarily in the claim in controversy, and was the general attorney for the Elkhorn

Mining Company in all matters relative to its interests in respect of said claim, can it be reasonably contended that these facts, presented at this late day, should avail the protestants to secure the cancellation of the entry in question? I think not. It seems to me that if said affidavit were technically defective for the reasons stated, admitting them to be founded on fact, the proper time to have taken advantage of such defect was when the affidavit was presented and filed for action thereon by the local officers, and before the entry was made. It is too late, in my judgment, to raise the question of such supposed defect, which, if indeed a defect at all, is purely technical in its nature, after the affidavit has been acted upon by the local office and the entry allowed. It should be borne in mind that it is *the fact of posting* the plat and notice on the claim, that forms in part the basis of the applicants' claim for patent. The affidavit is, more properly speaking, the means prescribed by which the *fact* of such posting is to be shown. The provision of the statute, in respect to such affidavit, is, that after the applicant for patent shall have posted the plat of his claim and notice of his application, as required, he "shall file an affidavit of at least two persons that such notice has been duly posted." It was evidently the intention of Congress, by this provision, to prescribe what should be offered by the applicant, and accepted by the Government, as *ex parte* proof of the act of posting, and also the manner in which such proof should be presented. In this case the directions of the statute in this respect were strictly followed. The affidavit filed, being in all respects, therefore, in due form, was accepted by the officers of the Government and the entry allowed without objection being made. \* \* \* There can be no question, in my judgment, even admitting the affidavit to have been originally defective in respect of the points named, that the entry attacked must be sustained. At most the defects charged could have rendered the affidavit voidable only, and not void absolutely, and it is too late, after the purposes of the affidavit have been fully accomplished, as in this case, to raise with avail the question of the defects claimed, conceding them to be such.

In the case at bar the application, as executed, and its accompanying affidavit of posting were received and acted upon by the local officers as sufficient, and responsive to the notice thereupon issued an adverse claim was filed, pursuant to which suit was seasonably instituted and prosecuted to judgment in favor of the applicant company. Mineral entry was allowed November 22, 1910. Since then the patent application and the affidavits which have been called in question have been superseded in the record by others so executed as to conform to the requirements of the law, as they have been interpreted, and with the regulations thereunder, and with these amendments the record is now complete and correct in that respect.

In view of the facts disclosed and the authorities cited, the Department is of opinion that the rejection of the application would result in an unnecessary hardship and delay and is not demanded by any interests either of the Government or any possible adverse parties.

The rule embodied in the foregoing authorities is not, however, to be considered as encouraging or condoning a lax observance of the specific provisions of the mining laws, and whenever substantial

defects of the character in question occur, apart from whatever advantage might seasonably be taken of them by those claiming adversely, the parties interested must assume the burden of their correction. The desired result will be materially aided if the local officers are careful to scrutinize each application for patent as it is presented and permit none to proceed further except it and the accompanying papers are found to be, or shall be made, regular.

The Department accordingly holds that, even if it be conceded that the statute quoted is applicable outside of the District of Columbia, there being no question as to the fact of notice, the verification of the application and affidavits is properly subject to amendment, and in this case that has been done. In so far, therefore, as the case of El Paso Brick Company (37 L. D., 155), and others to the same effect, are inconsistent with the views and conclusion above expressed and reached, they are hereby overruled and superseded.

In the absence of other objections, the Stock Oil Company's application for patent and the entry will be allowed to proceed in due course. The Commissioner's decision herein, to the contrary, is reversed.

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**OSCAR O. REEG.**

*Decided July 31, 1911.*

**HOMESTEAD ENTRY—VESTING OF RIGHT—FORFEITURE OF TITLE.**

The initial homestead entry is merely a declaration of intention to acquire title to the land by performing the conditions required by the homestead laws, and protects the entryman as against the intrusion of other settlers, but as against the government his right is only conditional and inchoate; and until proof that he has fulfilled the conditions required by the homestead laws, and is entitled to patent, has been submitted, and final certificate issued, no right vests in claimant as against the government; and prior to the vesting of such right the rule that a forfeiture of title should not be declared except upon clear, positive, and convincing proof, has no application.

**HOMESTEAD LAW CONTEMPLATES BONA FIDE AGRICULTURAL HOME.**

The object of the homestead laws is the donation of public lands to persons seeking to establish and maintain agricultural homes thereon, conditioned upon actual occupancy of the same as a home, and cultivation and improvement of the land; and mere occasional visits to the claim do not meet the requirements of the law.

*ADAMS, First Assistant Secretary:*

This is a motion for rehearing of the decision of the Department of April 26, 1911, affirming the decision of the General Land Office holding for cancellation the homestead entry of Oscar O. Reeg of the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 7, N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 18, T. 10 N., R. 15 E., Sacramento, California.

Reeg made entry June 9, 1902. He submitted final proof October 21, 1907, but final certificate was withheld upon a protest by the Forest Service, the entry, at the date of said proof, being included within the limits of a national forest. An officer of the Forest Service filed charges against said entry to the effect that the entryman had never resided upon the land and had failed to comply with the homestead law in other respects. Upon those charges a hearing was had.

The General Land Office found that claimant had not in good faith established and maintained a residence on the land. The decision complained of affirmed that finding, which was based solely upon the testimony taken at the hearing.

It is insisted by counsel for claimant that this was a proceeding to enforce forfeiture of the entry, and that the rule which requires strict and positive proof to secure a forfeiture was not observed in arriving at such conclusion.

But that rule has no application to the facts in this case for the reason that there was no final entry to forfeit. Not only had no final certificate been issued, but final proof had not even been considered by the local officers when the hearing was ordered. The initial entry was merely a declaration of intention to acquire title to the land by performing the conditions required by the homestead laws. By such entry a settler is protected against intrusion by other settlers, but as against the Government his right is only conditional and inchoate. *Whitney v. Taylor* (158 U. S., 85, 95); *Frisbie v. Whitney* (9 Wall., 187).

To acquire any right against the Government by such filing or entry, it is incumbent upon a claimant to establish by sufficient proof, to the satisfaction of the land department, which may prescribe the character of such proof and the manner of its submission, that he has fulfilled the conditions required by the homestead laws and is entitled to a patent for the land. Until such proof has been submitted and final certificate issued no right vests in claimant, and hence there is no room for the application of the rule that a forfeiture of title should not be declared, except upon clear, positive and convincing proof.

But, even if the testimony in this case be examined in the light of that rule, it will be found of such clear and convincing force as to establish, beyond doubt, that claimant did not maintain an actual residence upon the land at any time and that his actual home was in Placerville, distant thirty miles from the claim, from the time of his entry until the submission of final proof, where he was employed as a clerk or cashier in a bank.

The probative force and value of testimony is not derived alone from the answers of the witnesses but must be considered in the light of surrounding circumstances, the manner of its delivery, and the probable motive and interest of the witnesses.

The testimony of Max Mierson, president of the Mierson Banking Company, who was called as a witness by the Government to prove that Reeg was employed by said bank as clerk or cashier from a date prior to entry to the date of final proof and that he continuously performed such duties at the bank during that period, is so evasive as to induce the belief that he was attempting to avoid disclosure of facts which would tend to establish the charge. The same may be said of the testimony of claimant.

Mierson was served with the *subpoena duces tecum* to produce the books of the bank for the purpose of showing Reeg's account with the bank. The witness declined to produce them. After testifying that he did not know exactly how many months Reeg was employed at the bank and that he knew Reeg had leave of absence in 1902 but did not know whether he received his salary during such absence, he was allowed, after a persistent and searching cross-examination, to make an explanation which was not recorded with the testimony. He was then interrogated:

Q. In your explanation, Mr. Mierson, you state that Mr. Reeg was regularly employed by the bank and that his time was generally allowed to go on and salary not deducted during absence.

A. Invariably so.

Reeg, after much vacillation in his testimony as to the periods of his employment with the bank and the portion of time spent on the homestead, was asked:

Q. What I am trying to get at is what portion of the time you spent of the open months and whether your salary was deducted or whether it was allowed to go on.

A. They never deducted anything from my salary.

Q. Was it continuous?

A. They paid me every month.

It appears from the testimony that claimant was employed in the bank at Placerville from August, 1901, up to the date of final proof and was paid a regular salary each month during that period; that his employment in the bank was continuous during all the time covered by his final proof, except for occasional short absences. Mierson testified that he was regularly employed but had the privilege of going to his homestead any time he wanted.

Except on one occasion when he was ill at Santa Cruz, the periods of absence from his duties at the bank were spent in brief periodical visits to the homestead during the summer months, his actual home being with his aunt in Placerville part of the time and, after 1906, in a house belonging to the Mierson banking company, which he occupied with his wife. There is no satisfactory proof to the contrary.

Silvestro Bandero, who worked for Reeg on the land from August 16, 1906, to the last of October, testified that Reeg was there during

that period twice staying four or five days the first time and two or three days the second time. Witness was on the land again in 1907 from June 6 to October 8. He states that during that period Reeg went upon the claim with his wife and baby some time in June; that claimant's wife remained on the land with her baby for about two months when she left in August some time on account of the baby's illness; that Reeg during that time would go back and forth staying on the claim a few days at a time.

With that exception, the testimony fails to show any such occupancy of the land by claimant personally prior to marriage or by his family, after marriage, indicative of a purpose to make the land a home.

The object of the homestead laws is the donation of public lands to persons seeking to establish and maintain agricultural homes thereon, conditioned upon actual occupancy of the same as a home, by cultivation and improvement of the land. In *Bohall v. Dilla* (114 U. S., 47, 51), the court said:

This implies a residence both continuous and personal . . . The settler may be excused for temporary absences caused by well-founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion, or by engagement in the military or naval service. Except in such and like cases, the requirement of a continuous residence on the part of the settler is imperative.

In this case there was not even a colorable compliance with the law by formal occupancy of the land for any extended period.

The motion is denied.

### MARTHA J. WESTFALL.

*Decided July 31, 1911.*

#### HOMESTEAD ENTRY—DISQUALIFICATION—OWNERSHIP OF LAND.

An absolute conveyance of property, although made to defraud creditors, is, as between the parties to the deed, a valid conveyance of the title, and not merely a conveyance in trust; and one vested with title under such conveyance, to more than 160 acres, is disqualified to make homestead entry.

#### ADAMS, *First Assistant Secretary:*

Martha J. Westfall has appealed to the Department from the decision of the Commissioner of the General Land Office of January 28, 1911, reversing the action of the local officers and holding for cancellation her homestead entry number 6897, Stockton series, (Serial Sacramento 0859), made January 14, 1899, for the SE.  $\frac{1}{4}$ , Sec. 32, T. 7 S., R. 18 E., M. D. M., Sacramento, California, land district. Final proof was submitted September 12, 1905, but certificate did not issue. Certain other proceedings in connection with said entry are

recited in the Commissioner's decision but need not have attention herein.

By the Commissioner's letter "P" of June 17, 1907, proceedings were directed against said entry, charging that claimant was disqualified to make said entry because at the date thereof she was the proprietor of more than 160 acres of land in the State of California.

The testimony upon such charge was taken before a designated officer in December, 1909, the Government being represented by a special agent and the claimant appearing in person with counsel and witnesses.

The question presented upon this appeal is as to whether or not the claimant, Martha J. Westfall, was, at the date of her entry, the proprietor of more than 160 acres of land in the State of California. The facts in this connection are as follows:

On April 27, 1894, claimant's son, Sampson W. Westfall, conveyed to her by deed certain lands in Mariposa County, California, aggregating more than 160 acres, consideration stated in said deed being \$1,300; the deed was duly recorded in the office of the County Recorder of that county.

The property was reconveyed by claimant to her son by deed of July 1, 1899, and was again conveyed by deed by her son to claimant, February 14, 1903, which last mentioned deed was, like the others, duly recorded; this was the condition of title at time of final proof.

These deeds from her son to claimant were made by him for the purpose of hindering, delaying, and defrauding his creditors; although it would appear from the record that he, subsequently, paid those creditors.

It further appears from the evidence that claimant, prior to and at the time of her entry, had knowledge of the execution and recording of the deed of April 27, 1894, and it will be noted that reconveyance of the property was not made by her until July 1, 1899, six months after date of entry.

It is contended by counsel for claimant that said deed of April 27, 1894, having been made "for the purpose of saving himself from his creditors until such time as he could pay his indebtedness," claimant "was simply the trustee of her son, Sampson W. Westfall," and, consequently, she was not the proprietor of the land. With this contention I cannot agree.

As between the parties to a transaction of this character, it is the universal rule of law that such transfer or conveyance of property is valid and binding as between them, their privies, assigns, and persons claiming under them. Courts will not grant affirmative relief to either of the parties to such a fraudulent transfer by impeaching or rescinding it, whether the relief is sought by way of defense or as a direct cause of action at the instance of one of the parties. An



absolute conveyance of property, although made to defraud creditors, conveys the legal and equitable title to the grantee against all of the world except defrauded creditors, and even entitles grantee to maintain action for the property against his grantor in possession. After such conveyance, the grantor has no interest which can be asserted either in law or in equity. And this rule has been applied to fraudulent transfers from parent to child, husband to wife, and, as in this case, from child to parent.

Of course, the creditors could, in a suit instituted for that purpose, have the deed set aside; or, on a proper judgment against the grantor, have execution against the property in the hands of the grantee, and, upon a purchase thereof at the execution sale, quiet title against the latter. This remedy of the creditors, however, is merely for the purpose of pushing aside the effect of the deed so that they may be let in to the extent of their claims, but whatever surplus there is belongs to the grantee; in any such suit the conveyance is set aside only as to the creditors, and does not operate to revest the title in the grantor.

Consequently, in the present case, as between the parties to the deed, it was a valid conveyance of the title and not a conveyance in trust as contended for by claimant's counsel. Therefore, at the time claimant made entry here, she was the owner of the whole title, legal and equitable, to the land conveyed to her by her son, and, thus, the proprietor of more than 160 acres of land in the State of California, and was not a qualified homestead entryman.

For the reasons above stated, the action of the Commissioner in holding the entry for cancellation is affirmed.

### INSTRUCTIONS.

#### SALE OF QUAPAW ALLOTMENTS—RESERVATION OF HOMESTEAD.

The special act of March 3, 1909, with respect to sales of lands by allottees of the Quapaw Agency, supersedes the general act of March 1, 1907, and therefore in sales under the act of 1909 the allottee must retain at least forty acres of his allotment as a homestead.

*First Assistant Secretary Pierce to the Commissioner of Indian Affairs, May 3, 1911.*

The Department has received your letter of April 4, 1911, relative to the question of the sale of Quapaw Indian homesteads under the act of March 3, 1909 (35 Stat., 751).

The act of March 1, 1907 (34 Stat., 1015, 1018), for the sale of allotments of non-competent Indians, provides:

That any non-competent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest,

on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; and any conveyance made thereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee simple patent had been issued to the allottee.

The act of March 3, 1909, *supra*, for the removal of restrictions from lands of the Indians of the Quapaw Agency, Oklahoma, provides:

That the Secretary of the Interior be, and he is hereby, authorized, upon application of any adult member of either of the tribes of Indians belonging to the Quapaw Indian Agency in the State of Oklahoma, to remove the restrictions on any part of or all of the lands allotted to such applicant, and permit a sale under such terms and conditions as he may deem for the best interests of the applicant, excepting a tract of not less than forty acres, which shall be designated and held as a homestead: *Provided*, That this section does not apply to the Modocs.

The question is presented as to whether upon the sale of lands by allottees of the Quapaw Agency, all of the allotment may be sold as provided in the act of March 1, 1907, or whether it is necessary to retain at least forty acres for a homestead, as provided in the act of March 3, 1909.

The language of the act of March 3, 1909, is entirely clear, showing that it was the intention to attach a condition to subsequent sales by allottees of the Quapaw Agency, so as to except from the land sold a tract to be designated and held as a homestead. The later special act of March 3, 1909, must, as to the Indians belonging to the Quapaw Agency, be regarded as superseding the general law of March 1, 1907. Therefore, in sales under the act of March 3, 1909, it is necessary for the allottee to retain at least forty acres as a homestead.

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### INSTRUCTIONS.

#### SALE OF LANDS BY HEIRS OF MOSES AGREEMENT ALLOTTEES.

Heirs of an allottee under the agreement of July 7, 1883, between the United States and Chief Moses and other Indians of the Columbia and Colville Indian reservations, ratified and confirmed by the act of July 4, 1884, may not under the general act of June 25, 1910, sell all the land embraced in the allotment, but must retain eighty acres as required by the special act of March 8, 1906.

*First Assistant Secretary Pierce to the Commissioner of Indian Affairs, May 23, 1911.*

You have requested opinion as to whether the heirs of a Moses Agreement allottee may sell all of the land embraced in his allotment.

The question involved arises upon the statement that the Wapato Irrigation Company, purchaser from the heirs of Lakayuse and Makai, Moses Agreement allottees Nos. 16 and 17, desires also to purchase the portions of the allotments retained from the sale by said heirs under the provisions of the act of March 8, 1906 (34 Stat., 55). The company executed a deed conveying a perpetual right to certain waters to irrigate the lands retained by the heirs, together with bond to guarantee the faithful performance of its contract. It is represented that the two tracts desired to be purchased are so located as to require the completion of the company's high-line ditch before delivering water for the irrigation of said tracts, as called for in the agreement to supply the same with water by June 1, 1911; that the company claims it will not be able to complete said ditch and get water on the land within the time specified, and, rather than ask for an extension of time, the company desires to purchase, and is willing to pay a liberal price for said tracts.

These allotments were made under an agreement of July 7, 1883, between the United States and Chief Moses and other Indians of the Columbia and Colville reservations, in Washington Territory, which provided, in part:

All other Indians now living on the Columbia Reservation shall be entitled to 640 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected.

This agreement was ratified and confirmed by the act of July 4, 1884 (23 Stat., 76, 79), with the proviso:

That in case said Indians so elect to remain on said Columbia Reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians.

In construing the foregoing agreement and act of Congress the courts have held that Indians to whom lands are allotted in severalty thereunder acquire a mere right of possession and use, the title remaining in the United States. *United States v. Moore* (161 Fed. Rep., 513). Neither the agreement in question nor the act ratifying it contains any provision for issuing patents to Moses Agreement allottees. But by the act of March 8, 1906, *supra*, the Secretary of the Interior is authorized and directed to issue trust patents to such Indians as have been allotted land under and by virtue of the Moses Agreement. The second section of the act reads as follows:

That any allottee to whom any trust patent shall be issued under the provisions of the foregoing section may sell and convey all the lands covered thereby, except eighty acres, under rules and regulations prescribed by the Secretary of the Interior. And the heirs of any deceased Indian to whom a patent shall be issued under said section may in like manner sell and convey all of such

inherited allotment except eighty acres, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser the same as if a final patent without restrictions upon alienation had been issued to the allottee.

Moses Agreement allotments are sold under this act and patents in fee issued to the purchasers under the act of May 29, 1908 (35 Stat., 444), the latter on the ground that only a change in the mode of conveyance being involved, authority exists for issuing such patents, especially in view of the language of the act which provides:

That the lands, or any part thereof, allotted to any Indian, or any inherited interest therein, which can be sold under *existing* law by authority of the Secretary of the Interior. . . . *And provided further*, That upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold.

The act of June 25, 1910 (36 Stat., 855), provides:

That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent and his decision thereon shall be final and conclusive. 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; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold.

The question presented by you is, whether the tracts retained by the heirs of these Moses Agreement allottees may be sold by them under the provisions of said act of June 25, 1910, notwithstanding the provisions of the act of March 8, 1906. The latter act is a special one, authorizing the sale and conveyance of all of an inherited Moses Agreement allotment, except eighty acres. The act of June 25, 1910, although general in its nature, is prevented from operating in this instance by the provisions of the special act of March 8, 1906. It is well settled in statutory construction that a special act is not repealed by one general in its terms and application, unless the intention to repeal or alter the special act is manifest, although the terms of the general act would, taken strictly, and but for such special act include the cases provided for by it. Repeals by implication are not favored and the language of the act of March 8, 1906, is clear and explicit.

The question was recently presented here by you as to whether upon the sale of lands by allottees of the Quapaw Agency, all of the allotment could be sold as provided in the general act of March 1, 1907 (34 Stat., 1015, 1018), known as the non-competent act, or whether it would be necessary for the allottees to retain at least forty

acres as a homestead, as provided in the special act of March 3, 1909 (35 Stat., 751), providing for the sale of any part or all of the lands allotted to Indians belonging to the Quapaw Agency, except a tract of not less than forty acres. It was held in that case that the language of the act of March 3, 1909, being clear, it must as to such Indians be regarded as superseding the general law of March 1, 1907, thereby making it necessary for them to retain at least forty acres.

It seems to be immaterial which law is first enacted. If the special act is later, its enactment operates necessarily to restrict the effect of the general act from which it differs. *Townsend v. Little* (109 U. S., 504).

You are accordingly advised that the heirs of a Moses Agreement allottee may not under the later general acts sell all the land embraced in the allotment, but must retain eighty acres as required by the special act of March 8, 1906.

## APPOINTMENTS OF MINERAL SURVEYORS.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, July 7, 1911.*

THE HONORABLE SECRETARY OF THE INTERIOR.

SIR: Complying with the suggestion in department letter of June 23, 1911, addressed to U. S. Surveyor-General, Reno, Nevada, copy furnished this office, I submit below proposed amendment to paragraph 4, page 4, Manual of Instructions for the Survey of Mineral Lands of the United States, approved by the department October 6, 1908.

Although neither the letter to the Surveyor-General, nor the decision, therein referred to, of the department, of same date, in the case of mineral surveyor Edward Nissen, 10-108782, treat directly of revocation of appointments, except for cause, and at the expiration of each four years from the date of appointment (the practice would make the four years commence with the acceptance of the bond by this office), the proposed amendment has been prepared so as to authorize removal at any time when a bond becomes subject to renewal under the statute, but not, however, when only new or additional surety is deemed necessary.

I recommend that the regulation in question be so amended that, when amended, it will read as follows:

4. The Surveyors-General have authority to suspend or revoke the appointments of mineral surveyors at any time, for cause, and to

suspend or revoke the appointments at such times as the bonds become subject to renewal under the act of March 2, 1895 (28 Stat., 808), for reasons appearing sufficient to sustain a refusal to appoint in the first instance. The surveyors, however, will be allowed the right of appeal from the action of the surveyor-general in the usual manner. The appeal must be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office. (20 L. D., 283).

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved July 29, 1911:

SAMUEL ADAMS,  
*Acting Secretary.*

## PREPARATION AND DISPOSITION OF PLATS OF SURVEY OF MINING CLAIMS.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, July 29, 1911.*

#### UNITED STATES SURVEYORS GENERAL:

The following instructions are issued in pursuance of a plan for preparation and disposition of plats of survey of mining claims, which was approved by the First Assistant Secretary of the Interior June 6, 1911.

The surveyor-general will prepare the original plat on form 4-675. ALL lines clear and sharp in black. All letters and figures clear and sharp in black.

The original plat, so prepared, will be signed and dated by the surveyor-general and forwarded to the General Land Office flat or in tube and unmounted.

The Commissioner will have three photolithographic copies made upon drawing paper, which copies, with the original plat, will be forwarded to the surveyor-general, the duplicate, triplicate, and quadruplicate to be signed by him, and the four plats to be filed and disposed of in the same manner as provided in paragraph 34 of the Mining Regulations, viz: one plat and the original field notes to be retained in the office of the surveyor-general; one copy of the plat to be given the claimant, for posting upon the claim; one plat and a copy of the field notes to be given the claimant, for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the sur-

veyor-general to the register of the proper land district, to be retained on his files for future reference.

A certain number of photolithographic copies will be furnished the surveyor-general for sale at a cost of 30 cents each, and a photolithographic copy printed on tracing paper will be furnished the surveyor-general, from which blue prints may be made, to be sold at cost.

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved July 29, 1911:

SAMUEL ADAMS,  
*Acting Secretary.*

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**CHARLES F. SAUNDERS.**

*Decided August 2, 1911.*

**UNITED STATES MINERAL SURVEYOR—INTEREST IN MINING CLAIM.**

It is inconsistent with the duties of a United States mineral surveyor to become the owner of capital stock in a company which is the record owner of an unpatented mining claim and to participate in the subdivision of the claim into town lots and act as agent for the company in negotiating the sale of such lots; and in such case he must either divest himself of all interest in and connection with the company or become liable to revocation of his appointment.

**ADAMS, *First Assistant Secretary:***

This is an appeal by Charles F. Saunders from the action of the Commissioner of the General Land Office, March 1, 1911, in revoking the appellant's appointment as a United States mineral surveyor for the district of Nevada.

The matter begins with the fact that the Fairview Land and Improvement Company, a Nevada corporation, is the record claimant of the Fairview and Fawcett placer claims (survey No. 2721), for which it filed its patent application May 10, 1907, and apparently carried it through the usual course of proceedings, except that entry does not appear to have been yet made. Some things in the record indicate that the claims are under investigation by the Commissioner.

It appears that the placers have to some extent (how far the record does not disclose) been surveyed out into town lots, for sale as such, and it is admitted by the appellant that he assisted in so surveying several of the lots, for which service he received a small amount of the capital stock of the company in payment; also that he was authorized to act as agent for the company in disposing of part of the lots, upon a commission as the basis of his compensation. Later, he and his friends bought in a controlling interest in the

stock of the company, after which he made but one contract of sale, which, subject to ultimate issuance of patent for the placers, was the method of disposition of the lots.

Upon consideration of the foregoing state of facts, the Commissioner, November 26, 1910, deeming the appellant's ownership of the capital stock to be an indirect violation of the prohibition contained in section 452 of the Revised Statutes, directed that the appellant be accorded sixty days' time within which to divest himself of all his interest in the company, both as a stockholder and as its selling agent, or to show cause why his appointment as mineral surveyor should not be revoked.

To this the appellant responded with the statement that he could not so dispose of his interest without a great financial loss, and asked that the requirement be modified accordingly, contending: (1) That his stock ownership does not make him the owner of the claims, and (2) that mineral surveyors are not within the contemplation of section 452 of the Revised Statutes.

Thereupon, by the decision first-above mentioned, the Commissioner took the action from which the pending appeal is taken.

In a word, then, this appellant, while holding an appointment as mineral surveyor, whose duties as such are at least quasi official in character, has become the owner of capital stock in a company which is the record claimant of two yet unpatented placers, has actively participated in their subdivision into town lots and has also acted as the company's agent in negotiating the sale (as far as a sale can be made under the circumstances) of some of the lots. It is obvious that in every such transaction, especially in his double capacity of stockholder and agent, he has placed himself under every obligation to the vendee to secure the latter a title in fee simple by procuring the issuance of patent from the Government; and this is a position which is inconsistent with his duties generally under his appointment, and with the spirit of the injunctions contained in the mining regulations, even though he did not himself make the official survey of these particular placer claims. Abstractly speaking, at least, the devotion of a claimed placer area to town site purposes is ordinarily inconsistent with the appropriation under the placer laws, and whereas such a disposition of contingent titles by one holding no other relation to the Government than as a placer claimant should receive no official sanction, such conduct on the part of one who holds a mineral surveyor's appointment should be discountenanced by the termination of the one or the other.

The Department does not regard the action of the Commissioner in this case as abusive of his judgment and discretion in the premises, but rather as in the line of good administration; and the action is accordingly affirmed.



## DALY ET AL. v. F. A. HYDE &amp; CO.

*Decided August 4, 1911.*

## CONTEST—FOREST LIEU SELECTION—GOVERNMENT PROCEEDINGS.

It is within the sound discretion of the Commissioner of the General Land Office to accept or reject an application to contest a forest lieu selection tendered after the initiation and during the pendency of government proceedings against the selection.

ADAMS, *First Assistant Secretary*:

Isabella Morgan Daly and Robert Pringle have filed their joint appeal from separate decisions of the General Land Office rejecting their respective applications to contest forest lieu selections, made by F. A. Hyde & Company for the NW.  $\frac{1}{4}$ , Sec. 6, T. 31 S., R. 10 W., and SE.  $\frac{1}{4}$ , Sec. 8, T. 31 S., R. 10 W., Roseburg, Oregon, in lieu of lands within a forest reserve.

Isabella Morgan Daly applied to contest the NW.  $\frac{1}{4}$  of said Sec. 8, T. 31 S., R. 10 W., and Robert Pringle applied to contest the SE.  $\frac{1}{4}$ , Sec. 8, T. 31 S., R. 10 W., both applications alleging the same general ground of contest, to wit, the invalidity of the title to the base.

The General Land Office rejected said applications for the reason that applicants alleged no prior right in themselves to the respective tracts and do not allege that the State of California is complaining of the alleged fraudulent manner by which title to the base land was obtained; but principally for the reason that the Government, prior to the filing of said contest affidavits, had initiated proceedings against said selection and no application to contest the same should be accepted as no individual right of contest is given by the statute in such cases.

Applicants assign error in said ruling.

It is only necessary to consider the last ground upon which the application was rejected as it is the decisive question presented by the appeal.

Applicants contend that the affidavits of contest should have been received and held to await the termination of the Government proceedings, citing in support of their contention the decision of the Department in the cases of *Farrell v. McDonnell* (13 L. D., 105) and *United States v. Scott Rhea* (8 L. D., 578), to the effect that where an application to contest an entry is offered pending proceedings by the Government, it should be received and held subject to the result of such proceedings, and, if said proceedings fail, the contestant is then entitled to proceed against said entry as of date when his application was filed.

That rule, which was designed to govern the conduct of local officers and not to restrict or control the discretion of the Commissioner

of the General Land Office, has not been uniformly applied. Whenever it has been applied in the manner stated in the case cited, and similar cases, the entry in question was of the character of entries specified in the act of May 14, 1880 (21 Stat., 140), and where the contestant was seeking to acquire the right accorded by said act, which provides that where any person has contested, paid the land office fees and procured the cancellation of any "preemption, homestead, or timber culture entry," he shall have for thirty days from notice of the cancellation of the entry a *preference right* to enter said land.

But even in applications to contest entries of that character tendered after the initiation of proceedings by the Government and while such proceedings were pending, the application was not always accepted but was rejected outright upon the ground that it is within the discretion of the Commissioner of the General Land Office to refuse to entertain a contest when the entry in question is under investigation by the Government, through its special agents, and such action of the Commissioner is not the denial of a statutory right. *Gage v. Lemieux* (8 L. D., 139; on review 9 L. D., 66); *Joseph A. Bullen* (8 L. D., 301); *George F. Stearns* (ib., 573); *Drury v. Shetterly* (9 L. D., 211); *Arthur B. Cornish* (ib., 569); *Iverson v. Robinson* (16 L. D., 58).

In *John N. Dickerson* (35 L. D., 67, 69), it was held that while the act of May 14, 1880, awards a preference right to a person who has contested and procured the cancellation of an entry, "it does not give an absolute right to contest an entry, nor take from or qualify the power and authority conferred by the organic act upon the land department to supervise and direct all proceedings relating to the disposal of the public lands, and to determine whether a contest should or should not be allowed."

In *Sanders v. Parkinson* (39 L. D., 102), the rule that allows an application to contest an entry filed pending Government proceedings against said entry to be received and held subject to the final determination of the Government proceeding, was recognized and it was further held that the Commissioner may, in his discretion, even suspend the Government proceeding and allow the individual contest to proceed.

It was upon the principle that the granting or refusing of an application to contest an entry after the institution of proceedings by the Government is a matter resting in the sound discretion of the Commissioner of the General Land Office. In the exercise of such discretion, he may accept or refuse the offer of any one to aid in the prosecution of proceedings against an entry that has been commenced by the Government. *John N. Dickerson*, *supra*; *Milroy v. Jones* (36 L. D., 438); *Newcomb v. Foster* (ib., 440).

That rule applies with greater force where no preference right of entry can be acquired under such contest and where, in consequence thereof, no legal right is denied by refusing to allow the application.

The decision of the General Land Office is affirmed.

### SCHULTE v. FORSTMAN.

*Decided August 5, 1911.*

#### HOMESTEAD CONTEST—SUFFICIENCY OF CHARGE.

The charge in an affidavit of contest against a homestead entry that the entry was illegal in its inception, that it is held for speculative purposes only and with a view to selling a relinquishment thereof and not with intent to make the land a home, is sufficient to warrant the ordering of a hearing.

#### ADAMS, *First Assistant Secretary*:

Lorenz Schulte appealed from decision of the Commissioner of the General Land Office of January 20, 1911, rejecting his contest against entry of Frank W. Forstman for S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 14, T. 137 N., R. 106 W., Dickinson, North Dakota.

April 23, 1910, Forstman made entry for this land, against which, August 1, 1910, Schulte filed contest affidavit:

That said Frank W. Forstman did not make said entry in good faith but for speculative purposes only. That he still holds said land for speculative purposes. That he holds said land for the mere purpose of selling his relinquishment thereto and is now attempting to do so and that he did not make said entry for the purpose of making a home upon said land.

No action was taken on this affidavit for the reason that it was lost or stolen from the local office. August 8, 1910, Forstman relinquished his entry and Louis Harth made entry for the land. August 26, 1910, Schulte investigating the matter ascertained the disappearance of his contest affidavit and was permitted to file a copy of the original made at the time, to be accepted in lieu of the original, which was lost. The local office rejected the contest and Schulte appealed. Pending the appeal, September 13, 1910, Louis Harth relinquished and John H. Harth made entry. The Commissioner affirmed the action of the local office, holding that the charge of speculative purpose in the entry is simply a conclusion and must be held insufficient in absence of a statement of facts that would lead to such conclusion. As to the allegation that Forstman was holding the land for purpose of selling his relinquishment, it was insufficient for a hearing.

In a similar case, *Sims v. Busse*, involving a timber culture entry (4 L. D., 369), the Department held that an allegation that an entry was illegal in its inception, setting forth facts showing wherein the illegality consists, does state a cause of action. While it is not suffi-

cient to allege alone that an entryman has repeatedly offered the land for sale, or is offering it for sale, such allegations alone do not set out a cause of action, but if there are other allegations showing that the entry was made for that purpose, and was illegal in its inception, a cause of action is stated. In the present case, the charge is distinctly made that Forstman did not make the entry in good faith, but for speculative purposes only, and did not make the entry for the purpose of making a home on said land. This is joined with the allegation that he holds it for speculation and for the mere purpose of selling his relinquishment. These are not mere conclusions, but the charge is made and the facts are stated to bear out the charge. It might be stated with more particularity, as he had offered to sell the land to certain particular persons. That, however, appears unnecessary, unless defendant moves for a more specific statement.

Looking at the history of this entry, Forstman held the entry less than four months and relinquished it in one week after Schulte's contest was filed. The person next entering at the same time that the relinquishment was filed held the land but five weeks and another entryman of the same surname made entry. These proceedings following in so close sequence are circumstances justifying a suspicion that the land is merely being covered from lawful appropriation. Schulte having filed a charge that the entry was illegal in its inception, and was held for speculative purposes only, and not with intent to make the land his home, was entitled to a hearing. The loss of his contest affidavit no way prejudiced his right to a hearing, as he proceeded promptly and supplied the lost affidavit to satisfaction of the local office.

The decision is reversed, but as the entry has been relinquished and another has intervened, the present entryman must be made party and notified.

#### PARAGRAPH 44 OF MINING REGULATIONS AMENDED.

##### REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., August 8, 1911.*

THE HONORABLE,

THE SECRETARY OF THE INTERIOR.

SIR: I hereby respectfully recommend that regulation number forty-four of Mining Regulations, approved March 29, 1909 (37 L. D., 728-786), be amended to read as follows:

44. Before approving for publication any notice of an application for mineral patent, local officers will be particular to see that it includes no land which is

embraced in a prior or pending application for patent or entry, or for any land embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that notice of a mineral application should not, for this or other reasons, be approved for publication, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

Very respectfully,

S. V. PROUDFIT,  
*Acting Commissioner.*

Approved, August 9, 1911:

SAMUEL ADAMS,  
*Acting Secretary.*

**ANNIE McADAM.**

*Decided August 8, 1911.*

**DESERT ENTRY—SUSPENSION OF TOWNSHIP—RECLAMATION PERIOD.**

Where a township is suspended from all forms of entry for the purpose of resurvey thereof, the time between the date of suspension and the filing in the local office of the new plat of survey should be excluded from the time accorded by statute for the reclamation of land under a desert land entry within the township, and the statutory period of the entry extended accordingly.

*ADAMS, First Assistant Secretary:*

Annie McAdam has appealed from decision of November 25, 1910, by the Commissioner of the General Land Office, denying her application for extension of time and requiring her to submit within sixty days from notice the three years' annual proof declared to be due upon her desert land entry, made November 6, 1907, for the SW.  $\frac{1}{4}$ , Sec. 6, T. 31 S., R. 43 W., Lamar, Colorado, land district.

June 15, 1909, the claimant made application for extension of time to make annual proof of expenditures for the following reasons:

That the land embraced in said entry lies in that part of Baca County which is now being resurveyed by the United States Government; that according to the lines and corners made in an adjoining township the improvements which claimant has already made would not be on the land claimant intended to enter; that affiant does not feel justified in making the necessary expenditure required for her annual proof until the resurvey, which is now being made, has been completed, and she is able to determine the location of the land embraced in her said entry.

It appears from the record that by the Commissioner's letter "E" of February 3, 1908, directions were given for suspension from all forms of entry certain townships in Colorado, including the one here in question, for the purpose of resurvey, said suspension to become effective when certain lists of entries had been furnished, and it

appears that same became effective June 18, 1908. The plat of resurvey was approved May 14, 1910, and filed in the local land office December 13, 1910.

The applicant in her informal appeal to the Department states that soon after making her filing for the land it was the prevailing opinion that the resurvey which had been ordered would change the boundary lines, hence she only enclosed the land with a fence and dug a well, feeling that she would not be justified in making further improvements at that time; that as it turned out the resurvey did take the fence and nearly all of the natural reservoir; that she had confidence that the Government, having withdrawn the land from entry, would not charge the time intervening between the time of said withdrawal and the filing of the resurvey and reopening of the land to entry. She further stated that she was engaged in changing the fence and had made other improvements and arrangements to have an artesian well on the land in case of the granting of extension of time to make proof to November 6, 1911, as requested.

The Commissioner held that the time for the submission of the three years' annual proof expired November 6, 1910, and he refused to grant extension of time for the reasons stated. He called attention to the fact that the plat of resurvey showed the same land called for by the old survey as to the lands described in this entry, no change being made in the boundaries.

It has been held that the statutory period within which final proof should be offered under a homestead entry does not run during the pendency of an order suspending the official survey of the land. See case of *Lambert v. Lambert* (21 L. D., 169).

It has also been held in numerous decisions that the period of time covered by departmental order suspending entries should be excluded from the time accorded by statute for the reclamation of land under a desert land entry, and that such a claimant is not required to proceed with the work of reclamation during that period. See cases cited on page 208 of *Digest of Land Decisions* (1902). The rule excluding such period is within the scope of administrative authority and not violative of the desert land law. *Magner v. Lawrence* (20 L. D., 548).

This claimant could not with reasonable assurance proceed with her improvements while the lines of her claim were involved in uncertainty. The fact that the Government found it necessary to resurvey this township in connection with others in that locality is sufficient evidence that the former lines were not sufficiently defined. Before the resurvey was ordered an entryman might have felt justified in proceeding according to the supposed lines of the old survey, but after the township plat was suspended for resurvey, ordinary caution would demand suspension of development of a tract until it became definitely defined by the resurvey.

According to the plan of this claimant she expects to sink an artesian well near the west and south lines of the claim, and it was not to be expected of her that she proceed to place such improvement on the land when the reestablished lines might show this particular portion of land to be outside the lines of the subdivision claimed by her and thus bring her in conflict with some other claimant. It appears from the record that the fundamental object of this "reestablishment and restoration survey" was to define the old survey upon the ground and to make a correct plat thereof, which was accomplished without changing the lot numbers or the areas in this part of the township. This is unlike a metes and bounds survey by which existing claims are surveyed out upon the ground irrespective of the old subdivisional lines. Had this claimant placed improvements upon land supposed to be within her claim bounded by the lines of the old survey, she might have found upon reestablishment of the lines by the new survey that she had misplaced the improvements outside the actual and proper lines because of the indefiniteness and uncertainty of such lines. It appears that this actually occurred as to the fence constructed by her.

Therefore the Department is of opinion that the period of time between the date of suspension of the official survey and the filing in the local office of the new plat, should be eliminated from consideration and the statutory period of the entry extended for that period, which will add about two and one-half years to the life of the entry. However, as more than one year has elapsed since the making of the entry exclusive of the period of the said suspension, the first annual proof is due. The claimant will be allowed sixty days from notice hereof within which to submit satisfactory first annual proof.

The decision appealed from is modified accordingly.

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### NATALBANY LUMBER CO. LTD.

*Decided August 16, 1911.*

#### SOLDIERS' ADDITIONAL—HONORABLE DISCHARGE—SECTION 2304, R. S.

An enlisted man who deserted from the service of the United States, but subsequently enlisted again and served for a term of ninety days or more and received an honorable discharge from such enlistment, is deemed to be honorably discharged within the meaning of section 2304 of the Revised Statutes.

*ADAMS, First Assistant Secretary:*

March 15, 1909, the Natalbany Lumber Company, Ltd., by its attorney, filed in the local office at New Orleans, Louisiana, an application to enter under sections 2306 and 2307, R. S., the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ ,

Sec. 5, T. 5 S., R. 4 E., St. H. M., containing 81.38 acres, based on the assignment of the right of Elizabeth Morton, administratrix of the estate of William Morton, deceased, who, it is alleged served in Co. "F", 7th Regiment, Kansas Cavalry, from March 23, 1864, to September 29, 1865, under the name of John William Morton, and who, it is further alleged, made homestead entry, No. 5835, on August 19, 1868, for the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 15, T. 39 N., R. 22 W., which was canceled on relinquishment February 7, 1870.

In the decision appealed from it is stated:

Under date of June 18, 1910, the Pension Office reported that John William Morton, who served in Co. F, 7th Kansas Cav., *supra*, was the same party who, under the name of William D. Morton, was enrolled July 5, 1861, in Co. A, 6th Missouri Vol. Cav., and deserted September 6, 1862. The War Department verified said service and reports said William D. Morton enlisted in Capt. Switzer's Company, Freemont's Battalion, Missouri Cav., on September 1, 1861, which afterwards became Co. A, 6th Missouri Cav.

The evidence upon which this conclusion is based is not at all satisfactory nor conclusive. However, it is not necessary to pass upon this question of fact here.

Section 2304, R. S., provides that every private soldier or officer who served in the Army of the United States during the rebellion for ninety days and who was honorably discharged, shall be entitled to make homestead entry and be credited with his term of service as residence thereon, and sections 2306 and 2307 provide for an additional entry in certain cases. It would appear from a fair construction of the section above referred to that the soldier herein was entitled to an additional entry by reason of his service in company "F", 7th Regiment, Kansas Cavalry, as he served in said company for over one year and his service therein was terminated by an honorable discharge.

It appears to have been the practice of the land office prior to the case of Clarke I. Wyman (38 L. D., 164), to allow entries based upon service similar to that in this case, and the decision of the Commissioner herein seems to have been the result of a misinterpretation of the decision in that case. The case at bar is essentially different from the Wyman case. In the Wyman case it appeared that the soldier was discharged for the purpose of reenlistment and deserted under the last contract of service. It was accordingly held that "his discharge on December 24, 1863, for the purpose of reenlistment was not an honorable discharge, separating him from the service, and therefore that he had never been honorably discharged within the meaning of the land laws." In the present case the soldier received an honorable discharge from his second enlistment which separated him from the service of the United States. It is believed that in cases similar to that under consideration, where a



person may have deserted from the service of the United States, but subsequently enlisted again and served for a term of ninety days or more and received an honorable discharge from such enlistment, such person should be deemed to be honorably discharged within the meaning of section 2304, R. S. It is accordingly held that the desertion of the soldier from his first enlistment, in view of the second enlistment, service, and honorable discharge therefrom, did not disqualify him from receiving the benefits of sections 2304-6-7, R. S.

The decision appealed from is accordingly reversed and the case remanded for further proceedings in accordance with the views herein expressed.

### WILLIAM CHARLES HARTMAN.

*Decided August 17, 1911.*

#### TIMBER AND STONE APPLICATION—APPRAISAL—CHARACTER OF LAND.

Where a tract of land has been appraised in accordance with the instructions of November 30, 1908, upon application of one desiring to make timber and stone entry thereof, and returned by the appraiser as not chiefly valuable for its timber, the applicant, upon submitting a *prima facie* showing, by affidavit, corroborated by at least two persons having actual knowledge of the character of the land, that it is chiefly valuable for the timber thereon, may be accorded a hearing to determine that question.

ADAMS, *First Assistant Secretary*:

July 8, 1909, William Charles Hartman filed timber and stone sworn statement for purchase of E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 34, and N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 35, T. 6 N., R. 82 W., 6th P. M., Denver, Colorado, land district, estimating the timber upon the land to be worth \$400, and placing no value at all upon the land exclusive of the timber.

Said tracts were appraised under the instructions of November 30, 1908 (37 L. D., 289). According to said appraisement the land exclusive of the timber has a value of \$2 per acre, each 40-acre subdivision thereof being appraised at \$80. The timber upon the tracts was appraised at \$40 each upon two subdivisions and \$25 and \$35 respectively upon the other two subdivisions, making a total appraisement of the land and the timber upon the entire claim of \$460. This the applicant paid and he was allowed to make entry accordingly.

December 5, 1910, the Commissioner of the General Land Office held the said entry for cancellation because, according to said appraisement, the tracts were not chiefly valuable for the timber thereon. A motion for review of said decision having been filed, the Commissioner on February 27, 1911, adhered to his former decision. The claimant found no fault with the aggregate value placed upon the

tracts and he therefore paid said amount and made entry as above stated. He however, disputes the characterization of the tracts as being of more value for agricultural purposes than for the timber thereon, requesting that a hearing be had to determine the true character of the land. The Commissioner held that if the claimant desired to dispute the findings of the appraiser he should apply for reappraisal in accordance with the provisions of paragraph 20 of the said instructions of November 30, 1908.

The Department is of the opinion that the provisions of paragraph 20 do not properly apply to this case. As above stated claimant found no fault with the aggregate valuation placed upon said tracts. The real question at issue is whether this land is subject to entry under the timber and stone law. The appraiser has characterized the land as not subject to entry at all under said act because it is not chiefly valuable for its timber. The claimant on the other hand insists that the land exclusive of the timber has no value at all. If a proper *prima facie* showing were made in support of claimant's contentions, a hearing should be ordered to determine the question at issue. The claimant has not supported his contention by any evidence other than his own affidavit. He will be allowed thirty days from notice hereof within which to file an affidavit corroborated by at least two witnesses having actual knowledge of the character of this land showing that same is chiefly valuable for the timber thereon. If such affidavit be filed within the time allowed, a hearing will be ordered to determine the question. If the above requirement be not complied with the entry will be canceled.

The decision appealed from is modified accordingly and the case is remanded for action as above directed.

### CONSTRUCTIVE RESIDENCE—CREDIT FOR FIRST SIX MONTHS AFTER ENTRY ABOLISHED.

#### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., August 18, 1911.*

*Registers and Receivers, United States Land Offices.*

GENTLEMEN: Below is quoted the instructions dated August 4, 1911, from the Acting Secretary of the Interior, in regard to constructive residence during the first six months of entries:

In the matter of proof submitted under the homestead law, it seems that a practice has existed according to entrymen, where residence is begun within six months following the date of the entry, credit for residence beginning with

the date of the entry. The result is that where a party takes up an actual residence just at the expiration of the six months following the making of his entry, he is accorded a constructive residence for the intervening six months and is thus permitted to secure title on proof of residence for a period of only four years and six months.

There is clearly no statutory authority recognizing the period of constructive residence referred to. On the contrary, the statute is specific in requiring five years' residence. By section 2291 of the Revised Statutes it is provided that:—

“No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law. That the proof of residence, occupation, or cultivation, the affidavit of nonalienation, and the oath of allegiance, required to be made by section twenty-two hundred and ninety-one of the Revised Statutes, may be made before the judge, or, in his absence, before the clerk of any court of record of the county and State, or district and territory, in which the lands are situated; and if said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said State or Territory; and the proof, affidavit, and oath, when so made, and duly subscribed, shall have the same force and effect as if made before the register or receiver of the proper land-district; and the same shall be transmitted by such judge, or the clerk of his court, to the register and the receiver, with the fee and charges allowed by law to him; and the register and the receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same. That if any witness making such proof, or the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proof, affidavits, or oaths, the said false swearing being willful and corrupt, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register.”

Thereunder a homestead claim could only be initiated by entry, and, as a consequence, it is provided that no patent shall issue until the expiration of five years from date of the entry, and therein it is also plainly required that the party seeking to secure patent shall prove residence for the term of five years.

By the third section of the act of May 14, 1880 (21 Stat., 141), it was provided:

“That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws.”

By this section for the first time the entryman's right was made to relate back to the time of his settlement, and while a party can now claim credit for a period of residence preceding the allowance of his entry, yet the five-year period of residence required by the homestead law is in nowise affected thereby.

The practice of according credit for constructive residence covering the period of six months following the allowance of the entry is, perhaps, due to an erroneous interpretation of section 2297 of the Revised Statutes, by which section it is provided that on proof to the satisfaction of the register and receiver that a person had actually changed his residence or abandoned the land covered by his homestead entry for more than six months at any one time, then, in that event, the land so entered shall revert to the Government. While said section may protect a homesteader from contest for abandonment for a period of six months following the allowance of his entry, it is clearly not authority for according the entryman credit for constructive residence during that period.

After most careful and mature consideration of this matter I feel it my duty to disregard the erroneous practice heretofore obtaining in your office and to direct that you exact of homestead entryman proof of residence for the full period of five years, as required by the statute, before the same can be approved as a basis for the issuance of patent thereon. Because of the long practice heretofore prevailing, I believe it right and proper to give ample time for notice of the contemplated change before putting the same into effect. I have, therefore, to advise you that in all instances where ordinary final proof is submitted under the homestead laws on or after the 1st day of December next, the law as above interpreted be followed.

You will cause all registers and receivers to be immediately advised hereof.

Very respectfully,

SAMUEL ADAMS, *Acting Secretary.*

You are directed to carefully examine the above instructions, and you will be strictly governed thereby.

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

## PREPARATION OF TRANSCRIPTS OF TESTIMONY.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, D. C., August 19, 1911.*

REGISTERS AND RECEIVERS,

*United States Land Offices.*

GENTLEMEN: To avoid the transmission here of incomplete records in contest cases, you will prepare, or cause to be prepared, the transcripts of testimony in litigated matters to show—

1. The names of the parties, date and place of hearing, and name of the officer taking the testimony.
2. The appearance made by either party, whether general or special, and, if represented by an attorney or agent, the post-office address of such representative.
3. The names of the various witnesses called and sworn, by whom called, and the name of the attorney or person conducting the examination both in chief and otherwise.

4. If any motions or objections are made they should be fully transcribed, giving the name of the party making the same; and the ruling thereon, if any, should be carefully noted.

5. When either party rests his case, such fact should be noted. Any adjournments in the taking of testimony should also be noted.

6. A complete index should accompany each record.

The contest clerk should be carefully instructed in order that records may show just what proceedings were had at the hearing.

Very respectfully,

FRED DENNETT, *Commissioner*.

Approved:

SAMUEL ADAMS, *Acting Secretary*.

### BERGMAN ET AL. v. CLARKE (ON REVIEW).

*Decided August 24, 1911.*

#### FOREST LIEU SELECTION—ADVERSE OCCUPANCY.

Mere adverse occupancy of land will defeat a forest lieu selection thereof, irrespective of whether the occupant is or is not complaining of such selection, or whether he is entitled to occupy, or whether such occupancy meets the requirements of law or not.

#### FOREST LIEU SELECTION—CONTEST—CHARGE.

An affidavit of contest against a forest lieu selection, charging that the selected land was occupied at the date of the selection, is not sufficient in the absence of a further charge that the occupancy was adverse to the selector.

#### CONTEST AGAINST FOREST LIEU SELECTION.

Although there is no statutory right of contest against a forest lieu selection, and no preference right of entry can be secured by the cancellation of the selection as result of a contest, nevertheless, where an affidavit of contest is presented containing every material averment as to the invalidity of the selection, the government may accept the aid of contestant to determine that question.

#### ADAMS, *First Assistant Secretary*:

This motion is filed by Charles J. Bergman and James Mowat for rehearing of the decision of the Department of April 7, 1911 (40 L. D., 3), affirming a decision of the General Land Office rejecting their separate applications to contest forest lieu selection, made by C. W. Clarke for unsurveyed lands under the act of June 4, 1897 (30 Stat., 36), described as the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 10, which Bergman applied to contest, and the N.  $\frac{1}{2}$  S.  $\frac{1}{2}$ , Sec. 34, all in T. 15 N., R. 6 W., Olympia, Washington, which Mowat sought to contest.

The ground of contest was the same in both cases, the charge being that the land selected was settled upon and improved at the date of selection and that the nonoccupancy affidavit filed with selector was

untrue. The Commissioner rejected the application for the reason that neither Bergman nor Mowat alleged any prior right to the land in themselves nor stated who were the alleged occupants thereof, citing as authority for its ruling the decision of the Department in *McAllister v. Clarke*, decided October 8, 1910, which held, among other grounds, that occupancy of land by one not holding adversely to the selectors will not bar selection under the act of June 4, 1897, and that an application to contest upon the ground of occupancy will not be entertained unless it is further charged that such occupancy is adverse to the selector.

It was contended, upon appeal, and is now contended in support of this motion that such ruling is in conflict with the settled rule of the Department, as announced in *Litchfield v. Anderson* (32 L. D., 298), that lands actually occupied are not subject to selection as lieu lands under the act of June 4, 1897, if such actual occupancy existed at the date of selection, and that the question as to whether such occupancy is such as to meet the requirements of the homestead or other laws, or whether the occupant is qualified to assert and maintain a claim under those laws will not be tried and determined upon an application to select the land under said act.

It was not intended in the decision cited nor in the decision complained of to modify the ruling of the Department that occupancy of land at the date of selection is sufficient *per se* to defeat a selection made under the act of June 4, 1897, whether the occupant is complaining of such selection or not, although there are expressions in said decision that might seem to indicate a modification of said ruling in respect to the character and effect of occupancy as a bar to selection under said act.

The expressions referred to are that the sole purpose of the requirements that the land selected shall not be occupied is for the protection of such legal rights as the occupant may have, who alone can avail himself of the fact of such occupancy and that, if the occupant makes no complaint and alleges no prior interest in himself, the existence of improvements is a matter of no concern to the United States.

Those expressions were used with reference to the sufficiency of the affidavits as to whether an issuable fact was presented which, if proved, would require the rejection of the application and whether the affidavit was sufficiently corroborated.

The Department disclaims any intention to hold that a valid selection can be made under the act of June 4, 1897, of lands occupied at the date of selection but, on the contrary, adheres to the uniform ruling of the Department that mere adverse occupancy of the land will defeat the selection, irrespective of whether the occupant is or is not complaining of such selection. It is true the existence of im-

provements upon the land is a matter of no concern to the United States unless the land is occupied, but they are *prima facie* evidence of occupancy and improvement taken into consideration in determining whether the land was actually occupied.

In *Mudgett v. Gosslyn* (32 L. D., 282), the charge was that the land was chiefly valuable for the timber and that the selector did not examine the land before selection. The application was rejected because the charge, if proven, would not authorize the rejection of the selection. It was also charged that the "scrip is illegal, fraudulent and void"; but that charge was based upon information and belief. In respect to said charge, it was held that "when no adverse right is alleged and the ground of contest is some defect or vice inherent in the entry or selection, the contestant, or corroborating witnesses, must state facts within their own knowledge, not mere information, rumor or belief," citing *Buckley v. Massey* (16 L. D., 391). It was with reference to such defective affidavits that it was said, "this requirement is necessary to protect the land department and persons dealing with it from unfairness, annoyance and delay to public business by meddlesome, mischievous, or malicious and irresponsible persons."

In *Gentry v. Pacific Livestock Company*, decided October 27, 1902, the land described was occupied at the time of the selection by the Pacific Livestock Company. Gentry was also occupying the land, but he went upon it as an employee of the company. The selection was made by F. A. Hyde for the company. It was held that Gentry's occupancy was occupancy by the company and was not adverse to any right of the selector. It was therefore held that such occupancy was not such as to bar selection under the act of June 4, 1897.

There is no conflict in the principle announced therein with the principle announced in *Litchfield v. Anderson*, *supra*, that mere occupancy of the land is sufficient to bar selection under the act of June 4, 1897, irrespective of whether the occupant was entitled to occupy or whether such occupancy meets the requirements of law or not. It must, however, be adverse to the selection, and failure to state in the affidavit that the tract was occupied at date of selection by some one adverse to the selector was sufficient ground for rejecting an affidavit to contest a selection made under said act, although affidavits may heretofore have been accepted without such allegation.

If any one is asserting an adverse claim in himself to land selected under the exchange provisions of the act of June 4, 1897, supported by sufficient *prima facie* showing, he is entitled to a hearing as a matter of right to establish his claim to the land and, although there is no statutory right of contest against a selection made under said act and no preference right of entry can be secured by the cancellation of a selection as the result of a contest, it does not follow that

the United States may not accept the aid of contestants in determining whether lands selected under said act are valid selections where affidavits of contest are presented containing every material averment as to the invalidity of such selection.

The case is remanded to the General Land Office with instructions to allow contestants to amend their affidavits by showing that the occupant was holding adversely to said selection, and to take such other action in the premises as may be right and proper under the views herein stated.

### GJERLUF HANSON.

*Decided August 28, 1911.*

RECLAMATION—ADDITIONAL HOMESTEAD UNDER SECTION 6, ACT OF MARCH 2, 1889.

The right of additional homestead entry granted by section 6 of the act of March 2, 1889, can not be exercised upon lands within a reclamation project.

*ADAMS, First Assistant Secretary:*

Gjerluf Hanson has appealed to the Department from the decisions of the Commissioner of the General Land Office of September 9, 1910, and January 17, 1911, holding for cancellation his homestead entry 06176, made May 6, 1910, for farm unit "A", or the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 21, T. 8 N., R. 6 E., B. H. M., 80 acres, Bellefourche, South Dakota, land district. Said land is within the Bellefourche irrigation project, and was entered subject to the provisions of the act of June 17, 1902 (32 Stat., 388).

Prior to the making of the above entry, Hanson had made homestead entry, December 3, 1895, for the N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 22, T. 8 N., R. 6 E., B. H. M., 80 acres, same land district, upon which he submitted final proof January 22, 1903. The entryman having acquired title under the homestead law for 80 acres, claimed an additional right to 80 acres under section 6 of the act of March 2, 1889 (25 Stat., 854).

The Commissioner held that inasmuch as the entryman had made former homestead entry, for which he acquired title, he was not qualified to make an entry under the Reclamation Act. His holding was based upon and was in accord with departmental Instructions of June 16, 1909 (38 L. D., 58).

After further consideration, the Department adheres to the conclusion reached in said last mentioned Instructions and holds that the act of March 2, 1889 (25 Stat., 854), has no application to entries under the Reclamation Act, and that the additional right granted in said act of March 2, 1889, can not be exercised by entry within a reclamation project.

The decision appealed from is affirmed and the entry will be canceled.



## JOSEPHINE C. WOOLSON.

*Decided August 30, 1911.*

## POWER-SITE RESERVE—SOLDIERS' ADDITIONAL APPLICATION.

An application to make soldiers' additional entry, pending at the date of an executive order, under the act of June 25, 1910, reserving lands for power-site purposes, is not a homestead entry within the meaning of the excepting clause of that act and therefore is not effective to except the land from the operation of the executive order.

ADAMS, *First Assistant Secretary*:

April 26, 1910, application was filed with the local officers by Josephine C. Woolson, to enter under sections 2306 and 2307, R. S., lot 6, Sec. 9, T. 27 N., R. 23 E., Waterville, Washington, land district, containing 17.65 acres, based on the unused portion of 40 acres of an assignment of 80 acres of the right of Henry H. Dudley, who, it is alleged, served as private in Company "B", 1st Regiment, Minnesota Cavalry Mounted Rangers, from October 29, 1862, to November 9, 1863, when he was mustered out as corporal, and who, it is further alleged, made homestead entry No. 827, on November 23, 1863, at St. Peter, Minnesota, for the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 52, T. 107 N., R. 30 W., containing 80 acres, which was canceled on relinquishment July 29, 1865.

From a decision of the Commissioner of the General Land Office, dated March 15, 1911, rejecting said application upon the ground that the land applied for was withdrawn from entry at the time the application was filed, this appeal was prosecuted to the Department.

It appears that the land embraced in this entry was on March 31, 1910, withdrawn as part of temporary power site withdrawal No. 135, and was included within power site reserve by Executive order of July 2, 1910, under the act of June 25, 1910 (36 Stat., 847).

It is contended in the appeal that the temporary withdrawal of March 31, 1910, was without authority of law and that the Executive order of July 2, 1910, could not ratify or confirm a void order. It is unnecessary in this case to pass upon the validity of the temporary withdrawal of March 31, 1910. At the time the land was included within the power-site reserve by the President, on July 2, 1910, under the act of June 25, 1910, *supra*, the only right which the claimant had initiated was an application to make a soldiers' additional entry, which had not been passed upon by the Commissioner, either as to the validity of the assignment or the sufficiency of the base.

The act of June 25, 1910, *supra*, provides:

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale or entry any of the public lands of the United States including the district of Alaska and reserve the same for water-power

sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: . . . *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made.

It has been held by the Department that while a soldiers' additional entry is generally classed as a homestead, it is not in fact a homestead entry but amounts to a scrip, or special consideration for private entry of land. Thomas A. Cummings (39 L. D., 93-94).

As the claimant in this case had only a pending soldiers' additional application to enter, and not an entry, it will be seen that he does not come within the exception specified in the above act.

The decision appealed from is accordingly affirmed.

#### INSTRUCTIONS.

##### RESIDENCE BY CONTESTANT PRIOR TO CANCELLATION OF CONTESTED ENTRY.

A successful contestant who prior to September 24, 1910, filed his contest and established residence upon the land embraced in the contested entry and has since maintained such residence, is entitled, in submitting final proof upon the entry made by him pursuant to the contest, to credit for the time he resided upon the land before cancellation of the contested entry, the practice prior to that date being to accord credit for such residence:

*Acting Secretary Adams to the Commissioner of the General Land Office, August 19, 1911.*

Under date of September 24, 1910 (39 L. D., 230), the Department considered the question submitted by your office letter of September 1, 1910, as to whether credit should be allowed a homestead entryman when making final proof, for residence maintained upon the tract entered prior to the date of his entry and while the land was embraced in the preexisting entry of another person. In your said letter it was stated that while the Department has never explicitly authorized credit for such residence, nevertheless, such practice had obtained in your office for a long time:

In disposing of this matter it was said by the Department:

The entire matter considered the Department is disposed to only lay down merely the general rule that credit for residence should not be allowed during the time that the land is not subject to entry by the person maintaining such residence, and with this announcement the Department prefers to adjudicate

the several cases that may subsequently arise upon the material facts of each particular case.

My attention has been further invited to this subject through a letter from Hon. Dick T. Morgan, who was formerly register of the United States land office at Woodward, Oklahoma. From representations contained in his letter and those subsequently made in person, it appears that many homestead entries were made in Oklahoma by persons having no intention of ever complying with the provisions of the homestead law. This, perhaps, was due to the fact of the settled condition of the country surrounding Oklahoma before its opening to entry and the consequent easy access to the local offices from such settled communities. It is apparent, therefore, that an intending settler coming within one of these districts would find much of the land unoccupied but he would also find that nearly all the desirable tracts were embraced in existing entries. It was necessary, therefore, that he institute contest proceedings in order to clear the record of the invalid homestead entry before his entry for the land could be allowed. The fraudulent entry was usually made in the interest of some one desiring to traffic in the land and such persons could, by means of the several appeals, postpone the final judgment in the case for years. The intending homesteader, being fully satisfied as to the final result of his contest, often settled upon the land, made extensive improvements, and at the time of the final cancellation of the fraudulent entry had been an actual resident upon the land for several years. As soon as the tract became available to him he made entry upon the land and his residence has since continued, and the question now presented is whether, under those circumstances, the residence maintained prior to the final judgment canceling the fraudulent entry, is available to the existing *bona fide* entryman in making final proof upon his entry.

As before stated, your office letter of September 1, 1910, represents that such residence had been accepted by your office for a long period of time, and Mr. Morgan advises the Department that, based upon such action on the part of your office, he, as local officer, advised many persons that such residence would be credited upon their entries when made.

In view of the practice formerly obtaining, both in your office and the local offices, respecting the matter of credit for residence established and maintained by a contestant after the bringing of his contest and before its successful termination, the Department is of opinion that it is but fair that residence so established and maintained should be respected and credited on the period required in consummation of his homestead entry; and in instances where such residence had been begun prior to September 24, 1910, when for the first time, apparently, the Department gave consideration to this question, such residence will be available to the entryman when making final proof upon his entry made in pursuance of his contest.

**TIMBER AND STONE REGULATIONS OF NOVEMBER 30, 1908,  
REVISED AUGUST 22, 1911.**

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., November 30, 1908.*

## REGISTERS AND RECEIVERS,

*United States Land Offices.*

SIRS: The regulations under the act of June 3, 1878 (20 Stat., 89), and amendatory acts, commonly known as the timber and stone law, are hereby revised, modified, and reissued as follows:

Any lands subject to sale under the foregoing acts, may, under the direction of the Commissioner of the General Land Office, upon application or otherwise, be appraised by smallest legal subdivisions, at their reasonable value, but at not less than \$2.50 per acre; and hereafter no sales shall be made under said acts except as provided in these regulations.

All unreserved, unappropriated, nonmineral, surveyed, public lands within the public-land States, which are valuable chiefly for the timber or stone thereon and unfit for cultivation at the date of sale, may be sold under this act at their appraised value, but in no case at less than \$2.50 per acre, in contiguous legal subdivisions upon which there is no existing mining claim, or the improvements of any bona fide settler claiming under the public-land laws. The terms used in this statement may be defined substantially as follows for the purpose of construing and applying this law:

2. *Unreserved and unappropriated lands* are lands which are not included within any military, Indian, or other reservation, or in a national forest, or in a withdrawal by the Government for reclamation or other purposes, or which are not covered or embraced in any entry, location, selection, or filing which withdraws them from the public domain.

3. *Unoccupied lands* are lands belonging to the United States upon which there are no improvements belonging to any person who has initiated and is properly maintaining a valid mining or other claim to such lands under the public land laws. Abandoned and unused mines, shafts, tunnels, or buildings occupied by mere trespassers not seeking title under any law of the United States, do not prevent timber and stone entries if the land is otherwise capable of being so entered.

4. *Nonmineral lands* are such lands as are not known to contain any substance recognized and classed by standard authorities as mineral, in such quantities and of such qualities as would, with reason-

able prospects of success in developing a paying mine thereon, induce a person of ordinary prudence to expend the time and money necessary to such development.

5. *Timber is defined* as trees of such kind and quantity, regardless of size, as may be used in constructing buildings, irrigation works, railroads, telegraph and telephone lines, tramways, canals, or fences, or in timbering shafts and tunnels or in manufacturing, but does not include trees suitable for fuel only.

6. *Lands valuable chiefly for timber*, but unfit for cultivation are lands which are more valuable for timber than they are for cultivation in the condition in which they exist at the date of the application to purchase, and therefore include lands which could be made more valuable for cultivation by cutting and clearing them of timber. The relative values for timber or cultivation must be determined from conditions of the land existing at the date of the application to purchase.

7. *Lands in all public land States* may be entered, but timber and stone entries can not be made in the Territories or in the District of Alaska.

8. One timber and stone entry may be made for not more than 160 acres (*a*) by any person who is a citizen of the United States, or who has declared his intention to become such citizen, if he is not under 21 years of age, and has not already exhausted his right by reason of a former application for an entry of that kind; or has not already acquired title to or is not claiming under the homestead or desert land laws through settlement or entry made since August 30, 1890, any other lands which, with the land he applies for, would aggregate more than 320 acres; or (*b*) by an association of such persons, or (*c*) by a corporation, each of whose stockholders is so qualified.

9. *A married woman may make entry* if the laws of the State in which she applies permit married women to purchase and hold for themselves real estate, but she must make the entry for her own benefit, and not in the interest of her husband or any other person, and she will be required to show that the money she pays for the land was not furnished by her husband.

10. *Any qualified person* may obtain title under the timber and stone law by performing the following acts: (*a*) Personally examining the land desired; (*b*) presenting an application and sworn statement, accompanied by a filing fee of \$10; (*c*) depositing with the receiver the appraised price of the land; (*d*) publishing notice of his application and proof; (*e*) making final proof.

11. *Examination of the land* must be made by the applicant in person not more than thirty days before the date of his application, in order that he may knowingly swear to its character and condition.

12. *The application and sworn statement must contain* the applicant's estimate of the timber, based on examination, and his valuation of the land and the timber thereon, by separate items. (See Form A, Appendix.) It must be executed in duplicate, after having been read to or by the applicant, in the presence of the officer administering the oath, and sworn to by him before such officer, who may be either the register or the receiver of the land district in which the land is located, a United States commissioner, a judge or a clerk of a court of record in the county or parish in which the land is situated, or one of these officers outside of that county or parish, if he is nearer and more accessible to the land than any other qualified officer, and has his office or place of business within the land district in which the land is located. Each applicant must, at the time he presents his application and sworn statement, deposit with the receiver, either in cash or in post-office money orders payable to the receiver, a filing fee of \$10.

13. *Applications by associations or corporations must,* in addition to the facts recited in the foregoing statement, show that each person forming the association or holding stock in the corporation is qualified to make entry in his own right and that he is not a member of any other association or a stockholder in any other corporation which has filed an application or sworn statement for other lands under the timber and stone laws.

14. *After application and deposit have been filed* in proper form, as required by these regulations, the register and receiver will at once forward one copy of the application to the chief of field division having jurisdiction of the land described, who, if he finds legal objection to the allowance of the application, will return it to them with report thereon. The register and receiver will, if they concur in an adverse recommendation of the chief of field division, dismiss or deny the application, subject to the applicant's right of appeal; but if they disagree with his recommendation, they will forward the record to the Commissioner of the General Land Office, with their report and opinion thereon, for such action as he may deem advisable.

If the chief of field division finds no such legal objection to the application, he shall cause the lands applied for to be appraised by an officer or employee of the Government. (Designation of Appraiser, Form B, Appendix.)

15. The officer or employee designated to make the appraisement must personally visit the lands to be appraised, and thoroughly examine every legal subdivision thereof, and the timber thereon, and appraise separately the several kinds of timber at their stumpage value, and the land independent of the timber at its value at the time of appraisement, but the total appraisement of both land and timber

must not be less than \$2.50 per acre. He must, in making his report, consider the quantity, quality, accessibility, and any other elements of the value of the land and the timber thereon. The appraisalment must be made by smallest legal subdivisions or the report must show that the valuation of the land and the estimate of the timber apply to each and every subdivision appraised. (See Form C, Appendix.)

16. The completed appraisalment must be mailed or delivered personally to the chief of field division under whose supervision it was made, and not to the applicant. Each appraisalment upon which an entry is to be allowed must be approved respectively or conjointly as provided in these regulations, by the chief of field division under whose supervision it was made, by the register and receiver who allow the entry, or by the Commissioner of the General Land Office.

17. The chief of field division will return to the appraiser, with his objections, an appraisalment which he deems materially low or high, and the appraiser shall, within 20 days from the receipt thereof, resubmit the papers, with such modifications or explanations as he may deem advisable or proper, upon receipt of which the chief of field division will either approve the schedule as then submitted, or forward the papers to the register and receiver, with his memorandum of objection. The register and receiver will thereupon consider the case. If they approve the appraisalment, they will sign the certificate appended thereto, and advise the chief of field division thereof. If the register and receiver approve the objection of the chief of field division, they will so indicate, and if the appraising officer is an employee of the Interior Department, under the supervision of the chief of field division, they will return the papers to the chief of field division, who will thereupon order a new appraisalment by a different officer. If, however, the register and receiver approve the objection of the chief of field division, when the appraiser is an officer of another bureau of this department, or of another department, they will forward the record of the case to the Commissioner of the General Land Office, who will then determine the controversy.

18. *When the appraisalment is completed*, the register and receiver will note the price on their records, and thereafter the land will be sold at such price only, under the provisions of the timber and stone acts, unless the land shall have been reappraised in the manner provided herein.

19. Unless the land department, as hereinbefore provided, or otherwise, as directed by the Secretary of the Interior, shall appraise any lands applied for under these regulations within nine months from the date of such application, the applicant may, without notice, within thirty days thereafter, deposit the amount, not less than \$2.50 per acre, specified in his application as the reasonable value of the land and the timber thereon, with the receiver, if appraise-

ment has not been filed prior to such deposit, and thereupon will be allowed to proceed with his application to purchase as though the appraisement had been regularly made. The failure of the applicant to make the required deposit within thirty days after the expiration of the nine months' appraisement period will terminate his rights without notice.

20. The register and receiver, after noting the appraised price on their records, will immediately inform the applicant that he must, within thirty days from service of notice, deposit with the receiver, either in lawful money or in post-office money orders payable to the receiver, or as provided in section 36 hereof, the appraised price of the land and the timber thereon, or within the time allowed for payment file his protest against the appraisement, deposit with the receiver a sum sufficient to defray the expenses of a reappraisement (which sum, not less than \$100, must be fixed by the register and receiver and specified in the notice to the applicant), together with his application for reappraisement at his own expense. (See Form D, Appendix.)

Notice should be given by registered letter and the envelope should be marked for return if not delivered within thirty days. If notice be returned after being held in the post office for thirty days, such proceedings will constitute constructive notice for thirty days.

21. Any applicant filing his protest against an appraisement, and his application for reappraisement, must support it by his affidavit, corroborated by two competent, credible, and disinterested persons, in which he must set forth specifically his objections to the appraisement. He must indicate his consent that the amount deposited by him for the reappraisement, or such part thereof as is necessary, may be expended therefor, without any claim on his part for a refund or return of the money thus expended.

22. *Upon the receipt of a protest against appraisement and application for reappraisement conforming to the regulations herein, the register and receiver will transmit such protest and application to the chief of field division, who will cause the reappraisement to be made by some officer other than the one making the original appraisement. The procedure provided herein for appraisement will be followed for reappraisement, except the latter, if differing from the former, must, to give it effect, be approved both by the chief of field division and the register and receiver, or, in case of disagreement between them, by the Commissioner of the General Land Office. (Form E, Appendix.)*

23. When a reappraisement is finally effected, the register and receiver will note the reappraised price on their records, and at once notify the applicant that he must, within thirty days from the date of notice, deposit with the receiver the amount fixed by such reap-



praisement for the sale of the land, or thereafter, and without notice, forfeit all rights under his application. (Form F, Appendix.)

24. The officer or employee of the United States making the reappraisement shall be paid from the amount deposited with the receiver by the applicant therefor, the salary, per diem, and other expenses to which he would have been entitled from the Government, in the case of an original appraisal, for his services for the time he was engaged in making and returning the reappraisement. The receiver will, out of the money deposited by the applicant, pay such compensation including reasonable expenses for subsistence, transportation, and necessary assistants; and the officer will deduct from his expense account with the Government the amount which he has received from the receiver for such services. The receiver will return to the applicant the amount, if any, remaining on deposit with him after paying the expenses of said reappraisement.

25. After the appraisal or reappraisal and deposit of purchase money and fee have been made the register will fix a time and place for the offering of final proof, and name the officer before whom it shall be offered and post a notice thereof in the land office and deliver a copy of the notice to the applicant, to be by him and at his expense published in the newspaper of accredited standing and general circulation published nearest the land applied for. This notice must be continuously published in the paper for sixty days prior to the date named therein as the day upon which final proof must be offered. (Form "G," Appendix.)

26. Final proof should be made at the time and place mentioned in the notice, and, as a part thereof, evidence of publication, as required by the previous paragraph, should also be filed. If final proof is not made on that day or within ten days thereafter, the applicant may lose his right to complete entry of the land. Upon satisfactory showing, however, explaining the cause of his failure to make the proof as above required, and in the absence of adverse claim, the Commissioner of the General Land Office may authorize him to readvertise and complete entry under his previous application. (See Form "H," Appendix.)

27. After an appraisal or reappraisal has been approved, the payments made, and satisfactory proof submitted in any case as required by these regulations, the register and receiver will, if no protest or contest is pending, allow a final entry.

28. Protest may be filed at any time before an entry is allowed, and contest may be filed at any time before patent issues, by any person who will furnish the register and receiver with a corroborated affidavit alleging facts sufficient to cause the cancellation of the entry, and will pay the cost of contest.

29. *If an applicant swear falsely in his application or sworn statement, he will be liable to indictment and punishment for perjury;*

and if he be guilty of false swearing or attempted fraud in connection with his efforts to obtain title, or if he fail to perform any act or make any payment or proof in the manner and within the time specified in the foregoing regulations, his application and entry will be disallowed and all moneys paid by him will be forfeited to the Government, and his rights under the timber and stone acts will be exhausted.

30. *After an application has been presented* hereunder no other person will be permitted to file on the land embraced therein under any public-land law until such application shall have been finally disposed of adverse to the applicant.

31. *Lands appraised or reappraised* hereunder, but not sold, may, upon the final disallowance of the application, be entered by any qualified person, under the provisions of the timber and stone laws, at its appraised or reappraised value, if subject thereto.

32. *Lands applied for but not appraised* and not entered under these regulations may, when the rights of the applicant are finally terminated, be disposed of as though such application had not been filed.

33. *Any lands which have not been reappraised* may be reappraised upon the request of an applicant therefor under these regulations who complies with the requirements of section 21 hereof.

34. *An applicant securing a reappraisement* under these regulations shall acquire thereby no right or privilege except that of purchasing the lands at their reappraised value, if he is qualified, and if the lands are subject to sale under his application; and he must otherwise comply with these regulations, but shall not, in any event, be entitled to the return of any money deposited by him and expended in such reappraisement.

35. *The Commissioner of the General Land Office* may at any time direct the reappraisement of any tract or tracts of public lands, when, in his opinion, the conditions warrant such action.

36. *Unsatisfied military bounty land warrants* under any act of Congress and unsatisfied indemnity certificates of location under the act of Congress approved June 2, 1858, properly assigned to the applicant, shall be receivable as cash in payment or part payment for lands purchased hereunder at the rate of \$1.25 per acre.

37. *Any application to purchase timber and stone lands* filed before January 1, 1909, which does not conform to these regulations shall be suspended, and the register and receiver should at once notify the applicant that he may, if he so elect, file a new application conformable to these regulations within thirty days from the date of the notice, and that failure to file such new application within the time specified will work a forfeiture of all rights under his suspended application, which will thereupon stand rejected without further notice.

38. These regulations shall be effective on and after December 1, 1908, but all applications to purchase legally pending on November

30, 1908, may be completed by compliance with the regulations in force at the time such applications were filed.

39. The forms mentioned herein and included in the appendix hereto shall be a part of these regulations.

40. The foregoing regulations apply to entries of lands chiefly valuable for stone, and the forms herein prescribed can be modified in such manner as may be necessary to the making of entries of stone lands.

41. All former regulations, decisions, and practices in conflict with these regulations are hereby revoked.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

JAMES RUDOLPH GARFIELD,  
*Secretary.*

Revised and approved August 22, 1911.

SAMUEL ADAMS,  
*Acting Secretary.*

AN ACT For the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale, according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided,* That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further,* That none of the rights conferred by the act approved July twenty-sixth eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improve-

ments, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

Sec. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

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Sec. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved, June 3, 1878. (20 Stat., 89.)

AN ACT To authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

SEC. 2. That an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land States.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

Approved, August 4, 1892. (27 Stat., 348.)

AN ACT To provide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section three of the act approved June second, eighteen hundred and fifty-eight.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in addition to the benefits now given thereto by law, all unsatisfied military bounty land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered under the desert land law of March third, eighteen hundred and eighty-[seventy-] seven, entitled "An act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber-culture law of March third, eighteen hundred and seventy-three, entitled "An act to encourage the growth of timber on the Western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An act for the sale of timber lands in the States of California, Oregon, Nebraska, and Washington Territory," and the amendments thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

Approved, December 13, 1894. (28 Stat., 594.)

AN ACT To abolish the distinction between offered and unoffered lands, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in cases arising from and after the passage of this act the distinction now obtaining in the statutes between offered and unoffered lands shall no longer be made in passing upon subsisting preemption claims, in disposing of the public lands under the homestead laws, and under the timber and stone law of June third, eighteen hundred and seventy-eight, as extended by the act of August fourth, eighteen hundred and ninety-two, but in all such cases hereafter arising the land in question shall be treated as unoffered, without regard to whether it may have actually been at some time offered or not.

\* \* \* \* \*

Approved, May 18, 1898. (30 Stat., 413.)

AN ACT To amend the Act of Congress of March eleventh, nineteen hundred and two, relating to homesteads.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That an Act entitled "An Act to amend sec-

tion twenty-two hundred and ninety-four of the Revised Statutes of the United States," approved March eleventh, nineteen hundred and two, be, and the same is hereby, amended to read as follows:

"That section twenty-two hundred and ninety-four of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"Sec. 2294. That hereafter all proofs, affidavits, and oaths of any kind whatsoever required to be made by applicants and entrymen under the homestead, preemption, timber-culture, desert-land, and timber and stone Acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: *Provided*, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. That if any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. That the fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

"For each affidavit, twenty-five cents.

"For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

"For each deposition of claimant or witness, prepared by the officer, one dollar.

"Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars."

Approved, March 4, 1904. (33 Stat., 59.)

AN ACT Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

\* \* \* \* \*

No person who shall, after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry, or settlement is validated by this act: *Provided*, That in all patents for lands hereafter taken up

under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

Approved, August 30, 1890. (26 Stat., 391.)

AN ACT To repeal the timber-culture laws, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

\* \* \* \* \*

Sec. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs; and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands, and not include lands entered or sought to be entered under mineral-land laws.

Approved, March 3, 1891. (26 Stat., 1095.)

The 320-acre limitation provided by the above acts of August 30, 1890 (26 Stat., 391), and March 3, 1891 (26 Stat., 1095), applies to timber and stone entries. (33 L. D., 539, 605.)

[Form A.]

APPLICATION AND SWORN STATEMENT.

[To be made in duplicate.]

Act June 3, 1878, and Acts Amendatory.

Departmental Regulations Approved November 30, 1908.

UNITED STATES LAND OFFICE,

— — —, 1908.

I, ———, hereby make application to purchase the ——— quarter of section ———, in township ——— and range ———, in the State of ———, and the timber thereon, at such value as may be fixed by appraisement, made under the authority of the Secretary of the Interior, under the act of June 3, 1878, commonly known as the "Timber and stone law," and acts amendatory thereof, and in support of this application I solemnly swear: That I am a native (or naturalized) citizen of the United States (or have declared my intention to become a citizen); that I am ——— years of age and by occupation ———; that I did on ———, 19—, examine said land, and from my personal knowledge state that said land is unfit for cultivation and is valuable

chiefly for its timber, and that to my best knowledge and belief, based upon said examination, the land is worth \_\_\_\_\_ dollars, and the timber thereon, which I estimate to be \_\_\_\_\_ feet, board measure, is worth \_\_\_\_\_ dollars, making a total value for the land and timber of \_\_\_\_\_ dollars and no more; that the land is uninhabited; that it contains no mining or other improvements, nor, as I verily believe, any valuable deposits of gold, silver, cinnabar, copper or coal, or other minerals, salt springs or deposits of salt; that I have made no other application under said acts; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit; that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself; that since August 30, 1890, I have not entered and acquired title to, nor am I now claiming, under an entry made under any of the nonmineral public land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres; that I am not a member of any association, or a stockholder in any corporation which has filed an application and sworn statement under said act; and that my post-office address is \_\_\_\_\_, at which place any notice affecting my rights under this application may be sent. I request that notice be furnished me for publication in the \_\_\_\_\_ newspaper, published at \_\_\_\_\_.

(Sign here, with full Christian name.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known, or has been satisfactorily identified before me by \_\_\_\_\_ (give full name and post-office address); that I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office in \_\_\_\_\_ (town), \_\_\_\_\_ (county and State), within the \_\_\_\_\_ land district this \_\_\_\_\_ day of \_\_\_\_\_, 19—.

(Official designation of officer.)

In case the applicant has been naturalized or has declared his intention to become a citizen, a certified copy of his certificate of naturalization or declaration of intention, as the case may be, must be furnished.

If the residence is in a city, the street and number must be given.

The newspaper designated must be one of general circulation, published nearest the land.

[Form B.]

#### DESIGNATION OF APPRAISER.

Departmental Regulations Approved November 30, 1908.

SIR: You are designated to appraise the \_\_\_\_\_ quarter of section \_\_\_\_\_, township \_\_\_\_\_, \_\_\_\_\_, and range \_\_\_\_\_, \_\_\_\_\_, which embraces a total of \_\_\_\_\_ acres. This land has been applied for by \_\_\_\_\_, of \_\_\_\_\_, \_\_\_\_\_, under the timber and stone law. If you accept this designation, it will be your duty to personally visit and carefully examine each and every legal subdivision of the land, and the timber thereon, and to make a return through this office of the



approximate quantity, quality, and the stumpage cash value of the various kinds of timber, the cash value of the land, and the total value of the land and timber. The total appraisal of the land and timber, however, must not amount to less than two dollars and fifty cents per acre for each acre appraised. Each legal subdivision must be separately appraised, or your return must show specifically that the appraisal applies to each legal subdivision.

Please inform me as soon as possible, and not later than \_\_\_\_\_, 19\_\_\_\_, whether you will be able to do the work, and also advise me the approximate date the appraisal will be completed.

Very respectfully,

\_\_\_\_\_,  
Chief of Field Division, General Land Office.

[Form C.]

APPRAISAL, TIMBER AND STONE LANDS.

Act of March 3, 1878, and Acts Amendatory.

Departmental Regulations Approved November 30, 1908.

Lot or quarter-quarter.	Kind of timber.	Quality of timber.	Board feet per tract.	Stumpage value per M.	Character of soil.	Value of land exclusive of timber.	Total value of land and timber per acre.	Value of land and timber per tract.

Logging:

Timber must be logged by \_\_\_\_\_ (wagon haul, flume, river driving, or railroad).

Distance logs or lumber are to be transported to market, \_\_\_\_\_ miles. Approximate cost per M for transportation of logs or lumber to market, \_\_\_\_\_ dollars. Accessible? \_\_\_\_\_ (yes or no). Manufacturing possible on the ground? \_\_\_\_\_ (yes or no). Will there be improvement in logging facilities in the vicinity? \_\_\_\_\_ (yes or no). Will the demand for timber products be likely to increase in the neighborhood in the near future? \_\_\_\_\_ (yes or no). Nearest available quotations on stumpage for the species estimated \_\_\_\_\_.

\_\_\_\_\_, 19\_\_\_\_.

STATEMENT BY APPRAISER.

I have carefully examined each and every legal subdivision of the \_\_\_\_\_ quarter of section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, and the timber thereon, and the estimates included in the above table and the foregoing statement were based on personal examination. I did not find any indication that the land or any part thereof contains any valuable mineral or coal deposits, and found no improvements or other evidence that any claim is being asserted under any of the public-land laws. I recommend that the application to purchase receive favorable action.

\_\_\_\_\_,  
Appraiser.

ACTION ON APPRAISEMENT.

I have carefully examined the within appraisal and find no reason to believe that it is improperly made.

It is therefore, accordingly, APPROVED.

\_\_\_\_\_,  
Chief of Field Division.



consent that the amount so deposited may be expended for the reappraisal, without any claim on your part that any portion thereof, so expended, shall be returned or refunded to you.

If a reappraisal is made under your application, you will secure no right or privilege, except that of purchasing the lands at their reappraised value, if they are subject to sale and you are properly qualified.

Very respectfully,

\_\_\_\_\_, *Register.*  
\_\_\_\_\_, *Receiver.*

[Form E.]

REAPPRAISEMENT.

Form C may be modified so as to show that the action taken is a reappraisal instead of an original appraisal. The return of the appraising officer and indorsements by the chief of field division and the register and receiver must show that the action taken is a reappraisal, and it must be approved conjointly by the chief of field division and the register and receiver.

[Form F.]

NOTICE OF REAPPRAISEMENT.

Departmental regulations approved November 30, 1908.

UNITED STATES LAND OFFICE,  
\_\_\_\_\_,  
\_\_\_\_\_.

SIR: You are advised that, pursuant to your application, the \_\_\_\_\_ quarter of section \_\_\_\_\_, township \_\_\_\_\_, and range \_\_\_\_\_, and the timber thereon, embraced in your timber and stone sworn statement, No. —, have been reappraised, and the price fixed at \_\_\_\_\_ dollars, which amount you must deposit with the receiver of this office within thirty days from service of notice hereof, or your application will be finally disallowed without further notice.

Very respectfully,

\_\_\_\_\_, *Register.*  
\_\_\_\_\_, *Receiver.*

[Form G.]

NOTICE OF APPLICATION TO PURCHASE UNDER TIMBER AND STONE LAWS.

Departmental regulations approved November 30, 1908.

UNITED STATES LAND OFFICE,  
\_\_\_\_\_, 19—.

Notice is hereby given that \_\_\_\_\_, whose post-office address is \_\_\_\_\_, did on the \_\_\_\_\_ day of \_\_\_\_\_, 19—, file in this office his sworn statement and application No. — to purchase the \_\_\_\_\_ quarter of section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ M., and the timber thereon, under the provisions of the act of June 3, 1878, and acts amendatory, known as the "Timber and stone law," at such value as might be fixed by appraisal, and that, pursuant to such application, the land and timber thereon have been appraised, the timber estimated \_\_\_\_\_ board feet, at \$\_\_\_\_\_ per M, and the land \$\_\_\_\_\_, or combined value of the land and timber at \$\_\_\_\_\_; that said applicant will

offer final proof in support of his application and sworn statement on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, before \_\_\_\_\_, at \_\_\_\_\_. Any person is at liberty to protest this purchase before entry, or initiate a contest at any time before patent issues, by filing a corroborated affidavit in this office, alleging facts which would defeat the entry.

\_\_\_\_\_, Register.

Where notice is issued under section 19, the register will modify the blank so as to show the valuation placed on the land and the timber thereon was that made by the applicant when he filed his sworn statement, instead of being fixed by appraisalment.

[Form H.]

TIMBER OR STONE ENTRY.

(4-370a.)

Departmental regulations approved by the Secretary of the Interior November 30, 1908.

DEPARTMENT OF THE INTERIOR.

U. S. LAND OFFICE, \_\_\_\_\_, \_\_\_\_\_, No. \_\_\_\_\_.

Receipt No. \_\_\_\_\_.

FINAL PROOF.

I hereby solemnly swear that I am the identical \_\_\_\_\_, who presented sworn statement and application, No. \_\_\_\_\_, for \_\_\_\_\_, section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ meridian; that the land is valuable chiefly for its timber, and is, in its present condition, unfit for cultivation; that it is unoccupied and without improvements of any character, except for ditch or canal purposes, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, coal, salines, or salt springs.

\_\_\_\_\_  
(Sign here, with full Christian name.)

\_\_\_\_\_  
(Post-office address.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by \_\_\_\_\_; that  
(Give full name and post-office address.)

I verily believe affiant to be a qualified applicant and the identical person hereinbefore described, and that said affidavit was duly subscribed and sworn to before me, at my office, in \_\_\_\_\_, \_\_\_\_\_, within the \_\_\_\_\_ land district, this \_\_\_\_\_ of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
(Official designation of officer.)

This form of proof can be accepted only where the land embraced in the application to purchase has been appraised or reappraised pursuant to the provisions of the Timber and Stone Regulations approved November 30, 1908, by the Secretary of the Interior.

Proof supporting applications to purchase under section 19 of the said regulations or under applications pending November 30, 1908, must be made by the applicant and two witnesses, as required by the regulations in force prior to December 1, 1908. (See Forms 4-370 and 4-371.)

[To be used only when sale is made under section 19 of the regulations approved November 30, 1908, and in sales under applications pending November 30, 1908.]

4-370.

(Form approved by the Secretary of the Interior November 12, 1907.)

## DEPARTMENT OF THE INTERIOR.

## TIMBER OR STONE ENTRY.

U. S. LAND OFFICE, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

## Testimony of claimant.

I, \_\_\_\_\_ (give full Christian name), being duly called as a witness in support of my application to purchase the \_\_\_\_\_, section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ meridian, testify as follows:

Question 1. What is your age, occupation, post-office address, and where do you live?

Answer. \_\_\_\_\_

Question 2. Are you a native-born citizen of the United States; and, if so, in what State or Territory were you born? Are you married or single?

Answer. \_\_\_\_\_

Question 3. Are you the identical person who applied to purchase this land on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and made the sworn statement required by law upon that day?

Answer. \_\_\_\_\_

Question 4. Have you made a personal examination of each smallest legal subdivision of the land applied for?

Answer. \_\_\_\_\_

Question 5. When, under what circumstances, and with whom was such examination made?

Answer. \_\_\_\_\_

Question 6. How did you identify said land? Describe it fully.

Answer. \_\_\_\_\_

Question 7. Is the land occupied, or are there any improvements on it? If so, describe them and state whether they belong to you.

Answer. \_\_\_\_\_

Question 8. Is the land fit for cultivation, or would it be fit for cultivation if the timber were removed?

Answer. \_\_\_\_\_

Question 9. What is the situation of this land, what is the nature of the soil, and what causes render the same unfit for cultivation?

Answer. \_\_\_\_\_

Question 10. Are there any salines or indications of deposits of gold, silver, cinnabar, copper, coal, or other minerals on this land? If so, state what they are.

Answer. \_\_\_\_\_

Question 11. Is the land valuable for mineral, or more valuable for any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone? (Answer each question.)

Answer. \_\_\_\_\_

Question 12. From what facts do you conclude that the land is chiefly valuable for timber and stone?

Answer. \_\_\_\_\_

Question 13. How many thousand feet, board measure, of lumber do you estimate that there is on this entire tract? What is the stumpage value of same?

Answer. -----

Question 14. Are you a practical lumberman or woodsman? If not, how do you arrive at your estimate of the quality and value of lumber on the tract?

Answer. -----

Question 15. What do you expect to do with this land and the timber when you get title to it?

Answer. -----

Question 16. Do you know of any capitalist or company which has offered to purchase timber land in the vicinity of this entry? If so, who are they, and how do you know of them?

Answer. -----

Question 17. Has any person offered to purchase this land if you acquire title? If so, who, and for what amount?

Answer. -----

Question 18. Where is the nearest and best market for the timber on this land at the present time?

Answer. -----

Question 19. What has been your occupation during the past year; where and by whom have you been employed, and at what compensation?

Answer. -----

Question 20. How did you first learn about this particular tract of land, and that it would be a good investment to buy it?

Answer. -----

Question 21. Did you pay or agree to pay anything for this information? If so, to whom, and the amount?

Answer. -----

Question 22. Did you pay out of your own individual funds all the expenses in connection with making this filing, and do you expect to pay for the land with your own money?

Answer. -----

Question 23. Where did you get the money with which to pay for this land, and how long have you had same in your actual possession?

Answer. -----

Question 24. Have you kept a bank account during the past six months? If so, where?

Answer. -----

Question 25. Have you sold or transferred your claim to this land since making your sworn statement, or have you directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which you may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except yourself?

Answer. -----

Question 26. Do you make this entry in good faith for the appropriation of the land and the timber thereon exclusively for your own use and not for the use or benefit of any other person?

Answer. -----

Question 27. Has any person other than yourself, or any firm, corporation, or association any interest in the entry you are now making, or in the land or in the timber thereon?

Answer. -----

\* Question 28. Have you since August 30, 1890, entered and acquired title to, or are you now claiming, under an entry made under any of the nonmineral public-land laws, an amount of land which, together with the land now applied for, will exceed in the aggregate 320 acres?

Answer. -----

(Sign here, with full Christian name.)

NOTE.—Every person swearing falsely to the above deposition will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.) In addition thereto, the money that may be paid for the land is forfeited, and all conveyances of the land, or of any right, title, or claim thereto, are absolutely null and void as against the United States.

\*NOTE.—In addition to the foregoing testimony the officer before whom the proof is made will ask such questions as seem necessary to bring out all the facts in the case.

I hereby certify that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that deponent is to me personally known [or has been satisfactorily identified before me by ----- (give full name and post-office address)]; that I verily believe deponent to be a qualified claimant and the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me, at my office, in ----- (town), ----- (county and State), within the ----- land district, this ----- day of -----, 19--.

I further certify that I tested the accuracy of affiant's information and good faith in making the entry, by close and sufficient cross-examination of claimant and the witnesses, and am satisfied from such examination that the entry is made in good faith for entryman's own exclusive use and not for sale or speculation, nor in the interest of, nor for the benefit of, any other person or persons, firm, or corporation.

-----  
-----  
(Official designation of officer.)

Sec. 125, United States Criminal Code.—Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

4-371

(Form approved by the Secretary of the Interior November 12, 1907.)

DEPARTMENT OF THE INTERIOR.

TIMBER OR STONE ENTRY.

U. S. LAND OFFICE, -----, -----.

Testimony of witness.

I, ----- (give full Christian name), being duly called as a witness in support of the application of -----, ----- (give full Christian name), filed at

the \_\_\_\_\_ land office, to purchase the \_\_\_\_\_ section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, \_\_\_\_\_ meridian, testify as follows:

Question 1. What is your age, occupation, post-office address, and where do you live?

Answer: \_\_\_\_\_

Question 2. By whom have you been employed during the last six months?

Answer: \_\_\_\_\_

Question 3. Are you acquainted with the land above described by a personal examination of each of its smallest legal subdivisions? Describe the tract fully.

Answer: \_\_\_\_\_

Question 4. When, with whom, and in what manner was such examination made?

Answer: \_\_\_\_\_

Question 5. Is it occupied or are there any improvements on it not made for ditch or canal purposes, or which were not made by, or do not belong to, the said applicant?

Answer: \_\_\_\_\_

Question 6. Is it fit for cultivation?

Answer: \_\_\_\_\_

Question 7. What causes render it unfit for cultivation?

Answer: \_\_\_\_\_

Question 8. Are there any salines or indications of deposits of gold, silver, cinnabar, copper, coal, or other minerals on this land? If so, state what they are.

Answer: \_\_\_\_\_

Question 9. Is the land valuable for mineral, or more valuable for any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone? (Answer each question.)

Answer: \_\_\_\_\_

Question 10. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Answer: \_\_\_\_\_

Question 11. How long have you known the applicant?

Answer: \_\_\_\_\_

Question 12. What is his financial condition so far as you know?

Answer: \_\_\_\_\_

Question 13. Do you know of your own knowledge that applicant has sufficient money of his own to pay for this land and hold it six months without mortgaging it?

Answer: \_\_\_\_\_

Question 14. Do you know whether the applicant has, directly or indirectly, made any agreement or contract, in any way or manner, with any person whomsoever by which the title he may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except himself?

Answer: \_\_\_\_\_

\* Question 15. Are you in any way interested in this application or in the land above described, or the timber or stone, salines, mines, or improvements of any description thereon?

Answer: \_\_\_\_\_

(Sign here, with full Christian name.)



NOTE.—Every person swearing falsely to the above deposition will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

\* NOTE.—In addition to the foregoing testimony, the officer before whom the proof is made will ask such questions as seem necessary to bring out all the facts in the case.

I hereby certify that the foregoing deposition was read to or by deponent in my presence before deponent affixed signature thereto; that deponent is to me personally known [or has been satisfactorily identified before me by \_\_\_\_\_ (give full name and post-office address)]; that I verily believe deponent to be a credible witness and the identical person hereinbefore described, and that said deposition was duly subscribed and sworn to before me, at my office, in \_\_\_\_\_ (town), \_\_\_\_\_ (county and State), within the \_\_\_\_\_ land district, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

-----  
 (Official designation of officer.)

Sec. 125, United States Criminal Code.—Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

### SORLI v. BERG.

*Decided September 5, 1911.*

#### HOMESTEAD ENTRY—QUALIFICATION—OWNERSHIP OF LAND—EXCESS OF LESS THAN ONE ACRE.

Section 2289 of the Revised Statutes specifically declares one who is the proprietor of more than 160 acres of land disqualified to make homestead entry; and the land department is therefore without power, by invoking the maxim *de minimis non curat lex*, to hold so qualified one who owns more than 160 acres, notwithstanding the excess may be less than one acre.

#### CONFLICTING DECISION OVERRULED.

*Amidon v. Hegdale*, 39 L. D., 131, overruled.

#### ADAMS, *First Assistant Secretary*:

Hans T. Sorli has appealed to the Department from the decision of the Commissioner of the General Land Office of January 6, 1911, sustaining the action of the local officers and dismissing his contest against homestead entry No. 42949 (Serial 06277), made July 3, 1906, by Iver J. Berg for the SW.  $\frac{1}{4}$ , Sec. 26, T. 163 N., R. 93 W., Minot, North Dakota, land district.

The contest affidavit was filed December 18, 1909, alleging that Berg was the owner of more than 160 acres of land at the date of said entry. The facts were presented in the form of a written agreement and stipulation by and between the parties.

In said agreed statement of facts, which was dated March 14, 1910, it was stipulated that on the 3d. day of July, 1906, Berg was the owner, in fee simple, of 160 acres of land in South Dakota, and, also, of a certain lot of land in Bryant, Hamlin County, South Dakota; by subsequent stipulation, it was agreed that the said last mentioned lot is 50 feet wide and 142 feet long. No other testimony was offered and the case was submitted on these agreed and undisputed facts.

The Commissioner dismissed the contest, holding that the defendant was not disqualified to make the entry; basing his decision upon the case of *Amidon v. Hegdale* (39 L. D., 131), decided July 28, 1910, wherein the Department held that—

Under the maxim *de minimis non curat lex*, the ownership of less than one acre in excess of one hundred and sixty acres will not be held a disqualification to make homestead entry.

Appellant, on this appeal, contends that the last mentioned decision is erroneous and should be overruled. This contention must be sustained.

Section 2289, Revised Statutes, provides that "no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law."

It is impossible to reconcile the decision in *Amidon v. Hegdale* with the statutory provision just quoted. By the decision, an entryman is allowed to own one acre more than that allowed by statute, while the slightest excess above the area allowed by the decision disqualifies him from making entry. If the statutory limit were made 161 acres, the same reasoning would fix the limit of disqualification at 162 acres, and, thus, the statutory limit of ownership would be continuously disregarded and increased by departmental decision in the nature of judicial legislation. It would resolve itself into a race between Congress with exclusive power to legislate, and this Department without such power, in which, notwithstanding, the Department would be, at all times, one lap ahead of Congress. The statute is plain, certain and unambiguous, and the Department has no right to so, in effect, legislate. And the maxim *de minimis non curat lex* cannot properly be invoked to justify a plain disregard of the statutory limit as to the area of land ownership disqualifying from homestead entry.

For the reasons above stated, and from the conclusion above reached, it follows that the departmental decision in the said case of *Amidon v. Hegdale* must be, and the same hereby is, overruled; and the decision from which this appeal is taken, although in conformity, when made, with departmental decision in the *Amidon* case, must be, and hereby is, reversed.

**HEFLIN v. SCHNARE.**

*Decided September 8, 1911.*

**DESERT LAND ENTRY—IMPROVEMENTS.**

To entitle a desert land entryman to credit for improvements made upon the land by a former entryman they must be permanent in character and have enduring utility tending to effect reclamation of the land: therefore expenditures for breaking by a previous entryman can not be accepted toward meeting the requirements of the statute where the ground broken has been permitted to relapse to its original state.

*ADAMS, First Assistant Secretary:*

Christian D. W. Schnare, assignee of Jesse G. Cramer, appealed from decision of the Commissioner of the General Land Office of January 16, 1911, canceling his desert-land entry, made by Jesse G. Cramer and assigned to him, for the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 13, T. 18 S., R. 26 E., Roswell, New Mexico.

March 19, 1907, Cramer made entry, and March 20, 1907, assigned it to Schnare. November 22, 1909, Heflin filed contest against the entry, charging that neither the entryman nor his assignee expended on said land \$1 per acre for the year from March 19, 1907, to March 19, 1908, nor for the year following, in necessary irrigation, reclamation, cultivation, or permanent improvement. Personal service of notice was made on defendant January 27, 1910, at Artesia, New Mexico, and March 31, 1910, both parties, with counsel and witnesses, participated before a United States commissioner at Artesia in taking testimony. The important question involved is whether defendant should be allowed credit for an alleged expenditure of \$200 for breaking of 40 acres of the land, the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , in 1905 or 1906. Testimony on behalf of contestant alleges that such breaking was in fact not done, and that there was no evidence on the ground that the land had ever been broken, with the exception of about 8 acres, and that the remainder of this 40 was in its native state and had never been broken. The evidence shows that exclusive of the alleged breaking of this 40 acres for which a credit of \$200 is claimed, the amount of expenditure on the land prior to service of notice would aggregate considerably less than \$320, the amount being about \$220. Defendant claims that including said \$220 an expenditure of about \$395 was made.

The great bulk of the evidence was directed toward the question whether this 40-acre tract had been broken up or not. The great weight of the evidence, in view of the Department, is that it had been. Contestant's witnesses, eight in number in chief, all lived at Artesia,  $8\frac{1}{2}$  miles from the land, and had never visited it but few times, and for the most part they were men unaccustomed to husbandry; two were physicians and one was a telephone company manager, but they testified from few visits and observations of the ground that there was no appearance of breaking and that it would

take from three to twenty years for land once broken up to return to its native state so that the former breaking would not be manifest by appearances on the ground. On the contrary, witnesses for defendant were agriculturists, living in the immediate vicinity. J. H. Cramer and his two sons, lived on adjoining land, as also did the witnesses O'Hearne and Dennis Littleton, a well digger and farmer, who drilled a well on the adjoining land. These witnesses all testified that the 40 acres were broken up as a matter of their own knowledge and observation, the breaking being done about the time that Littleton drilled a well on adjoining land and the witnesses actually saw the breaking when it was fresh and saw the work going on. Such testimony is immeasurably more weighty and of higher probative value than the opinions of persons who years afterwards passed over the land and came to the conclusion that no breaking had ever been done on it. The great weight of evidence was with defendant in this respect, and if that was the determining question it would necessarily be held that the work had been performed.

The evidence, however, shows that this breaking was done by a former entryman who held this and other lands under desert-land entry. This entryman, Carson Hon, used this improvement in his third annual proof submitted May 5, 1904, wherein he claimed expenditure of \$320 for breaking of this same 40-acre tract. Soon after that he relinquished, and Mary E. Hon the same day made entry for the same land. March 19, 1907, she relinquished this land and it was entered by Jesse G. Cramer, who entered it March 19, 1907, and next day assigned his entry to Schnare, who paid \$4,400 for such assignment. The NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of section 13 remained in the same condition as when Cramer entered and assigned to Schnare, except that 8 or 10 acres of it had been lately plowed; the remainder had practically returned to its native state.

The desert-land act requires the entryman "or his assignors" to expend in—

necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land and in the purchase of water rights for the irrigation of the same at least three dollars per acre of whole tract reclaimed and patented.

Based on use of the words "or his assignors," it was held in *Holcomb v. Scott* (33 L. D., 287) that an entryman could claim credit for expenditures of \$400 to \$800 made by her husband under a former entry which he was unable to perfect because an irrigation company failed to supply him with water within life of his entry. Near its expiration the husband relinquished, the wife made entry, and he assigned the improvements to her.

In *Holcomb v. Williams* (33 L. D., 547) an entryman had made improvements on land held under homestead entry which he relinquished and entered the land under the desert-land act. He was

allowed credit under the desert entry for expenditure upon improvements made during the homestead entry.

The improvements for which credit was given in these cases were of permanent character, remaining and adding value to the land at date the credits were given, being dwelling houses, stock barn, wells giving water, clearing and leveling land, irrigating ditches and canals.

This is a different case. While the proof shows that Carson Hon did break this 40-acre tract and used the expenditure in his annual proofs for 1904, the ground broken was allowed to relapse to its original state so that witnesses examining it in 1909 and 1910 were led to believe it was never broken. While they were mistaken, the fact is clear that this expenditure had not added to the value of the land or in any way tended to its reclamation and was not a "permanent" improvement. The law requires that expenditures must be permanent and have an enduring utility tending to effect reclamation of the land to entitle the entryman to credit for the expenditure. Aside from this relapsed breaking, the entryman showed only \$220 within the first year of his entry and was insufficient under the law.

Were it otherwise, expenditures to the required amount, though the work done had decayed and land partly improved had totally relapsed to its primitive desert state, might be availed of indefinitely by a succession of entrymen making no effort at reclamation, to hold the land against *bona fide* entry for reclamation purposes.

The circumstances respecting the successive entry of this land, and particularly the making of the entry by Cramer and assignment next day to Schnare, strongly suggest that Cramer's entry was not made with any intention on his part of complying with the desert-land law, but as a convenience to effect a sale of the property to Schnare, in which event it was an illegal entry; therefore, if it had been shown that the law had been met by the expenditures made in connection with the prior entries, a careful investigation would be had, and in this connection the then qualifications of Schnare to make a desert entry might suggest a reason for the entry in the name of Cramer.

The decision is affirmed.

## LEAVE OF ABSENCE TO CERTAIN HOMESTEADERS—ACT OF AUGUST 19, 1911.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., September 8, 1911.

REGISTERS AND RECEIVERS,

*United States Land Offices (named below).*

GENTLEMEN: Your attention is invited to the provisions of the act of Congress approved August 19, 1911 (Public—27), entitled "An act

granting leaves of absence to certain homesteaders," which reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who have heretofore made homestead entries in the Lemmon, Timber Lake, Rapid City, Chamberlain, Belle Fourche, Gregory, and Pierre land districts in the State of South Dakota; in the Denver, Pueblo, Sterling, Hugo, Lamar, and Glenwood Springs land districts, in the State of Colorado; in the Valentine, O'Neill, North Platte, Broken Bow, and Alliance land districts, in the State of Nebraska; in the Lawton, Woodward, and Guthrie land districts, in the State of Oklahoma; in the Dickinson, Minot, Williston, Devils Lake, and Bismarck land districts, in the State of North Dakota; in the Cheyenne, Evanston, Sundance, Buffalo, Lander, and Douglas land districts, in the State of Wyoming; in the Clayton, Fort Sumner, Las Cruces, Tucumcari, Roswell, and Santa Fe land districts, in the Territory of New Mexico; in the Phoenix land district, in the Territory of Arizona; in the former Spokane Indian Reservation, in the State of Washington; and in the Burns, Vale, La Grand, and The Dalles land districts, in the State of Oregon, are hereby relieved from the necessity of residence and cultivation upon their lands from the date of approval of this Act to April fifteenth, nineteen hundred and twelve: Provided, That the time of actual absence during the period named shall not be deducted from the full time of residence required by law.*

Homestead entrymen coming under the above act who are absent from their claims for any period between the dates of August 19, 1911, and April 15, 1912, are not required to file applications for such leave.

In the examination of final proofs, and in cases of contest alleging abandonment during the above period, you will give due consideration to the foregoing provisions.

Very respectfully,

JOHN MCPHAUL,  
*Acting Assistant Commissioner.*

Approved:

SAMUEL ADAMS, *Acting Secretary.*

VIRGIL PATTERSON.

*Decided September 8, 1911.*

DESERT LAND ENTRY—UNSURVEYED LAND—ACT OF MARCH 28, 1908.

The possession and improvement contemplated by the act of March 28, 1908, according a preference right to make desert land entry to one who has "taken possession of a tract of unsurveyed desert land . . . and has reclaimed or has in good faith commenced the work of reclaiming the same," are not such as required of a settler under the homestead law, but it is sufficient under that act if the possession and improvement conform to the requirements of the desert land law and evidence the party's good faith under that law.

ADAMS, *First Assistant Secretary:*

Appeal is filed by Virgil Patterson from decision of September 16, 1910, of the Commissioner of the General Land Office affirming

the action of the local officers in rejecting on February 1, 1910, the application filed by said Patterson March 5, 1909, to make desert land entry of the S.  $\frac{1}{2}$ , Sec. 12, T. 13 S., R. 15 E., S. B. M., Los Angeles, California, land district, for the assigned reason that said lands were withdrawn April 2, 1909, for Government use in connection with the Yuma Irrigation Project, act of June 17, 1902 (32 Stat., 388).

Examination of the records of the General Land Office shows these lands were suspended March 31, 1906, for resurvey under the act of July 1, 1902 (32 Stat., 728); that resurvey plats were filed February 23, 1909; and that the withdrawal made under said act of June 17, 1902, was adjusted to the resurvey April 5, 1910.

The applicant's corroborated affidavit filed with his application shows he has had possession of these lands since May 1, 1908, and has expended \$350 in constructing irrigation ditches and borders thereon, and that he applied at that time for filing but was informed by the local officers that said lands were not then open to entry but that he might secure a preference right to make entry thereof by improving and undertaking in good faith to reclaim the same, which he did accordingly, as stated, and filed this application within two weeks after filing of the resurvey plat.

The Commissioner held that no such acts of settlement are shown herein as would constitute the applicant a *bona fide* settler under the homestead laws, as held in the case of Charles Perrine (3 L. D., 331), and that, for this reason, this case would not be referred to the Reclamation Service, as directed to be done in certain cases in the Department's decision in the case of Charles G. Carlisle (35 L. D., 649).

This case is not one of settlement to be decided by the Department's decision in either of the cases cited. The former of said cases was one arising under the statute relative to special surveys authorized to be made on application by "settlers," as specified in that statute, which was construed in that decision to mean settlers who have performed acts sufficient to constitute a settlement under the homestead laws. The latter case was one of homestead settlement and application, and the rule there laid down related only to such settlements and applications made prior to a withdrawal under said act of June 17, 1902.

In the present case, no settlement, as such, is alleged or pretended to have been made, but only a taking possession of and improving, with a view to their reclamation under the desert land law, certain unsurveyed desert lands, as provided in the act of March 28, 1908 (35 Stat., 52), prohibiting desert land entries of unsurveyed lands but giving to a person who has "taken possession of a tract of unsurveyed desert land. . . . and has reclaimed or has in good faith commenced the work of reclaiming the same. . . . the prefer-

ence right to make entry of such tract under said acts [the desert land laws], in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

It is apparent that this act contemplates, in the possession and improvement of unsurveyed land required thereby as basing a preference right to make desert land entry of such land when surveyed, such acts of performance on the land as are required in perfecting title thereto under the desert land law. Residence on the land is not such required act under that law as under the homestead law, and as homestead settlement is made with a view to the required permanent residence on the land such character of settlement cannot be made a criterion for the possession and improvement required by said act of March 28, 1908. It is sufficient under that act if the possession and improvement conform to the desert land law's requirements, and evidence the party's good faith under that law.

Patterson's possession and attempt at reclamation of these lands, according to the showing made, appear to have been in good faith; and while said lands were not, strictly, unsurveyed lands at the time he took such possession and began such work of reclamation thereof, they appear to have been regarded by the land department as having the status of unsurveyed lands while under such suspension for resurvey, and he took possession and began reclamation thereof in good faith under such view and upon the advice of the local officers that he would thereby acquire a preference right of entry of said lands in accordance with said act of March 28, 1908. Upon the filing of the resurvey plat his preference right attached accordingly, and he thereupon acquired, subject to the timely exercise of such right, such interest in said lands, by reason of his prior occupation and improvement thereof in accordance with law, as entitled him to make entry of same and perfect title thereto under the desert land law, of which interest he cannot be deprived except by his own default in complying with law or by a valid withdrawal of said lands for government uses. As stated in the analogous case of William Boyle (38 L. D., 603):

His settlement under a law inviting it to be made on unsurveyed land gave him right to acquire the title subject only to its being taken by the government for its own use.

This application should, therefore, have been submitted to the Reclamation Service in accordance with the instructions contained in said decision in the case of Charles G. Carlisle, *supra*.

However, in view of statements made in the appeal that these lands are not needed for any government purpose, that lands in the vicinity similarly situated have been restored and desert land entry thereof made, and that he had made valuable improvements on these lands



each year since May, 1908, the Department asked the Director of the Reclamation Service to report as to said statements relative to withdrawal and restoration of said lands.

On June 9, 1911, the Director reported that said lands are shown by the records and information at hand to be three miles east of and at a somewhat greater elevation than the main canal of Water District No. 5, Imperial Valley, rendering gravity irrigation from existing canals of that system impracticable. He suggested, however, that applicant be given opportunity, as requested by him, to show that these lands are irrigable by that system and that said irrigation company is ready to undertake the delivery of water for their reclamation.

In view of the foregoing, the applicant should be called upon to file, within such reasonable time as the Commissioner may fix, such evidence as he may deem proper as to the irrigability of these lands under the Imperial Valley system. Upon such showing being made, the same should be submitted to the Director of the Reclamation Service for his further consideration and report, after which the Commissioner will take appropriate action in the premises.

The case is remanded accordingly.

## ROSEBUD LANDS—HOMESTEADS—EXTENSION OF TIME FOR PAYMENT.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., September 8, 1911.

REGISTER AND RECEIVER,

*Gregory, South Dakota.*

GENTLEMEN: Your attention is directed to the provisions of the act of Congress, approved August 17, 1911 (Public—No. 22), entitled "An act extending the time of payment to certain homesteaders in the Rosebud Indian Reservation, in the State of South Dakota," which reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who has heretofore made a homestead entry for land in what was formerly a part of the Rosebud Indian Reservation, in the State of South Dakota, authorized by the act approved March second, nineteen hundred and seven, may apply to the register and receiver of the land office in the district in which the land is located, for an extension of time within which to make payment of any amount that is about to become due, and upon the payment of interest for one year in advance, at five per centum per annum upon the amount due, and payment will be extended for a period of one year, and any payment so extended may annually thereafter be extended for a period of one year in the same manner: Provided, That the last payment and all other payments must be made within a period not exceeding one year after the last payment is due; that all moneys paid for interest as*

herein provided shall be deposited in the Treasury to the credit of the Indians as a part of the proceeds received for the lands.

Sec. 2. That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended as herein provided, will forfeit the entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited.

Sec. 3. That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this act.

In acting upon applications hereunder, you will be governed by the foregoing provisions; observing care to ascertain that the proper interest is paid, for one year in advance, before allowing an application for extension.

Very respectfully,

JOHN MCPHAUL,  
*Acting Assistant Commissioner.*

Approved:

SAMUEL ADAMS,  
*Acting Secretary.*

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**HIRAM M. HAMILTON.**

Motion for rehearing of departmental decision of March 25, 1911, 39 L. D., 607, denied by First Assistant Secretary Adams, September 9, 1911.

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**NATHAN H. PINKERTON.**

*Decided September 9, 1911.*

**RULE 72 OF PRACTICE—RECONSIDERATION OF DECISION BY COMMISSIONER.**

While Rule 72 of the Rules of Practice in terms provides that no motion for rehearing of the decisions of the Commissioner of the General Land Office will be allowed, yet said rule will not prevent the Commissioner, before appeal is taken, either on his own motion or where his attention is called to an alleged mistake or oversight, from reconsidering and correcting his decision in *ex parte* cases.

ADAMS, *First Assistant Secretary:*

This is the appeal of Nathan H. Pinkerton from decisions of the Commissioner of the General Land Office, January 16, and May 23, 1911, holding for rejection Pinkerton's application, under section 2306 of the Revised Statutes, to enter the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 27, T. 10 S., R. 13 E., The Dalles land district, Oregon, and denying a motion for reconsideration of that action upon the ground that Rule 72 of the Rules of Practice, approved December 9, 1910, does not permit the allowance of a motion for rehearing of any decision rendered by the Commissioner of the General Land Office.

Pinkerton's application is based upon the assignment of the claimed soldiers' additional right of Daniel Likes for 80 acres of land. No question is raised upon this record as to the requisite military service of Likes nor as to the fact alleged that on June 27, 1872, he

made entry for 80 acres of land, being the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 34, T. 25 N., R. 20 E., in the Independence land district, Kansas, which entry was relinquished May 14, 1873.

Ordinarily this military service and original homestead entry, together with the aforesaid assignment, would form the basis of a soldier's additional right in Pinkerton for 80 acres of land, but it appears that the land last above described lies within the indemnity limits of the grant in aid of the construction of the Missouri, Kansas and Texas railroad, and the decision of the Commissioner of the General Land Office, denying the additional right, is based upon the holding that such original entry, being of lands within a subsisting railroad indemnity withdrawal, was erroneously allowed. If such holding is well founded, there is clearly warrant for the action taken in denying an additional entry based thereon; for an entry allowed in violation of a withdrawal does not exhaust the homestead right, and a soldier's additional right can not be properly predicated thereon. But it is urged that such withdrawal did not affect this land because of the fact that the previous homestead entry of one Nicholson was still of record in the local land office at the date the order of withdrawal was received at that office, and further, that one Nott had purchased Nicholson's relinquishment of the homestead entry and had himself asserted a preemption claim to the land, which was a subsisting claim at the date of the receipt at the local land office of such order of withdrawal.

These matters were attempted to be urged before the General Land Office in a motion for review of the decision appealed from, but as it was held that such motion could not be allowed under the present Rules of Practice, consideration was not accorded, and the Department is without report as to the correctness of the allegations as evidenced by the record in the General Land Office. Under this state of facts, it is deemed advisable to remand the case for further consideration upon full statement of facts, in the light of contention advanced by counsel.

Upon the question of the Commissioner's action in refusing to entertain the motion to correct the alleged oversight, it seems not inappropriate to say that while Rule 72 of Practice in terms provides that no motion for rehearing of the decisions of the Commissioner will be allowed, yet that in a case of this character, especially in an *ex parte* proceeding, there would seem to be no reason why the Commissioner of the General Land Office should not, upon his attention being called to an alleged mistake or oversight, and before the case has been taken from his jurisdiction by appeal, reconsider and correct his decision. It is undoubtedly true that before appeal has been filed from a decision of the Commissioner, he could, on his own motion, recall any decisions theretofore rendered by him in that case and correct any errors committed therein.

**FLOSSIE FREEMEN.**

Motion for rehearing of departmental decision of May 23, 1911, 40 L. D., 106; denied by First Assistant Secretary Adams; September 11, 1911.

**INSTRUCTIONS.****WATER RIGHTS FOR STATE LAND PURCHASED ON DEFERRED PAYMENTS.**

Persons holding contracts to purchase lands from a State on deferred payments, no conveyance of title to be made to the purchasers until full payment, are entitled, if not in default and their contracts are in good standing, to subscribe for and purchase water rights under the reclamation act for irrigation of such lands, subject to the provisions and limitations of that act.

*Acting Secretary Adams to the Commissioner of the General Land Office, September 11, 1911.*

Attention of the Department has been called, by letter of the Director of the Reclamation Service, August 26, 1911, to the fact that a large part of the irrigable land in the Minidoka Project is State land, sold to purchasers on contracts for deferred payments extending through eighteen years, no conveyance of title being made to the purchasers until full payment has been made. The question has arisen whether such purchasers are entitled to obtain water rights before they have fully paid for their lands and obtained deeds from the State.

A purchaser of lands upon deferred payments is the equitable owner of the land so long as he is not in default of payment. What the United States desires is a speedy development of the irrigation projects, in order that the Treasury may be reimbursed for the reclamation expenditures at the earliest reasonable time. You will therefore instruct the local land office that purchasers of such lands having contracts in good standing—that is to say, not in default—will be permitted to subscribe for and purchase water rights for irrigation of the lands they hold under such contracts, subject, of course, to the limitation of the reclamation act that not more than one hundred and sixty acres shall be irrigated for one purchaser or owner, and such purchaser must comply otherwise with the reclamation act in respect to residence and cultivation. Any instructions or regulations contrary hereto will be disregarded.

A copy of this letter is sent to the Director of the Reclamation Service for his information.

**EAST TINTIC CONSOLIDATED MINING CLAIM.**

*Decided September 11, 1911.*

**LODE MINING CLAIM—DISCOVERY:**

To constitute a valid discovery upon a lode mining claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, possessing in and of itself a present or prospective value for mining purposes.

**LODE MINING CLAIM—DISCOVERY:**

The exposure of substantially worthless deposits on the surface of a lode mining claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof.

**ADAMS, *First Assistant Secretary:***

April 12, 1909, the East Tintic Consolidated Mining Company filed application for patent, Serial No. 03220, to the Great Eastern Nos. 1 to 8, inclusive, Great Eastern Fraction No. 1, Snowbird, September, East Fraction, Kidnapping, Sunbeam Nos. 1 to 4, inclusive, Great Irish Change, and September Fraction lode mining claims, Surveys Nos. 5740 and 5883, situate in T. 10 S., R. 2 W., S. L. P. M. M., Salt Lake City land district, Utah. After due publication and posting of the notice of said application, mineral entry was allowed for all of said claims except the Great Eastern Fraction No. 1, Sunbeam No. 4, Great Eastern No. 8, East Fraction and Kidnapping.

Upon consideration of the case, the Commissioner of the General Land Office, by decision of March 20, 1911, found that the only showing as to discovery of mineral upon any of the claims embraced in the entry consisted of a statement in the application to the effect that the claims bore "gold, silver and other precious metals," and deeming this insufficient to establish discovery within the limits of each of the claims, directed attention to the concluding portion of paragraph 41 of the Mining Regulations, and instructed the local officers to inform the claimant that compliance therewith would be required. He also held that two Keystone drill holes situated upon the Great Eastern No. 6 claim, an undivided one-seventh of whose total cost (given as \$3,527) was sought to be accredited in satisfaction of the \$500 expenditure for patent purposes required by law, to that and the September, September Fraction, Great Irish Change, and Great Eastern Nos. 1, 2 and 7 claims, were not acceptable as common improvements for their benefit, and directed that the claimant be notified that he would be required to show that other and satisfactory improvements had been made upon or for the benefit of the September, September Fraction, and Great Eastern Nos. 1, 2 and 7 claims, the remaining two of the seven locations having otherwise sufficient available patent expendi-

tures. Thirty days from notice was allowed claimant within which to make the showing required, and it was stated by the Commissioner that to the extent default should be made in complying with the requirements, or to appeal, the entry would be canceled.

Notice of this decision was duly served upon the claimant. From so much thereof as challenged the availability and sufficiency of the drill holes as common improvements for the benefit of the claims to which their cost was sought to be accredited, the company appealed. At the same time, and apparently with a view to showing a valid and sufficient discovery upon each of the several claims of the group, the claimant submitted the affidavit of B. F. Tibby. This affidavit, omitting the formal portions thereof, reads as follows:

Benj. F. Tibby, whose post office address is Salt Lake City, Utah, being first duly sworn according to law, deposes and says that he is, by occupation, a civil and mining engineer.

That at the instance and request of the East Tintic Consolidated Mining Company he surveyed for patent and made an examination of the ground embraced within the Great Eastern Nos. 1, 2, 3, 4, 5, 6, & 7, Sunbeam Nos. 1, 2, & 3, Great Irish Change, September, September Fraction, and Snowbird lodes, Surveys Nos. 5740 & 5883, known as Mineral Application No. 03220, and situate in Unorganized Mining District, Utah County, State of Utah.

That each and every one of said claims is based upon a discovery of mineral bearing rock in place, in iron-stained rhyolite or in quartz or iron croppings, such as in this locality is recognized as being indicative of pay mineral, and that with development may lead to a pay mine of gold, silver, lead, iron or copper; said indications being of the same general character as are found on adjoining mining claims throughout said district that are producing ore of such values as to justify a prudent person in the expenditure of money in the actual development of these claims by reason of such showing.

That small quartz veins, stringers or seams, due to fissuring of the rhyolite capping, are disclosed on the surface of each of said locations, and assays taken from these seams or veins show values varying from a trace to \$10.00 per ton in gold, silver and iron.

A few tons of ore have been shipped from the tunnel on the Great Irish Change Lode to test for fluxing purposes, bringing, however, only a small return, the exact figures of which are not available, otherwise no ore has been marketed, and ore in shipping quantities and quality is not now being produced, but the affiant believes from the showing of these seams and croppings, due apparently to the fissuring of the rhyolite, and from his knowledge of the geological conditions of the district, that with development into the ore bearing limestone beneath, ore will be found in commercial quantities.

The surface of the said claims contains no timber of commercial value. There is no water course through or upon said claims, and the land embraced is essentially mineral in character and useless for agricultural purposes.

In a report by a special agent of the General Land Office it is stated that on the Sunbeam No. 2 there are some deposits of iron ore of good quality, which had been worked to some extent in the past, and that iron float and iron ledges are frequently encountered on the ground embraced in the entry.

The foregoing, together with the formal statement made in the notice of location of each of the several claims, to the effect that the location is made on a "lode, vein, or deposit, bearing gold, silver and other precious metals," comprises all that is contained in the record relating to this entry, which is regularly before the Department, and presumably complete, that tends in any degree to show a discovery of mineral upon any of the claims.

To entitle an applicant to enter and receive patent for a location made under the lode mining laws, it is required by paragraph 41 of the Mining Regulations, approved March 29, 1909 (37 L. D., 728, 766), that—

The vein or lode must be fully described, the description to include a statement as to the kind and character of mineral, the extent thereof, whether ore has been extracted and of what amount and value and such other facts as will support the applicant's allegation that the claim contains a valuable mineral deposit.

To the same effect, also, is the decision of the Department in *Silver Jennie Lode* (7 L. D., 6), wherein it was held (syllabus) that—

Evidence as to the discovery of the alleged vein or lode should be furnished showing the place where, and when such discovery was made, the general direction of the lode or vein, and all the material facts in relation thereto; and such evidence should be clear and positive and based on actual knowledge and the witnesses' means of information be clearly set forth.

By the term "vein or lode," as used in the foregoing, the Department is not to be understood as having had in mind merely a typical fissure or contact vein, but, rather, any fairly well defined zone or belt of mineral-bearing rock in place.

It is evident from the record before the Department that the deposits alleged to have been exposed on these claims are regarded by the applicant as possessing practically no economic value, but that, on the other hand, title to the claims is sought essentially on account of their possible value for certain unexposed deposits supposed to exist at considerable depth beneath the surface, and having no connection, so far as shown, with any deposits appearing on the surface. The exposure, however, of substantially worthless deposits on the surface of a claim; the finding of mere surface indications of mineral within its limits; the discovery of valuable mineral deposits outside the claim; or deductions from established geological facts relating to it; one or all of which matters may reasonably give rise to a hope or belief, however strong it may be, that a valuable mineral deposit exists within the claim, will neither suffice as a discovery thereon, nor be entitled to be accepted as the equivalent thereof. To constitute a valid discovery upon a claim for which patent is sought there must be actually and physically exposed within the limits thereof a vein or lode of mineral-bearing rock in place, pos-

sessing in and of itself a present or prospective value for mining purposes; and before patent can properly be issued or entry allowed thereon, that fact must be shown in the manner above stated.

The showing made by the claimant in the present case, even if it be regarded as supplemented by the report of the special agent, above referred to, is manifestly too vague, general and indefinite to warrant its being accepted as fulfilling the requirements above set forth, or as establishing the existence of a valid discovery of mineral upon any particular one or more of the claims embraced in the entry. For this reason, therefore, and aside from any other consideration, the entry, in its entirety, will be canceled.

### AMBERS v. BJERKE.

*Decided September 15, 1911.*

#### PRACTICE—CONTEST—BURDEN OF PROOF.

Where an entryman is shown, in a contest proceeding against his entry, to have been in default as to residence prior and up to the filing of the contest affidavit based upon such default, and to have thereafter resumed residence prior to service of notice of such contest, the burden is upon the contestee to show that such resumption of residence by him was not induced by such contest and was in good faith.

#### PRACTICE—DEMURRER TO EVIDENCE—HEARING.

A party who chooses to abide by his overruled demurrer to his opponent's evidence is not entitled to further hearing.

#### ADAMS, *First Assistant Secretary*:

Appeal is filed by Martin J. Ambers from decision of October 10, 1910, of the Commissioner of the General Land Office, reversing that of the local officers and dismissing the contest, on the charge of abandonment, filed by said Ambers against the homestead entry made by John H. Bjerke on November 26, 1904, of the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 32, T. 141 N., R. 75 W., 5th P. M., Bismarck, North Dakota, land district.

The contest affidavit herein, dated November 10, 1909, was filed November 17, 1909, notice issued thereon November 29, 1909, and was served personally on the entryman December 8, 1909, at Driscoll, North Dakota.

Hearing was had January 19, 1910, at which both parties were present with counsel. The contestant presented the testimony of five witnesses, who were cross examined by the contestee. The latter demurred to such testimony, and his demurrer being overruled he rested the case thereon, and the local officers thereupon found and held that "claimant made only a pretense of residence and wholly failed to comply with the law. Allegations in affidavit of contest are fully sustained."

The testimony presented tends to show cultivation of seventy-seven acres of this land, and raising of a considerable crop therefrom, by



others than the entryman, on shares, for several years prior to the hearing, that there were no other improvements on the land except a small house, 10 by 12 feet, poorly furnished, and a dry well, and that the entryman was seen on the land occasionally, only, up to November 22, 1909, when he apparently for the first time took up his permanent residence thereon, remaining there since.

The entryman appears to have executed on that date a power of attorney, appearing in the record, appointing his present attorneys as his attorneys in "the contest involving homestead entry No. 29441," which is this entry. It does not appear when this power of attorney was filed, but it was referred to in the contestant's brief in reply to the contestee's appeal from the local officers' decision.

The Commissioner, after reviewing the testimony, found that residence by the entryman was shown herein on and after November 22, 1909, and stated, referring to the decision of the Department in the case of *Norton v. Casey*, rendered January 26, 1910, unreported, that:

In the light of which decision it is held that the burden of proof rested with the contestant to show affirmatively, that the alleged default of the entryman in the way of non-residence, existed and continued up to the time of service of the notice of contest; and, further, it having been shown that the defendant had established residence before service of the notice, it devolved upon the contestant to show that such residence was so established with actual knowledge of the pending contest, in order to rebut the presumption that the entryman was acting in good faith, and with the intention of complying with the law, there being time in which to submit commutation proof.

So far as this contestant is concerned it is immaterial whether three months or only as many days may have intervened between the date of filing the contest affidavit and service of the notice; the presumption being as before stated; nor in the presence of such presumption, and burden of proof, can the fact that there may be with the record an appointment of attorneys for the entryman, dated November 22, 1909, authorizing the attorneys named to appear for him in a contest not identified, be considered as evidence in this case, as to the merits, or as supplying the proof which the contestant himself was bound to proffer.

Your decision is reversed, the contest dismissed, and entry held intact subject to future compliance with the law.

It is urged in this appeal that the burden of proof as to the entryman's knowledge of the contest when he took up his residence on the land on November 22, 1909, was not upon the contestant but upon the contestee, the contestant having shown default in residence prior thereto; and in support of this appeal there is filed the affidavit of one of the attorneys for contestant, corroborated by registry receipts, showing the entryman received copy of the charges made in this contest affidavit on November 20, 1909.

Where an entryman is shown, in a contest proceeding against his entry, to have been in default as to residence prior and up to the filing of the contest affidavit based upon such default, and to have

thereafter resumed residence prior to the service of the notice of such contest, the burden is upon such contestee to show that such resumption of residence by him was not induced by such contest and was in good faith.

The decision of the Department in the case of *Norton v. Casey*, referred to in the decision appealed from, is not applicable to such case, as in that case the testimony showed the entryman's resumption of residence was prior to the filing of the contest affidavit.

In the present case, the contestant presented testimony showing, unrebutted, that this entryman was in default as to residence up to the filing of the contest affidavit. The entryman has the burden of showing the *bona fides* of his conduct thereafter.

This is in accord with the Department's holding in its unreported decision in the case of *Weast v. Beattie*, rendered March 16, 1905, and referred to in this appeal, wherein the Department stated that:

Default in the matter of residence being shown, it can be cured only by the resumption of residence, without knowledge of contest, and in absolute good faith, and the burden is upon the entryman to clearly prove both the fact and the good faith of such residence.

That decision was followed by the Commissioner in the case of *Ford v. Ward*, also referred to in this appeal, and the Commissioner's decision in the latter case was affirmed by the Department October 15, 1907, unreported.

A party who chooses to abide by his overruled demurrer to his opponent's evidence is not entitled to further hearing. *Snider v. Wright* (16 L. D., 88).

In accordance with the foregoing, the Department concurs in the local officers' finding that the entryman made only a pretense of residence and wholly failed to comply with the law, and finds further that under the entryman's demurrer the entry should be canceled accordingly. The decision appealed from is therefore reversed, and the entry is hereby canceled.

W. E. MOSES.

*Decided September 16, 1911.*

FOREST LIEU SELECTION—COAL CLASSIFICATION—RESTRICTED PATENT.

The fact that land embraced in an application to make forest lieu selection under the acts of June 4, 1897, and March 3, 1905, has been classified as coal is no bar to the right of the applicant to complete his application under the provisions of the act of June 22, 1910, by taking the limited patent provided by said act, or the right to a hearing with a view to disproving such classification and establishing his right to an unrestricted patent.

ADAMS, *First Assistant Secretary*:

By decision of April 13, 1910, the General Land Office rejected the application of W. E. Moses to select, under the acts of June 4, 1897

(30 Stat., 36), and March 3, 1905 (33 Stat., 1264), lot 4 of Sec. 4 and lot 4 and SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 3, T. 56 N., R. 83 W., Buffalo, Wyoming, in lieu of land in the South Platte forest reserve, Colorado. The application was rejected for the reason that at the time of the filing of the same the land had been classified as coal land.

The classification of the land was made June 20, 1908. The application to make selection was filed October 23, 1909.

Appellant alleges that it was error to reject the application and not allow him the privilege of accepting a surface patent under the provisions of the act of June 22, 1910 (36 Stat., 583), and a hearing for the purpose of disproving the coal character of the land, as provided in said act.

If the selection in question was authorized under the act of March 3, 1905, *supra*, which does not appear from the record now before the Department, the classification of the land as coal land is not a bar to the right of the selector to complete his selection under the provisions of said act of June 22, 1910, by taking the limited patent provided by said act, or the right to a hearing with a view of disproving such classification and establishing his right to an unrestricted patent, as held in said cases cited.

The decision of the General Land Office is reversed.

### REGULATIONS.

#### ALASKA COAL LAND CLAIMS—SURVEY—WORK AND IMPROVEMENTS.

Paragraph 13 of Alaska coal-land regulations approved April 12, 1907, amended to require the surveyor in making surveys of coal claims to show the location, character, extent and value of the work performed and improvements made upon the ground.

*First Assistant Secretary Adams to the Commissioner of the General Land Office, September 26, 1911.*

On September 15, 1911, your office submitted for departmental consideration a proposed amendment to the Alaska coal-land regulations, designed to require the surveyor, in making surveys of coal claims, to show the location, character, extent, and value of the work performed and improvements made upon the ground. The amendment submitted has been redrafted and modified in certain particulars.

Paragraph 13 of the Alaska coal-land rules and regulations approved April 12, 1907 (35 L. D., 673, 676), is hereby amended so as to read as follows:

The survey must be made in strict conformity with or be embraced within the lines of the location as appears from the record thereof with the recorder in the recording district, and must be made in accordance with the regulations relative to lode and placer mining claims so far as they are applicable. The

survey must be an actual survey upon the ground. This precludes the calculation of connection with a United States mineral monument or with a corner of the public-land survey, if there be one, or of any other lines of the survey, through prior surveys, unless it is satisfactorily shown in the return that such lines were retraced and found to be correct.

The field notes, plat, and return of the surveyor must show the actual conditions existing at the time the survey is made. There should be noted all development work performed and mining improvements made by the claimant, or his assignors, such as surface work, shafts, inclines, tunnels, drifts, cross cuts, buildings, machinery, etc., and the same should be described with particularity and detail as to dimensions, character, and estimated value. All improvements must be located by courses and distances from corners of the survey, or from described points on the boundary lines. A similar showing should be made as to the work done and improvements made, if any, by parties other than the claimant or his assignors, and it should be ascertained and shown whether such work and improvements have been appropriated and utilized by the claimant.

Where it is sought to consolidate claims or locations pursuant to the act of May 28, 1908 (35 Stat., 424), each individual claim or location will be properly surveyed and the requisite showing as to work and improvements returned for each separate location included in the consolidated claim.

### FISHER v. UNITED STATES EX REL. GRAND RAPIDS TIMBER CO.

*In the Court of Appeals, District of Columbia.*

#### PUBLIC LANDS—MANDAMUS.

In the absence of a specific act of Congress to the contrary, the entire administration of the disposition of the public lands of the United States is within the jurisdiction of the Commissioner of the General Land Office under the direction and supervision of the Secretary of the Interior.

Whether a letter and telegram from a special agent of the General Land Office to the Commissioner, asking that patents be withheld for lands embraced in certain entries pending a further investigation and report on the ground of suspected fraud, followed by an order suspending action on all such entries until further order, constitute a "pending contest or protest" against the validity of the entries, within the meaning of the act of Congress of March 3, 1891 (26 Stat., 1099), providing that after the lapse of two years from the issuance of a receiver's receipt upon the final entry, "when there shall be no pending contest or protest against the validity of such entry," the entryman shall be entitled to a patent—is a question within the jurisdiction of the Secretary of the Interior to determine, on an application by such entryman for a patent after the expiration of the period of two years; and on the Secretary's refusal to issue a patent to one of such entrymen mandamus will not lie to compel its issuance.

No. 2289. Submitted October 4, 1911. Decided November 6, 1911.

Hearing on an appeal by the respondent, the Secretary of the Interior, in a mandamus proceeding from a judgment of the Supreme Court of the District of Columbia directing the issuance of the peremptory writ of mandamus commanding the respondent to issue a patent to the relator for certain public land.

*Reversed.*

The Court in the opinion stated the facts as follows:

This case is here on appeal from a judgment of the Supreme Court of the District of Columbia directing that a peremptory writ of mandamus issue commanding the Secretary of the Interior of the United States to issue a patent to the appellee company for certain lands claimed to have been acquired from the United States under the homestead law.

It appears that on November 10, 1902, a receiver's receipt, No. 7754, was issued by the receiver of the Oregon City Land Office, Oregon, to one Stump upon the final commuted homestead entry for a certain tract of land within what was formerly known as the Siletz Indian Reservation. On February 12, 1903, Stump conveyed the land by warranty deed to one Morley, who conveyed it to the appellee company.

On November 4, 1903, Special Agent Hobbs of the Land Department of the United States sent a telegram to the Commissioner of the General Land Office as follows: "Please cause the further issuance of patents on lands in the original Siletz Indian Reservation stopped. These proofs on cash entries are practically all fraudulent." This was followed by a letter on November 11, 1903, in which Hobbs called attention to a large number of entries made in the Oregon City office, with the following statement and recommendation:

It will be seen that seventeen of the foregoing entries were made on the same date, viz. July 21, 1902, in the same township and range and in the same locality. That the remaining four entries of the list herein, were made for lands in the near locality of these other entries, and that the entire twenty-one entries, were sold at or near the date of the cash entry certificates. In view of this fact, it is reasonable to believe that these entries were not made in good faith by the entrymen for the purpose of making homes thereon, and as these lands are all in a district that is heavily timbered, it seems evident that the purpose is to acquire these timber lands in the interest of the transferee Mr. Morley, under cover of the homestead law. I suggest that no patents be issued for any of the lands embraced in the foregoing entries, pending a further examination and report, relative to the same.

On the strength of this information the Secretary of the Interior, on November 14, 1903, issued an order directing the Commissioner of the General Land Office to suspend action on all commuted homestead entries in five [*sic.* should be fifteen] townships designated therein in the former Siletz Indian Reservation, until further order. The lands here in controversy were included in the order.

It appears that the communications from Hobbs were in response to an investigation instituted by the Secretary of the Interior in March, 1903, based upon a letter from one Brown, agency clerk at the Yakima Indian Agency, Fort Simcoe, Washington, to the effect that it was the practice on the Siletz Indian Reservation for the

entryman to visit the land before filing and once every six months thereafter, remaining on the land overnight during each visit, and spending the balance of his time at his home and about his usual occupation; that it was rarely the case that any member of the family, except the father, came upon the land; that no home was established upon the land, or improvements made or household effects brought thereon, and that upon acquiring title the entryman seldom ever visited the land again.

*Mr. Charles W. Cobb*, Assistant Attorney-General, *Mr. F. W. Clements*, First Assistant Attorney, and *Mr. C. E. Wright*, Assistant Attorney, Interior Department, for the appellant.

*Mr. Duane E. Fox* and *Mr. Frank B. Fox* for the appellee.

Mr. Justice VAN ORSDER delivered the opinion of the Court:

The case, as presented, turns upon the interpretation to be placed upon the proviso to section 7 of the act of Congress of March 3, 1891, 26 Stats. L., 1099, as follows:

*Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuance of a patent therefor.

The court below sustained the contention of counsel for appellee, and entered an order peremptorily commanding the Secretary of the Interior to deliver to the relator a patent for the lands in controversy, and to recall, vacate, revoke and erase "any and all orders, marks, notations canceling or holding for cancellation, or purporting to cancel or hold for cancellation, said receiver's receipt numbered 7754 and the entry evidenced thereby." The writ was issued upon the ground that this is a statute of repose, a limitation alike upon the Government and all private protestants or contestants, and that the letter and telegram of Hobbs and the order of the Secretary were not sufficient to constitute a pending protest at the expiration of two years from the issuance of the final receipt, and that nothing therefore remained for the Secretary to do but to perform the mere ministerial duty imposed by the statute of issuing the patent.

The order of the court is assailed by counsel for the Government on the ground that the statute does not operate as a limitation upon the Government, and that the letter and telegram of Hobbs and the order of the Secretary constituted a valid pending protest at the

expiration of two years from the issuance of the final receipt. In our view, it is unnecessary to consider either of these assignments, as the appeal can be disposed of on appellant's fifth assignment of error, to wit:

We think the court erred because it failed to recognize and to hold (and hence refuse the writ) that the matters sought to be controlled by this writ are within the exclusive jurisdiction of the Secretary of the Interior, that they involve the exercise of judicial discretion, and that the ruling of the Secretary, that there was a protest or contest, filed within the statutory period, is conclusive upon the courts and not subject to direct review in judicial proceedings of this character.

In the absence of any specific act of Congress to the contrary, the entire administration of the disposition of the public lands of the United States is within the jurisdiction of the Commissioner of the General Land Office, under the direction and supervision of the Secretary of the Interior. *Nesqually v. Gibbon*, 158 U. S., 155. It will be conceded that well within the two years, proceedings had been instituted in the Interior Department looking to an investigation of the alleged fraud in the procuring of the final receipt. These proceedings formed the basis of a justiciable action, with the Government on one side and the holder of the receipt on the other. Whether or not the letter and telegram constituted a protest within the terms of the statute was a matter calling for a decision on the part of the Secretary of the Interior, the same as is required in passing upon the sufficiency of the pleadings in any controversy arising before him. In the determination of this question, the Secretary may have been mistaken in holding it sufficient to constitute a technical protest within the rules and precedents of the Land Department, but any attempt on our part to review his action in this proceeding would be to convert a writ of mandamus into a writ of error. It was within his jurisdiction to determine the sufficiency of the protest, or whether it, in fact, constituted a protest at all; and, having decided that it did, it is beyond our power to review his decision.

It is well settled that when the performance of a plain official duty, not requiring the exercise of discretion, is enjoined by law upon an executive officer of the Government, and performance is refused, a writ of mandamus will issue to compel its performance at the instance of any person who can show that he has been injured by such refusal. If, in the present case, nothing had been pending at the expiration of the two years from the issuance of the final receipt, and the Secretary had arbitrarily refused to issue a patent, we would have a very different case. But here, at the expiration of the limitation fixed by law, a case was pending challenging the right of the grantee of the entryman to a patent. It will not do in this

proceeding to say that it did not amount to a protest under the law. That was for the Secretary to decide. There is no way open for us to determine this question without exceeding our jurisdiction and reviewing the lawful acts of the Secretary of the Interior in the due exercise of his authority to administer the laws relative to the disposition of the public lands of the United States.

While it is true that arbitrary power resides nowhere in our system of government, and while the supervisory authority vested in the Secretary of the Interior and the Commissioner of the General Land Office over the disposition of the public lands is neither unlimited nor arbitrary, yet the question here presented as to whether or not the communications and order amounted to a protest, which we regard as exceedingly close, was one clearly within the power of the Commissioner to decide. To say that he was mistaken would require us to review a matter exclusively confided by law to his discretion and judgment. This proceeding will not admit of such a review.

The judgment is reversed with costs, and the cause is remanded with directions to vacate the order and dismiss the case.

*Reversed.*

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### FRANCISCO ALDERATE.

*Decided October 2, 1911.*

#### HOMESTEAD FINAL PROOF—NOTICE OF INTENTION TO SUBMIT.

Where the notice of intention to submit proof upon a homestead entry stated that commutation proof would be offered and the entryman submitted final five-year proof thereunder republication of notice will be required.

#### ADAMS, *First Assistant Secretary*:

Francisco Alderate has appealed from decision of April 18, 1911, by the Commissioner of the General Land Office, requiring republication of the notice of intention to make final proof upon his homestead entry from the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 18, E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 19, T. 5 N., R. 8 E., Santa Fe, New Mexico, land district.

Said entry was made February 6, 1909, and final five-year proof was submitted October 25, 1910. The public notice was to the effect that final commutation proof would be offered. A copy of the notice of intention to submit proof was transmitted to the chief of field division for the purpose of offering any protest or objection, if any reason therefor appear. The chief of field division stamped upon the copy of the notice sent to him the following: "No protest against the validity of this entry." This report, however, is without significance because the said copy stated that final commutation proof



would be offered, whereas five-year proof was offered, as the entryman claimed residence long prior to the date of the entry.

The Commissioner held that said notice was insufficient to give the proper information as to the nature of the proof which would be submitted.

The rules require that a homestead entryman applying to make proof state whether he will offer commutation or five-year proof and the form-blanks are prepared for the insertion of "five-year" or "commutation" as the case may be. The Department is of the opinion that this is an important requirement and no reason is seen for waiving same in this case. The mistake seems to have been that of the claimant or his agent, the United States commissioner to whom he presented the application.

The decision appealed from is accordingly affirmed.

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## OPENING OF NATIONAL FOREST LANDS—PUBLICATION OF NOTICE.

### NOTICE TO PUBLISHERS.

DEPARTMENT OF THE INTERIOR,

*Washington, October 4, 1911.*

The act of June 11, 1906 (34 Stat., 233), requires that the opening of national forest lands thereunder shall be advertised for not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated, except where no newspaper is published in the county wherein the land is situated, in which case the opening should be advertised in the newspaper nearest the land.

Therefore, publishers, before commencing publication of notices under the above-designated act, should determine whether their paper is the proper one in which to make such publication; if not, they should immediately return the notice to the register of the local land office so that publication may be ordered in the proper county and paper.

Publishers are hereby notified that if by mistake of Land Office officials, or for any reason, notices above described should erroneously be sent to them and they should publish the same, no compensation will be allowed therefor.

SAMUEL ADAMS,  
*First Assistant Secretary.*

## F. A. HYDE ET AL.

Decided October 6, 1911.

## SURVEY OF PUBLIC LANDS.

The United States makes its own surveys and its public lands are not surveyed until the plat of the field work has been in due form approved.

## FOREST LIEU SELECTION—UNSURVEYED LANDS.

Nonoccupied, nonmineral public lands of the United States are subject to the exchange provisions of the act of June 4, 1897, whether surveyed or unsurveyed; but a selection of unsurveyed lands, which designates them as what will be, when surveyed, technical subdivisions of specified sections, but which does not identify the selected land in law or in fact, is not such a selection as may be approved by the Commissioner of the General Land Office upon proof of nonoccupancy and nonmineral character.

## FOREST LIEU SELECTION—UNSURVEYED LANDS—SETTLEMENT RIGHTS.

An application to make forest lieu selection of unsurveyed lands not identified with reference to natural boundaries or monuments or such markings upon the ground as would constitute notice to intending settlers, is no bar to the attachment of rights under the act of May 14, 1880; and while approval of the township plat of survey is an identification of the lands as of the date of such approval, and, by relation, as against the government, as of the date of the filing of the application, it does not and can not so attach as to cut out intervening adverse settlement claims.

## PROOF OF NONOCCUPANCY AND NONMINERAL CHARACTER.

The proof of nonmineral character and nonoccupancy required to support an application to make forest lieu selection can not be completed, where the lands applied for are unsurveyed, until approval of the township plat of survey, unless they are identified in fact; and such proof, when furnished after identification by survey, should relate to present existing conditions as to the nonmineral character of the land, but it is sufficient if the proof of nonoccupancy relate to the date of such identification.

*ADAMS, Acting Secretary:*

This case is before the Department upon a duly entertained motion on behalf of the L. E. White Lumber Company, intervener, as transferee of F. A. Hyde, for review of departmental decision herein of September 21, 1911, which affirmed a decision of the Commissioner of the General Land Office, July 29, 1911, requiring further proof in support of selections Nos. 395, 176, 170 and 17, San Francisco series, proffered August 25 and 26, 1898, by the said F. A. Hyde, under the act of June 4, 1897 (30 Stat., 11, 36), for certain lands, more particularly hereinafter described, lying in T. 13 N., R. 16 W., M. D. M., San Francisco land district, California.

At the time these proffers were made that portion of the township here in question had not been surveyed and such proffers did not describe the desired land by metes and bounds or by reference to natural monuments or objects, but by designation of what it was surmised would be, when surveyed, certain technical legal subdivisions of that township. Notwithstanding this wholly insufficient

description for purposes of identification, certain pretended proofs were filed in support of the selection, intended to show, among other things, that the selections embraced only "vacant land open to settlement" within the meaning of the act. After consideration of these so-called proofs the proffers were all accepted and the selections approved for patent by the Commissioner of the General Land Office, October 31, 1899.

The plat of the survey of that portion of said township 13 N., R. 16 W., wherein these lands lie, was approved May 19, 1902. Thereafter numerous protests and contests were filed by alleged settlers against the patenting of the selections, and inquiry and investigation by the land department as to these settlement claims delayed the adjustment of the selections to the lines of the public survey, but such adjustment was made at various dates, parts of the selections being canceled for conflict with certain prior settlement claims, so that as finally adjusted the tracts covered by the respective selections stand described as follows:

- L. S. 395 (03345), covers lots 5 and 6, SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 3; SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$  and lots 5, 6, 7 and 8, Sec. 2; E.  $\frac{1}{2}$ , Sec. 10; all of Sec. 11; W.  $\frac{1}{2}$  and W.  $\frac{1}{2}$  E.  $\frac{1}{2}$ , Sec. 12; N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 13; NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 14.
- L. S. 176 (03966) covers fractional E.  $\frac{1}{2}$  E.  $\frac{1}{2}$ , W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 1, and fractional NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 12.
- L. S. 170, covers lots 6, 7 and 10, Sec. 1.
- L. S. 171 covers lots 2, 3 and 4, Sec. 12; all in said township 13 N., R. 16 W.

The act of June 4, 1897, *supra*, provides:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

In said decision of July 29, 1911, the Commissioner of the General Land Office, after reference to the fact of the aforesaid individual contests and to the fact of their insufficiency and futility, took up for examination "the papers on file in the several selections," noted that it appeared "that the only showing made as to the character and condition of the tracts applied for is the affidavit of one Henry W. Bowen, dated September 22, 1898, and filed with the application

in L. S. 395 (03343) and which it appears was intended to cover the land involved in the above selections," held that the showing so made "is vague and ambiguous and does not comply with the requirements of the law pertaining to forest lieu selections under the act of June 4, 1897," nor with the circular issued thereunder July 7, 1902, and required the selector, upon the authority of *Bakersfield Fuel and Oil Co. v. Saalburg* (31 L. D., 312), "to furnish a new affidavit by some one having actual personal knowledge of the facts showing the land applied for to be now nonmineral and nonsaline in character and unoccupied adversely to the selector, in accordance with form 4-061a, or its equivalent," and that "no rights having heretofore attached by reason of the said defective application, the selector, in addition to furnishing the affidavit above indicated, is required to publish and post notice of the selections in accordance with provisions of circular of February 21, 1908, no posting or publication having heretofore been made."

The oral argument accorded counsel in support of the motion for rehearing and the briefs since filed in that behalf, takè broad range. Counsel have assumed that said decision of the Commissioner of the General Land Office and that of the Department affirming it, required a showing as a present fact that the land in question is not occupied adversely. The Department, at first impression, was not inclined to take this view of these decisions, but close analysis constrains the admission that such was their necessary effect.

Again, the Department must admit that the requirement of posting and publication made by the Commissioner in retroactive application of the circular of February 21, 1908, was unwarranted. *A. J. Harrell* (29 L. D., 553). That requirement, based upon a circular of instructions promulgated nearly ten years after these selections were proffered, can only be defended upon the ground that the selections were and are wholly void for all purposes, a proposition to which the Department can not give its assent; and while said departmental decision in affirmance of the Commissioner carries with it such assent and approval, it is but fair to say that the failure of counsel to file a brief upon the appeal calling this matter to the attention of the Secretary was in part responsible for the oversight in not correcting the error. In so far, therefore, as said decision laid a rule upon the selector to post and publish notice of the submission of such further proof as may be hereinafter required, it is hereby recalled and vacated, as unwarranted.

Upon the whole case it was earnestly and forcefully contended that the selector at the date of the proffer of exchange complied with the law which extended the invitation and with all the conditions of its acceptance; that he conveyed lands to the United States, to which he

had complete title, in a forest reservation; that the United States approved his abstract of title, accepted the conveyance, and now owns these lands; that the lands selected do not exceed in area the lands relinquished; that they were and are nonmineral lands; that they were at date of selection not occupied under any public land law, and that they were, therefore, at that time, in truth and in fact, "vacant land open to settlement;" that the selector filed certain proofs of these facts which were considered by the Commissioner of the General Land Office and that that officer rendered an adjudication thereon, and in accordance with regulations and uniform practice of the land department approved these selections for patent; that intervener, relying upon the integrity of these proceedings, was induced to part with a large sum of money in purchase of this right, title, and claim; and that, therefore, the selector and his transferee in law and under recognized principles of just administration acquired a vested interest beyond the power of the Government to disturb; and that while intervener on behalf of the selector is willing to submit such further additional proofs as to the present nonmineral character of this land or as to the fact that it was unoccupied at date of proffer of the selections, further requirement of proof of non-occupancy as a present fact, would be in ruthless disregard of vested rights and result in practical confiscation of their property.

It will not be necessary to consider these specifications seriatim. The argument overlooks the fact that not only at the date the proffer of exchange was made but at the dates covering the entire time to which it refers for foundation of fact, the lands in question were unsurveyed; that they were subject to selection under the act of June 4, 1897, *supra*, need not at this late day be discussed. Upon that question the practice and decisions of the land department and the courts have been uniform. But they could not be patented before survey, and until that time they belonged to the great body of unsurveyed public domain made subject to settlement by any qualified homesteader by the act of May 14, 1880 (21 Stat., 140).

The act of 1897, *supra*, did not supersede said act of May 14, 1880. It did not provide for the withdrawal of such lands from settlement. This could only have been effected under proffers of the character here involved, by marking the land selected upon the ground, or by reference to such natural boundaries or monuments as would have been notice in fact or in law to intending settlers. A reference to lands as what will be, when surveyed, a technical subdivision of a specified section, gives no such notice either in law or in fact. So it results that until the approval of the survey such settlers had no notice and no means of acquiring information which would have enabled them to avoid conflicts with these selections. It follows that

any proof of non-occupancy was valueless. No person could have known in fact that what would be a particular subdivision of the public land when surveyed, was then unoccupied, and the fact that certain portions of this same township had theretofore been surveyed does not, for manifold reasons, weaken this plain conclusion. Upon this question it has not been thought necessary to verify objection of counsel that there were at the time of these selections other proofs of non-occupancy, consisting in part of an affidavit (not now in the record) other than that made by the said Henry W. Bowen, which was on file in still another of the Hyde selections; nor to give any weight to the record fact called specially to the attention of the Department since the oral hearing that the selections themselves show that the complete survey of this township had theretofore been made in the field.

As to the missing affidavit, assuming that it was properly in the record and that it purported all that is claimed for it, still in the view now taken of this case this affidavit proved nothing. The same is true of the recital in the selection itself. It was a coincidence only that the lines of the survey upon the ground and the description given by the selector of these technical subdivisions, were the same which received official recognition by the approval of the township plat. Such was not a necessary result. True, this coincidence was anticipated, but in law the case is the same as if that field survey had been rejected in its entirety and a new survey made upon other lines.

This being true, it was not possible in law for the Commissioner of the General Land Office to say that sufficient, or any, proof of this question had been presented, or that the selector would upon survey be entitled to a patent. That officer erred in so ruling. There was a total absence of jurisdictional facts upon which to base such ruling, and the selector took nothing thereby and his assignee is chargeable in law with this lack of jurisdiction and occupies no better position.

The Department has not overlooked the fact and is not disposed to evade the argument that in this view such a selector of unsurveyed land would have no reasonable assurance that he would in any case be able to complete title thereto. But the answer is plain. A person owning land within the limits of a public forest reservation was not bound to relinquish it to the Government. He might still own, hold, and enjoy it. He was not bound to accept the invitation extended by that act to make such relinquishment, but when he did so he was bound, not only by the terms of the act but by the limitations upon its benefits imposed by other laws. He might have selected surveyed public lands of the United States, vacant and open to settlement, and upon proof of their nonmineral character and non-occupancy concurrent in time with the selection, he might have completed title thereto

without delay; but if he selects unsurveyed lands it is a matter of his own choice and made at his own risk. It may be that the risk might have been reduced to the minimum by such description in making the selections as would have identified the lands as a then present fact, but where such identification was not made the selector necessarily takes the risk of their being or becoming occupied adverse to his selection before the approval of the township plat of survey, which, no matter what may be the application of the doctrine of relation in such cases, is the first identification of such land. Such identification previous to that time was not possible, either by the unofficial protraction of the lines of subsisting public surveys, or by a private survey of any character. The United States are sovereign and the sovereign makes his own surveys. See *United States v. Montana Lumber & Manufacturing Co.* (196 U. S., 573), and cases therein cited.

The mere fact that the act provides for the selection of vacant land open to settlement is conclusive upon this proposition. If it were not open to settlement, it was not subject to selection; but being subject to selection it was still, unless identified in fact, open to settlement under the act of May 14, 1880, *supra*, and might be under the provisions of that act appropriated adversely to the selector at any time before the approval of the township plat of survey. Such approval was an identification of the land as of that date, and by relation as against the Government as of the date of the proffers of exchange, but it did not and could not so attach as to cut out intervening adverse settlement claims. This thought receives additional support in the proviso of the act relating to cases of unperfected claims upon the lands relinquished and requiring the laws respecting settlement, residence and improvement, etc., to be complied with on the new claims, credit being allowed for the time spent on the relinquished ones. In cases of this sort the selector could without fear of jeopardizing his selection make it of unsurveyed land, because he would be required to settle, reside upon and improve such unsurveyed land and this residence, settlement and improvement would be notice to the world of his claim which would fully protect him until the filing of the township plat of survey, when he would be permitted to make entry thereof and complete title under the further terms of said act.

It results that until May 19, 1902, the date of the approval of the township plat of survey, no proof could have been offered by or on behalf of the selector which the Commissioner of the General Land Office was authorized to receive or upon which he was justified in making an adjudication, and in final analysis no such adjudication has been made.

Shortly thereafter, to wit, on July 7, 1902 [31 L. D., 372], the Department adopted regulations upon the subject of these selections, section twenty-one of which prescribes that—

The affidavit to support a selection based upon the relinquishment of land covered by a patent or by a patent certificate, must be made by the selector or by some credible person possessed of the requisite personal knowledge in the premises, and must be filed with and as a part of the selection. This affidavit must show that the selected land is nonmineral in character; that it contains no salt spring or deposit of salt in any form sufficient to render it chiefly valuable therefor; and that it is not in any manner occupied adversely to the selector—

and by section eighteen of the said regulations that—

All papers and proofs necessary to complete a selection must be filed at one and the same time and until they are all presented no right will vest under the selection.

Inasmuch as, as has been seen, no valid proof of either the non-mineral character or the non-occupancy of these lands had been filed at the date these regulations were promulgated, they may be properly applied to the case in hand, but it does not follow that the proofs required should relate to now existing conditions, and herein lies the vice of the Commissioner's requirement.

When the plat of survey was approved, identification was complete, it only remaining as matter of administration to adjust these selections to the township plat, the law not providing respecting such adjustments. Thus was notice given to all the world of the subsisting claim thereunder, and any person who went upon said lands thereafter was charged with knowledge of the fact of such selection and claim and would not be entitled to consideration at the hands of the land department. The case became one between the selector and the Government. Thereafter the selections became as of surveyed lands and the land department might, in the exercise of a reasonable discretion, impose any conditions of proof it saw fit respecting its vacancy or nonmineral character. The regulations of July 7, 1902, were made in the exercise of that discretion. These regulations provided, as has been seen, that "all papers and proofs necessary to complete a selection must be filed at one and the same time and until they are all presented no right will vest under the selection," but they had special reference to future selections under said act. Now, it has been hereinbefore determined that the proffers of Hyde became subsisting selections upon the approval of the township plat of survey, and that prior to that time no legal proofs of nonmineral character and non-occupancy of the lands had been or under the circumstances of this case could have been filed; so, under the anomalous condition here presented the regulations referred to might with propriety have been applied to these selections, but they did not attach, and of their own force imposed no obligation upon the



selector. Up to that time he had complied with subsisting regulations upon the subject and had the right to rely upon such compliance. Therefore in the imposition of these requirements upon the selector in this case, while the land department might with perfect propriety require him to submit his proofs in form and substance as provided in the circular, it might not reasonably require proofs of non-occupancy concurrent in time with the requirement, because in the meantime the lands may have become occupied without invitation or warrant of law.

This is only true, however, upon the question of non-occupancy. Differentiation is demanded upon the question of nonmineral character of these lands. If they are mineral now they were mineral upon the proffer of these selections and at all other times covered by these proceedings, and if of that character they may not be patented under said selections. *Bakersfield Fuel and Oil Co. v. Saalburg, supra;* see also *Cosmos Exploration Co. v. Gray Eagle Oil Co.* (190 U. S., 301).

Said decision of the Commissioner of the General Land Office herein is reversed, the decision of the Department in affirmance thereof is hereby recalled and vacated, and the Commissioner of the General Land Office will require, after seasonable notice, the filing of satisfactory proofs of the present nonmineral character of said land and of the fact that it was not occupied adversely to the selector May 19, 1902.

It is noted that in the decision of the Commissioner of the General Land Office reference is made to L. S. 4650 (03759) and L. S. 168 (04455), and the fact that these selections also cover land in said township and are still pending, but that "they appear to be complete in the particulars above indicated," meaning in the particulars of satisfactory proof of non-occupancy and nonmineral character. It is not thought it will be necessary to do more than advert to these selections, but the Commissioner of the General Land Office will in the further consideration thereof conform the proceedings to the rule herein laid down.

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JOHN H. HAYNES.

*Decided October 6, 1911.*

**RECLAMATION HOMESTEADS—ACT OF JUNE 25, 1910.**

By virtue of the provisions of the act of June 25, 1910, a homestead entry within a reclamation project is not limited to the seven-year period fixed for consummation of ordinary homestead entries elsewhere on the public domain, but may be completed within the time fixed in the public notice for compliance with the requirements of the reclamation act, unless the project be abandoned, notice of which abandonment will terminate the suspension of the seven-year period, and thereafter the entry will fall within the general class of homestead entries and be governed by the general homestead laws.

ADAMS, *First Assistant Secretary*:

John H. Haynes filed motion for rehearing of departmental decision of June 30, 1911, canceling his homestead entry for NW.  $\frac{1}{4}$ , Sec. 13, T. 9 S., R. 23 W., G. & S. R. M., Phoenix, Arizona.

The land was withdrawn from all entry under the reclamation act July 2, 1902, which was modified August 26, 1902, to the second form. November 2, 1903, Haynes made entry. September 30, 1904, the land was again withdrawn under the first form. May 28, 1909, a special agent made adverse report, upon which the Commissioner of the General Land Office, August 4, 1909, ordered proceedings upon the charge that residence had not been established, and there was no cultivation of the land. Haynes applied for a hearing, which was appointed for January 20, 1910, for taking of testimony and for hearing at the local office March 28, 1910. March 29, 1910, the local office found the charge sustained and recommended cancellation of the entry. March 11, 1911, the Commissioner affirmed that action, which, on defendant's appeal, was affirmed by the Department June 30, 1911.

The act of June 25, 1910 (36 Stat., 864), provided:

That all qualified entrymen who have heretofore made *bona fide* entry upon lands proposed to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the national irrigation act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: *Provided*, That the period of actual absence under this act shall not be deducted from the full time of residence required by law.

In the departmental decision of June 30, 1911, this act was overlooked and no reference was made thereto. The entryman shows that he has contributed all his earnings above a bare living to the support of his widowed mother and six minor brothers and sisters, and has made substantial improvements upon the land; that without irrigation it was impossible to reclaim the land, though he had resided upon it and has been actually present all the time it was possible to do so, considering his natural obligations for support of his dependent relatives. He shows that at the time of his entry his intent was to obtain water from a private irrigation project—the Colorado Delta Canal Company—which was then developing a project, and might perhaps have completed it except for interference of the United States by entering upon the Yuma Project in the same vicinity, involving use of the same water. The entry is within the spirit and purpose of the act of June 25, 1910, and is entitled to its benefit.

The act of June 25, 1910, *supra*, excuses residence by homestead entrymen therein referred to "until water for irrigation is turned

into the main irrigation canals from which the land is to be irrigated," but provides "the period of actual absence under this act shall not be deducted from the full time of residence required by law." These two provisions taken together necessarily suspend running of the seven-year limitation of life of a homestead entry within a reclamation project.

As to an entry within a reclamation project, the conditions imposed by the reclamation act change many of the features of an ordinary homestead entry. It may be made for one hundred and sixty acres, but is liable to reduction to an area found by the Secretary of the Interior sufficient to support a family. No patent can issue until all reclamation charges are paid; nor until at least half the irrigable land is reclaimed. These added requirements can not be performed by the entryman, or even definitely known, until the project is completed. More than seven years after the date of entry may elapse before a reclamation project is completed, water available, and charges known. Until water is available cultivation is impossible. Any earlier attempt to cultivate would necessarily result in total loss of seed and labor. It would be irrational and unreasonable to subject the entryman to such loss in merely pretentious compliance with form of performance known to be useless and hopeless of fruitful return. Under the public notice of completion of a reclamation project charges may be and usually are distributed over a period of ten years after notice.

An entry within a reclamation project, considered in light of these features added by legislation later than that of the homestead act, especially that of act of June 25, 1910, *supra*, is not limited to the seven years period fixed for consummation of ordinary homestead entries elsewhere on the public domain, but may be completed by full compliance within the time fixed in the public notice for compliance with requirements of the reclamation act.

Should the project be abandoned, then the entry will fall within the general class of homestead entries, and the entryman must thereafter be governed by the general homestead laws after notice of such abandonment, which notice will terminate the suspension of the seven-year period of life of homestead entries.

The decision of June 30, 1911, is recalled and vacated; the proceeding is dismissed, and the entry will remain intact.

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**MARTHA J. WESTFALL.**

Motion for rehearing of departmental decision of July 31, 1911, 40 L. D., 209, denied by Acting Secretary Thompson, October 24, 1911.

## FISHER v. BALLINGER ET AL.

*In the Court of Appeals, District of Columbia.*

## PUBLIC LANDS—DESERT LANDS—EQUITY—OFFICERS—INJUNCTION.

Desert land so far reclaimed by a former entryman that in one year it produced 200 tons of hay is not subject to desert-land entry after the relinquishment of the land by such entryman.

A court of equity will not exercise its discretion and lend its aid in a case where it is clear no equity exists.

A bill in equity by the assignee of an entryman of public land against the Secretary of the Interior, who has directed the cancellation of the entry on the ground of fraud and collusion between the entryman and others, to enjoin the Secretary from proceeding further without first according the plaintiff a hearing upon the question of whether such fraud and collusion in fact existed, will not lie where it appears that, aside from such question, the land was not subject to the entry made, and that therefore the plaintiff had acquired no right thereunder from the assignor. (Citing *Garfield v. United States*, 31 App. D. C., 332.)

No. 2229. Submitted January 6, 1911. Decided March 6, 1911.

Appeal by plaintiff from a decree of the Supreme Court of the District of Columbia, in equity, No. 28,637, dismissing a bill for an injunction, etc.

*Affirmed.*

*Mr. Webster Ballinger* for the appellant.

*Mr. Oscar Lawler*, Assistant Attorney-General, *Mr. F. W. Clements*, First Assistant Attorney, and *Mr. C. E. Wright*, Assistant Attorney, Interior Department, for the appellees.

Mr. Justice Robb delivered the opinion of the Court:

Appeal from a decree of the Supreme Court of the District of Columbia, dismissing appellant's bill to restrain the Secretary of the Interior from cancelling the desert-land entry, under which appellant claims, until appellant is accorded a hearing upon the precise question determined by the Secretary and forming the basis of his decision that said entry be canceled.

The hearing before the trial court was upon bill, answer, and agreed statement of facts. The land in controversy is in the SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , the W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , and the SW.  $\frac{1}{4}$  of Sec. 2, and the NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of Sec. 3, T. 34 N., R. 110 W., Evanston land district, Wyoming, and contains 320 acres. Several years prior to 1902 one James Westfall settled upon this land, reclaimed part of it, and then deserted his family. In 1902 his son, Perry A. Westfall, made desert-land entry of part of said land, and on June 21, 1903, assigned his interest to Cordelia Helen Fisher, wife of the complainant. On August 21,

1903, William H. Allen, who had entered the residue of said tract, also assigned his interest to Mrs. Fisher. At the time of the taking of these assignments Mrs. Fisher had exhausted her right under the desert-land act by entry of 320 acres. She, however, was advised by the register of the United States land office at Evanston, Wyoming, that notwithstanding she had exhausted her personal right in the premises she could take another 320 acres by assignment. This advice was erroneous, but she acted upon it and paid about \$1,200 for the improvements and rights she was supposed to have acquired. The work of reclamation, begun by James Westfall and continued by her assignors, she supplemented by grubbing and irrigating the land, so that in 1905 about 200 tons of hay were cut thereon.

Learning that the advice of the register as to her right to take this land was erroneous and that she was disqualified to enter it, Mrs. Fisher, on July 15, 1905, relinquished said land, and her entry was canceled. Thereafter, on July 17, 1905, E. May Inkster, a cousin of Mrs. Fisher and a member of the Fisher household, made oath before complainant, as United States commissioner, to her declaration of intention to *reclaim* said land *under the provisions of the desert-land laws*. This declaration was in due form and accompanied by the required affidavits. Thereafter, on July 20, 1905, the register and receiver of the United States land office in said Evanston issued their joint certificate in regular form, certifying that said entrywoman had filed her declaration as aforesaid. Thereafter, on August 10, 1905, Miss Inkster gave notice that on September 23, 1905, she would make final proof on said land claim before complainant as United States commissioner, and on that day final proof was made, final charges paid, and on October 7, 1905, the register of said land office executed a final certificate to said land. On December 23, 1905, Miss Inkster conveyed this land to the complainant out of gratitude to him and Mrs. Fisher for providing her a home and realizing, as Mr. Fisher subsequently stated in his testimony, that the Fishers "put the money up for all the improvements."

On May 17, 1906, one William J. Alexander filed a contest affidavit at the United States land office at said Evanston, Wyoming, praying that said Inkster's desert-land entry be canceled and forfeited to the United States because "said land is not desert in character and at the time of entry was, and had been for a number of years, thoroughly reclaimed and was then producing a paying crop of hay." Thereafter, on June 10, 1907, after due notice to the parties, a hearing was had in said contest proceeding before the register and receiver of the land office at Evanston, Mr. and Mrs. Fisher being present and testifying. The decision was in favor of Mr. Fisher, and appeal was thereupon prosecuted to the Commissioner of the General Land

Office, who, upon the testimony already in the case, reversed the decision of the local land officers and in the course of his opinion said:

In her (Miss Inkster's) declaration executed July 17, 1905, before Fred C. Fisher, United States commissioner, she swore, *inter alia*, that said land has hitherto been unappropriated, unoccupied, and unsettled because it has been impossible to cultivate it successfully on account of its dry and arid condition.

If the entrywoman did not know this to be false, the officer before whom she so declared knew it to be so, as he had been irrigating and cutting hay from the land, averaging more than a ton to the acre, for the two years preceding the entry of the land by Inkster. The evidence submitted leads to the inevitable conclusion that Inkster, the entrywoman, was in collusion with the Fishers and that she made the entry with the intent to convey the title to them.

Without considering other questions presented in this appeal, it is sufficient to state that land that has been effectually reclaimed is not subject to desert-land entry (14 L. D. 194). The land embraced herein was unmistakably of that character when Inkster attempted to acquire title thereto by entering same under the desert-land laws and her attempt must fail.

An appeal was taken from the decision of the Commissioner, and the First Assistant Secretary of the Interior, in deciding that appeal, stated that the material facts in the case had been correctly recited in the decision of the Commissioner; that "with reference to the condition of the land the testimony shows that it was practically reclaimed when Miss Inkster's entry was made." The Assistant Secretary then found that Miss Inkster's "entry was made solely in the interest of Mrs. Fisher, who was not qualified to complete the entries of Westfall and Allen and that it was used as a subterfuge to accomplish indirectly what could not be done directly." He thereupon affirmed the decision of the Commissioner.

Thereafter, Miss Inkster filed a motion for review of the decision of the Assistant Secretary, assigning as one of the grounds for her motion that it was error on his part "to find fraud, conspiracy, or collusion between the entrywoman and others as no such charge was made in the contest and that question was not put in issue by the contest." This motion was overruled, the Assistant Secretary in his opinion, saying—

it is evident that Mrs. Fisher will sustain great loss because of her inability to make available her rights under the assignments of Westfall and Allen, unless she can recover from her assignors. The rights assigned to her by Westfall and Allen were valuable rights, for which a large consideration was paid, and there appears to be no material equities in her favor by reason of her expenditure of money on the erroneous advice of the Government officer, if the Department was not powerless to recognize in her any right under said assignment. But it can not be seen how she can be affected by the cancellation of this entry, except upon the theory that her relinquishment of a valuable right without compensation and the entry of Miss Inkster were designed to accomplish indirectly what could not be accomplished under her assignment.

Thereafter, a motion for re-review, accompanied by affidavits, was filed. One of those affidavits was by the complainant, who therein

stated "that had I been apprised of the fact that the contest was being prosecuted upon any ground of collusion and conspiracy with E. May Inkster, I could have completely disproved same." Thereafter, on March 25, 1909, said motion for re-review was denied.

Thereafter, on June 24, 1909, the Commissioner of the General Land Office caused to be placed upon the proper tract book in his office the notation of cancellation of said desert-land entry so made by Miss Inkster, and caused a like notation to be made upon the final certificate issued by the register and receiver upon said entry, and on the same day said Commissioner wrote to the register and receiver of the land office at Evanston, Wyoming, inclosing a copy of said decision of the Assistant Secretary of the Interior. The letter contained the following: "The entry is hereby canceled. You will allow contestant thirty days' preference right of entry." Thereafter, on June 28, this suit was filed and on the same day the Commissioner of the Land Office telegraphed the local officers at Evanston, Wyoming, countermanding the order to note cancellation of the Inkster entry and directing the return of said letter of June 24. This telegram reached the local officers before any action had been taken upon the Commissioner's letter.

After the refusal of the trial court to issue a restraining order *pendente lite*, and pending final disposition in that court, appellees directed the local land officers in Wyoming to note cancellation of the Inkster entry and permitted others to file homestead entries upon the land involved; in other words, between the filing of the bill and final hearing in the cause, the act sought to be prohibited was done. These facts were brought to the attention of the trial court by supplemental bill. Upon the final hearing, however, the court contented itself with an order denying any relief and dismissing the entire proceeding. It is here suggested that a moot case only is presented for our consideration.

Without intimating any opinion upon the other grounds suggested we are quite content to rest our decision upon the fundamental proposition that appellant has no right to complain of the refusal of the Assistant Secretary of the Interior to grant him a hearing upon the question whether there was collusion between appellant and Miss Inkster, assuming that there was such a denial, for the reason that he has no right to protect. We find it impossible to escape the conclusion from the evidence in this record that when Miss Inkster in July, 1905, filed on this land it was not desert in character, but that its condition was practically the same as it was when final proof was made about two months later. James Westfall, many years prior thereto, had settled upon and partially reclaimed this land. From 1902 down to the time Mrs. Fisher attempted to acquire the land, sufficient progress had been made towards its reclamation to induce her to pay a

considerable sum of money for the improvements thereon. Appellant's evidence in the contest proceedings shows that this work of reclamation was continued by Mrs. Fisher so successfully that the summer she relinquished the land it produced 200 tons of hay. When Mrs. Fisher relinquished the land it, of course, reverted to the public domain, and unless it was in fact desert land it was not subject to entry as such. The Commissioner of the Land Office correctly found that at that time the land had been effectually reclaimed and was not subject to desert-land entry. Appellant makes no contention that he was not accorded a hearing upon that question. That hearing demonstrated conclusively the lack of equity in appellant's claim. "The machinery of the law may always be set in motion to protect valid property rights; but here no rights exist." *Garfield v. United States ex rel. Turner* (31 App. D. C., 332). The right of the complainant in this case to the land in controversy is based upon the Inkster entry. It appearing that the land was not subject to such entry, no rights could attach thereunder. It is therefore immaterial whether the Assistant Secretary based his decision upon the finding of collusion, as a court of equity will not exercise its discretion and lend its aid in a case where it is clear that no equities exist.

The decision will therefore be affirmed with costs. *Affirmed.*

## ORDER AMENDING RULES 82 AND 83 OF PRACTICE.<sup>a</sup>

### RULES OF PRACTICE.

DEPARTMENT OF THE INTERIOR,  
*Washington.*

The rules of practice in cases before the United States district land offices, General Land Office, and the Department of the Interior, approved December 9, 1910 [39 L. D., 395, 408], are hereby amended in the following particulars:

1. Rule 82 is hereby amended to read as follows:

RULE 82. Oral argument in any case pending before the Secretary of the Interior will be allowed, on motion, in the discretion of the Secretary, at a time to be fixed by him, after notice to the parties. The counsel for each party will be allowed only one-half an hour unless an extension of time is ordered before the argument begins.

2. Rule 83 is hereby amended to read as follows:

RULE 83. A motion for rehearing of a cause by the Secretary of the Interior, together with all papers used in connection therewith, must be in writing, and must, together with evidence of service thereof on the adverse party, be filed in the General Land Office or in the local land office, for transmittal through the

<sup>a</sup> See further amendment, p. 299.



General Land Office to the Secretary, within 30 days after service of notice of the decision in said cause. A motion so filed will act as a supersedeas until further action is taken by the Secretary.

Such motion must state concisely and specifically the grounds upon which such rehearing is asked and may be accompanied by written argument in support thereof. No matters other than those specified will be considered.

The adverse party will be allowed 15 days after the service of the motion upon him in which to serve and file reply to the motion for rehearing; and immediately upon the expiration of the periods allowed herein, the Commissioner of the General Land Office shall transmit the entire record to the Secretary, who will consider the same as early as practicable.

No oral argument will be allowed on any such motion, and this rule will be strictly adhered to. If the motion be granted, the Secretary will at once proceed to dispose of the case, or, in his discretion, if the motion, or the reply thereto, has been accompanied by a request for oral argument in the event of its being granted, will set the cause down for oral argument. In any case, however, if the motion be granted, the Secretary may set the cause down for oral argument.

Rules 82 and 83, as hereby amended, will take effect and be in full force on and after December 15, 1911.

Dated this 6th day of November, A. D. 1911.

WALTER L. FISHER,  
*Secretary.*

## RULE 83, RELATING TO MOTIONS FOR REHEARING, AMENDED.

### RULES OF PRACTICE.

DEPARTMENT OF THE INTERIOR,  
*Washington, November 16, 1911.*

Rule 83 of the rules of practice in cases before the United States district land offices, General Land Office, and the Department of the Interior, approved December 9, 1910 [39 L. D., 395, 408], as amended November 6, 1911 [40 L. D., 298], is hereby amended to read as follows:

Rule 83. A motion for rehearing of a cause by the Secretary of the Interior, together with all papers used in connection therewith, must be in writing and must, together with evidence of service thereof on the adverse party, be filed with the Secretary of the Interior within 30 days after service of notice of the decision in said cause.

Said motion must state concisely and specifically the grounds upon which such rehearing is asked and may be accompanied by written argument in support thereof. No matters other than those specified will be considered.

The adverse party will be allowed 15 days after the service of the motion upon him in which to serve and file with the Secretary of the Interior a reply to the motion.

In case no such motion be filed within the period above prescribed, the record will at once be transmitted to the Commissioner of the General Land Office for execution of the judgment of the Secretary. Like action will be taken immediately after the judgment of the Secretary on any motion for rehearing.

No oral argument will be allowed on any such motion, and this rule will be strictly adhered to. If the motion be granted, the Secretary will at once proceed to dispose of the case, or, in his discretion, if the motion, or the reply thereto, has been accompanied by a request for oral argument in the event of its being granted, will set the cause down for oral argument. In any case, however, if the motion be granted, the Secretary may set the cause down for oral argument.

Rule 83, as hereby amended, will take effect and be in full force on and after December 15, 1911.

Dated this 16th day of November, A. D. 1911.

SAMUEL ADAMS,  
*Acting Secretary.*

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**FRANK L. CHAMBERS ET AL.**

Motion for rehearing of departmental decision of May 16, 1911, 40 L. D., 85, denied by First Assistant Secretary Adams November 14, 1911.

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**MERTIE C. TRAGANZA.**

*Decided November 17, 1911.*

**PROVISO TO SECTION 7, ACT OF MARCH 3, 1891—PROCEEDINGS BY GOVERNMENT.**

The proviso to section 7 of the act of March 3, 1891, has no reference to proceedings by the United States, or its officers or agents, in respect to entries of the classes therein specified, and in this connection does not affect the conduct or action of the land department in taking up and disposing of final proof of entrymen after the lapse of the two years mentioned in the act.

*ADAMS, First Assistant Secretary:*

September 9, 1902, Mertie C. Bell, now Traganza, made homestead entry for SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Section 19, and SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Section 20, T. 9 N., R. 14 E., M. D. M., Sacramento, California, on which she offered commutation proof July 27, 1904, and cash certificate issued the same day. January 21, 1909, the commutation proof was rejected by the Commissioner and the entry held for cancellation. She appealed to the Department, which, on August 17, 1909, affirmed that decision. She moved for review of that decision, and, February 28, 1910, it was denied. On April 2, 1910, the entry was cancelled and the case closed.

August 8, 1910, she filed in the local land office a paper designated an "application for confirmation of said final entry and the issuance of patent thereon for said tract under the provisions of the Act of March 3, 1891, Section 7." (26 Stat., 1095.)

The Commissioner, March 27, 1911, denied the said application, and Traganza appealed.

The provisions of the law relied on by the applicant have no reference to proceedings by the United States, or its officers or agents, in respect to entries of the classes therein specified, and in this connection do not affect the conduct or action of the Land Department in taking up and disposing of final proof of entrymen after the lapse of the two years mentioned in the act.

However, the record in this case shows that proceedings against this entry were initiated by the Land Department on March 24, 1904, this being before the submission of commutation proof, and the investigations made under these proceedings continued up to the time of the cancellation of the entry and showed, as, indeed, did the final proof itself, that the entryman had not complied with the homestead law to a degree sufficient to justify the issuance of the commutation final certificate or entitle entryman to a patent. These proceedings, pending at all times from proof up to and at the time of the cancellation of the entry, were sufficient both in form and substance to take the entry out of the operation of the said act, even if the latter applied to the United States; and, consequently, under no circumstances, is the applicant entitled to the relief she asks, even if, in any event, she would be entitled to it under such procedure as she has adopted.

The action of the Commissioner was proper, and the decision appealed from is affirmed.

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### STATE OF CALIFORNIA ET AL.

*Decided November 24, 1911.*

#### APPLICATION TO AMEND SCHOOL INDEMNITY SELECTION—INTERVENING WITHDRAWAL.

An application to amend a defective school indemnity selection is defeated by an intervening withdrawal of the land from agricultural entry, with a view to classification by the Geological Survey, under which the lands were subsequently classified as oil and placed in a petroleum reserve.

*ADAMS, First Assistant Secretary:*

The State of California and Miller & Lux, incorporated, transferee, appealed from decision of the Commissioner of the General Land Office of December 2, 1910, rejecting application to amend school indemnity selection of the State for SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 24, T. 30 S., R. 24 E., 120 acres, M. D. M., Visalia, California.

February 7, 1896, the State filed its selection, assigning as base 120 acres, unspecified, in Sec. 16, T. 8 S., R. 28 E., in Sierra Forest Reserve, California.

At subsequent dates the State made other selections on unspecified base in the same section, as follows:

February 10, 1896, 3309, Marysville, 173.58 A.  
 September 19, 1896, 12022, San Francisco, 142.73 A.  
 September 19, 1896, 12023, San Francisco, 43.69 A.  
 October 25, 1899, 3103, Stockton, 80 A.  
 November 28, 1899, 2616, Sacramento, 98.26 A.

All these selections were listed and approved between April 18, 1898, and January 16, 1901, for a total of 538.26 acres, leaving the State 101.74 acres unsatisfied base in the section. During this time no action was taken on this selection, which was first in time.

It does not appear from the decision what, if any, action was taken on this selection, but October 26, 1903, the State, apparently on its own motion, applied to amend this selection by substitution of 18.26 acres in NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 36, T. 19 N., R. 8 E., which the local office rejected and the State did not appeal. The case on such application to amend was closed November 19, 1904.

January 27, 1905, the State again applied to amend, designating as base the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  (80 acres), the balance of NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  (21.74 acres), Sec. 16, T. 8 S., R. 28 E., M. D. M., lot 4, Sec. 36, T. 1 S., R. 20 E., M. D. M. (9.25 acres), the balance of NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 36, T. 43, N., R. 14 E., M. D. M. (8.92 acres), and the balance SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 36, T. 15 S., R. 30 E., M. D. M. (.08 acres)—a total of 119.99 acres—which was transmitted to the General Land Office July 12, 1905. These base tracts were found available, but there was no certificate of non-sale and non-incumbrance by the State. April 14, 1908, the Commissioner notified the State that the application would be allowed if no other objection appear, and required certificates were furnished within sixty days.

October 24, 1908, the local office transmitted two certificates by the State, filed in the local office July 10, 1908. One of these certificates was accepted; the other described land not assigned as base, and January 16, 1909, new certificates were required as to S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 16, T. 8 S., R. 28 E.; lot 4, Sec. 36, T. 1 S., R. 20 E.; and SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 36, T. 15 S., R. 30 E.—all M. D. M. This letter was received by the State April 5, 1909.

September 14, 1908, the selected land was withdrawn from agricultural entry pending classification by the Geological Survey, and was again so withdrawn September 27, 1909, pending legislation. The latter withdrawal provided that forest claims may proceed to entry after field examination. June 22, 1909, the selected lands were classified as oil lands, and were placed in petroleum reserve No. 2

by executive order of July 2, 1910. July 15, 1910, W. C. Hammett, of San Francisco, made a non-mineral affidavit in support of the selection. The Commissioner rejected the selection, and the State and transferee appealed.

An intervening adverse claim defeats an application to amend. George F. Brice, 37 L. D., 145. A school indemnity selection upon undesignated base defective in part is bad *in toto*. State of California *v.* Youles *et al.*, 37 L. D., 609.

A withdrawal of land by the Government for public use has the same effect as an intervening adverse claim and defeats the application to amend. As this land had been classified as oil land, and was reserved by executive order, it ceased to be subject to disposal under the agricultural land laws. Charles G. Carlisle, 35 L. D., 649. There was therefore no error in the Commissioner's decision, and it is affirmed.

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### L. W. LOWELL ET AL.

*Decided November 29, 1911.*

#### PLACER LOCATION—DISCOVERY—WITHDRAWAL.

A placer location of oil lands, not preceded by discovery, and upon which no work which led to the discovery of oil was being prosecuted at the date of departmental withdrawal No. 5 of September 27, 1909, does not except the land covered thereby from the force and effect of such withdrawal, regardless of the subsequent discovery of oil thereon.

#### ADAMS, *First Assistant Secretary*:

L. W. Lowell, on behalf of himself and his seven co-applicants, has appealed from the decision of the Commissioner of the General Land Office, dated April 4, 1911, which affirmed the action of the local officers in rejecting their mineral application No. 011146, filed July 28, 1910, for the Lone Star placer mining claims, embracing the NW.  $\frac{1}{4}$ , Sec. 32, T. 12 N., R. 23 W., S. B. M., Los Angeles, California, land district, because at the date of the departmental withdrawal of September 27, 1909, no discovery of oil had been made, and the claimants were not then engaged in the diligent prosecution of work leading to discovery, "and also because they did not post notice of the application upon the land and furnish due proof thereof prior to the filing of said application."

The applicants assert ownership to the ground under the Lone Star location, made February 15, 1909, by three of the present applicants and five other persons. The location notice, filed March 16, 1909, contains the following description:

Commencing at Southwest corner of the N. W.  $\frac{1}{4}$  of Section 32, T. 12—R. 24 E., D. M., and running North to the Northwest corner of said Sec.  $\frac{1}{4}$  Section,

thence 1/2 mile East to the N. E. corner Sec. 32, T. 12—R. 24—thence South 1/2 mile to the Southeast corner, thence West 1/2 mile to place of beginning, containing 160 acres, more or less.

The calls in the above description are so erroneous, uncertain, and indefinite that no particular 160-acre tract can be identified thereby.

The same eight locators, on January 31, 1910, made a so-called amended location of the Lone Star claim, correctly describing the tract now applied for. The notice of that location recites that it was "recorded to correct an error in the description" in the location of February 15, 1909, and that such notice was posted near the southwest corner of said quarter section "where there is a deposit of gypsum, which deposit was discovered on or about the first day of March, 1909."

July 9, 1910, these locators also made another location of the ground as the Lone Star claim. By deeds of various dates from February 10 to July 15, 1910, five of the original locators assigned their interests to five of the present applicants.

On February 19, 1910, the then claimants for the Lone Star placer entered into a contract for the drilling of an oil well upon the land with J. V. Hoffman, which contract also provided for the conveyance, upon certain conditions, to him of 80 acres of the land. March 2, 1910, said Hoffman executed a contract and lease with the Los Angeles-McKittrick Oil Company for drilling a well on the west 80 acres of the land, and thereupon the work of erecting a drilling rig and its equipment was commenced, and when the same was completed, drilling was begun and continued until July 6, 1910, when oil in paying quantities was discovered and produced.

The value for patent purposes of the labor and improvements upon the location, consisting of the erection of a complete standard rig and the drilling and casing of the well, 1,930 feet in depth, is claimed to be in excess of \$10,000. It is alleged that said well is capable of producing 250 barrels of oil during each twenty-four hours.

June 22, 1909, the lands in said section were classified as oil lands. September 27, 1909, this tract, with many others, was included in the departmental order of withdrawal, which, in part, is as follows:

*Temporary Petroleum Withdrawal No. 5.*

In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or nonmineral public land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination.

The above withdrawal continued until the lands were embraced in the Executive order of July 2, 1910, the essential portions of which read as follows:

ORDER OF WITHDRAWAL.

*Petroleum Reserve No. 2.*

It is hereby ordered that those certain orders of withdrawal made heretofore: On Sept. 27, 1909, and described as Temporary Petroleum Withdrawal No. 5. . . . .

in so far as the same include any of the lands hereinafter described, be, and the same are hereby ratified, confirmed, and continued in full force and effect; and subject to all of the provisions, limitations, exceptions, and conditions contained in the act of Congress entitled "An Act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910, there is hereby withdrawn from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, all of those certain lands of the United States set forth and particularly described as follows. . . . .

By the acts of June 25, 1910 (36 Stat., 847), and March 2, 1911 (36 Stat., 1015), Congress took cognizance of the fact that departmental withdrawals of oil lands had been made. The former act contains, among others, the following provisos:

*Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further*, That this act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this act.

The second act mentioned, which was designed to cure defective titles to oil or gas land claims where transfers had been made prior to discovery, concludes with the following proviso:

*Provided, however*, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.

In the case at bar there was at the date of the departmental order of withdrawal no work being prosecuted which led to the discovery of oil, nor was there then any inception of development work on the claim. These provisions of the statute relating to discovery and development work are the only ones affording relief or protection to oil claimants who did not have completed and valid locations at the date of withdrawal. The second proviso above quoted expressly states that the withdrawal act must not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated

upon oil lands *after any withdrawal* antedating the act. Thus it appears that there is no validation, recognition, or protection under the terms of these acts for a claim of the status of the one here involved, except it be determined and held that the departmental order of September 27, 1909, is ineffective and invalid.

Appellants urge that the departmental withdrawal "was unauthorized and contrary to the laws of Congress, and void." With this view the Department is not favorably impressed. The *fact* of such withdrawals was known to Congress and recognized, and thereupon it enacted substantive legislation. In addition to the two acts above mentioned, the comprehensive act of June 22, 1910 (36 Stat., 583), entitled "An act to provide for agricultural entries on coal lands," affords a striking example of the recognition of departmental withdrawals. Furthermore, the Executive order of July 2, 1910, expressly ratified and confirmed prior withdrawals of oil lands. Under these circumstances, the Department is not persuaded that it can or should treat the order of September 27, 1909, as ineffective and void. It follows, therefore, that the application of Lowell *et al.* can not be allowed.

With the pending appeal there were filed proof of posting and affidavits tending to show that such proof had been forwarded to the local officers with the application for patent.

The above conclusion renders a decision on this branch of the case unnecessary, but as is contemplated by the law, section 2325 of the Revised Statutes, and required by the mining regulations, paragraph 40 *et seq.*, the affidavit of two persons, showing that notice was posted on the land, should be furnished when the application for patent is presented to the local office.

The judgment below rejecting the application is accordingly affirmed.

### ROBERTS v. SPENCER.

*Decided October 2, 1911.*

#### RECLAMATION ENTRIES—RESIDENCE—ACTS OF JUNE 25, 1910.

The act of June 25, 1910, 36 Stat., 835, was designed to withhold lands within a reclamation project from entry of every character until public announcement of the date when the water could be applied; while the act of that date, 36 Stat., 864, was intended to relieve entrymen who had made entry for lands within a reclamation project prior to the passage of said act, and prior to the applying of water by the project, from the necessity of maintaining residence upon the land "until water for irrigation is turned into the main irrigation canal from which the land is to be irrigated," it condones the prior failure of the entryman to maintain residence where water has not been available for irrigation of the land, and suspends the running of the seven-year limitation of the life of the entry by allowing the period of residence to commence from the time when the water is made available.



## PARAGRAPH 19, REGULATIONS OF MAY 31, 1910, MODIFIED.

Paragraph 19 of the regulations of May 31, 1910, under the latter act of June 25, 1910 (as amended by the circular of October 15, 1910), holding that "if the approval of the act preceded the termination of the contest, all rights thereunder were *ipso facto* terminated by the act," is modified to hold that upon a finding that the entryman is within the class protected by the act a contest against such entry, yet pending, will be dismissed.

ADAMS, *First Assistant Secretary*:

This case first came before the Department upon the appeal of Jacob D. Spencer from a decision of the General Land Office of February 12, 1908, sustaining the finding of the local office and holding for cancellation Spencer's homestead entry of lot 4 and SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 19, T. 10 S., R. 23 E., Hailey, Idaho, for failure to establish and maintain a residence upon the land.

The decision of the General Land Office was affirmed by decision of the Department of November 11, 1908, concurring in the finding of the General Land Office that claimant never established an actual residence on the land, and that his actual home was in Salt Lake City, Utah, in a house that he owned, where he was living at the time of his entry and up to the date of the hearing, being employed during that time as clerk in the office of the general passenger agent of the Oregon Short Line Railroad Company at Salt Lake City.

The record upon which said decision was rendered disclosed no error in that finding, and no other conclusion could have been warranted by the testimony delivered at the original hearing. But by departmental decision of March 18, 1909, a rehearing was granted in said case upon the petition of Spencer, supported by the joint affidavit of Charles A. Haight, David A. Harding, and Parley Clark, stating that since said hearing they are enabled to state from facts brought to their knowledge that Spencer is a *bona fide* homesteader, having settled upon the land in March, 1905, for the purpose of making a permanent home, and that he was not absent from his homestead for more than six months. The application for rehearing was also supported by the petition, dated March 4, 1909, of twenty-six persons, who stated that the contest was brought for speculative purposes, and that Spencer is a *bona fide* homesteader, having made improvements on the tract in question of the value of \$1,800; that he has raised two crops upon the land without water, the first in 1906, consisting of 10 acres of oats, which was cut to hay; the second in 1907, consisting of 80 acres of wheat, "13 acres threshed, averaging 18 bushels to the acre, the balance of the crop being cut to hay;" that since the pending contest was initiated Spencer and his family had resided continuously on the homestead and are still residents thereon.

It was ordered that either party be allowed to submit any further showing desired bearing upon the charge contained in Roberts's con-

test, and it was directed that upon the termination of said hearing "the case be readjudicated upon the record made at the first hearing as supplemented by that made upon the rehearing."

Upon the rehearing the local officers were divided in opinion, the register holding that sufficient evidence had not been presented to justify a reversal of their former decision, recommending the entry for cancellation, and the receiver recommended that the contest be dismissed and the entry remain intact. The General Land Office affirmed the decision of the register and held the entry for cancellation.

No testimony was introduced at the rehearing that tended in any material respect to disprove or discredit the testimony offered at the first hearing, or to justify any departure from the finding of the Department in its decision of November 11, 1908, that claimant had not at any time prior to the original hearing established and maintained a *bona fide* residence on the land.

A considerable, if not the greater, part of the supplemental testimony has reference solely to the countercharge that the contest is speculative and was being prosecuted in the interest of a brother of contestant. That charge may be dismissed with the simple statement that the material fact to be determined is whether claimant had complied with the law and not as to the motive that prompted the prosecution of the contest and the interest the contestant is seeking to promote.

This land was withdrawn in November, 1902, as land susceptible of irrigation from the Minidoka Irrigation Project. April 22, 1904, it was divided into farm units and claimant's entry was allowed in accordance with the unit subdivision, but water has not been and is not now available for the irrigation of the land, and public announcement has not been made when the water can be applied.

While this case was pending upon the rehearing allowed by departmental decision of March 18, 1909, the act of Congress approved June 25, 1910 (Chap. 407, 36 Stat., 835), was passed, providing that no entry shall thereafter be made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and a date when the water can be applied, and made public announcement of the same.

The act of Congress granting leaves of absence to homesteaders on lands to be irrigated under the provisions of the act of June 17, 1902, which was also approved June 25, 1910 (Chap. 432, 36 Stat., 864), provides:

That all qualified entrymen who have heretofore made *bona fide* entry upon lands proposed to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, known as the national irrigation Act, may,

upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior; obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: *Provided*, That the period of actual absence under this Act shall not be deducted from the full time of residence required by law.

The evident purpose of this legislation was to cure a defect in the reclamation act allowing homestead entries to be made of arid lands within irrigation projects in advance of the supply of water, which could not be successfully cultivated in their desert condition. It was well known that it was impossible for the settler to live on the land and support his family without irrigation, and in many cases great distress resulted in the effort to maintain residence upon such lands. To avoid the evil consequences that would inevitably result from the allowance of entries upon lands within irrigation projects in advance of sufficient progress in the construction of the works to reasonably assure a sufficiency of water for the irrigation of the land, the Department from time to time had been, prior to the passage of said act of June 25, 1910, importuned to withhold such lands from entry of every character as a matter of public policy and in the interest of sound administration until water for the irrigation of the land was available, which could not be entertained, because of the express provisions of the reclamation act allowing entries under the homestead law of lands susceptible of irrigation from the project. See Instructions (33 L. D., 104).

The first act of June 25, 1910 (Chap. 407), was designed to cure these apparent defects in the reclamation act by withholding lands in a reclamation project from entry of every character until public announcement is made of the date when the water can be applied, and the second act of that date (Chap. 432) was intended to relieve entrymen who had made entries prior to the passage of said act and prior to the supply of water by the project from the necessity of maintaining residence upon the land "until water for irrigation is turned into the main irrigation canal from which the land is to be irrigated."

It condones the prior failure of entrymen to maintain residence upon the land where the water has not been available for irrigation of the land, and suspends the running of the seven-year limitation of the life of the entry by allowing the period of residence to commence from the time when water is made available.

The regulation for carrying into effect the provisions of said act declare that "if the approval of the act preceded the termination of the contest, all rights thereunder were *ipso facto* terminated by the act." (39 L. D., 296.)

It is urged in behalf of contestant that this contest was virtually brought to a conclusion and the preference right earned when the Department found that the contest had been sustained and affirmed the decision of the General Land Office, holding the entry for cancellation; that the act of June 25, 1910, does not authorize such sweeping confiscation of preference rights. But the preference right of entry accorded a successful contestant under the act of May 14, 1880 (21 Stat., 140), does not attach until the cancellation of the entry. Like the reward offered to an informer, the right may be defeated by the repeal of the statute or the remission of the penalty by competent authority. *United States v. Connor* (138 U. S., 61); *Strader v. Goodhue* (31 L. D., 137).

As the entry of Spencer has never been canceled, no right has vested and no interest has been acquired that could defeat the operation of the act of June 25, 1910. *Emblen v. Lincoln Land Company* (184 U. S., 660).

The only conditions required by the act to entitle the claimant to leave of absence from the land are that he shall be a qualified entryman, shall have made a *bona fide* entry upon the land, and have made substantial improvements thereon. These conditions have been fulfilled.

In view of this determination it follows that the contest must be and is accordingly dismissed.

It is perhaps true that the regulation under the act of June 25, 1910, *supra*, above quoted, viz, "if the approval of the act preceded the termination of the contest, all rights thereunder were *ipso facto* terminated by the act," is a little too broad, for literally applied, it would terminate the contest even though the entryman might not be adjudged entitled to the relief granted by the act, and it should therefore be modified to a holding that upon a finding that the entryman is within the class protected by the act the contest against such entry, yet pending, will be dismissed.

The decision of November 11, 1908, is vacated and annulled, the decision of the Commissioner of the General Land Office of July 20, 1911, is reversed, and the entry of Spencer will be allowed to remain intact, subject to future compliance with the law as contemplated under the act of June 25, 1910, *supra*.

JOHN C. CLARK ET AL.

*Decided October 2, 1911.*

ENLARGED HOMESTEAD—ADDITIONAL ENTRY.

One who makes entry under the enlarged homestead act for less than 320 acres may, under section 3 of said act, enter other contiguous lands, subject to that act, which shall not, together with the land in the original entry, exceed 320 acres.

ADAMS, *First Assistant Secretary*:

May 10, 1910, the local officers at Sterling, Colorado, allowed John C. Clark to make additional homestead entry No. 012808, under section 3 of the act of February 19, 1909 (35 Stat., 639), for the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 10, T. 1 N., R. 45 W., 6th P. M., as additional to his homestead entry No. 08714, made September 4, 1909, under said act, for the SE.  $\frac{1}{4}$ , Sec. 4, E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 9, same township and range.

T. 1 N., R. 45 W., 6th P. M., was designated by the Secretary as falling within the provisions of the enlarged homestead act on April 27, 1909, and the local officers were notified by Commissioner's letter "C" on May 1, 1909.

This appeal is prosecuted to the Department from the decision of the Commissioner of the General Land Office dated May 16, 1911, directing Clark to show cause why his entry should not be canceled because erroneously allowed, and allowing Major A. Fonte to make entry of said land.

On May 25, 1910, it appears that Major A. Fonte appealed to the Commissioner of the General Land Office from the action of the local officers rejecting his application 012886, filed under section 3 of the act of February 19, 1909, *supra*, for additional entry for the NW.  $\frac{1}{4}$  of said section 10, as additional to homestead entry No. 10224, made by him on December 16, 1909, for the SW.  $\frac{1}{4}$  of said section.

This land appears to have been embraced in the entry of Osa Glick, now Speirs, made April 29, 1905, for the NW.  $\frac{1}{4}$  of said section, which entry was canceled on relinquishment filed April 8, 1910.

In the decision appealed from it is stated:

A person who makes entry of lands designated as falling within the provisions of the act of February 19, 1909, after its designation is not thereafter entitled to make an additional entry under said act.

In the present case claimant has submitted a showing in the form of an affidavit stating that at the time he made his first entry he could not get other adjoining lands for the reason that there were none vacant; that he was informed and believed that he could make additional entry for sufficient land to make up the maximum amount allowed by the act of February 19, 1909, *supra*, and that he did not intend to exhaust his right by making his first entry. The entry was allowed by the local officers and since then claimant has broken out forty acres and placed a substantial fence around the entire entry, and it appears that he will suffer great loss by the cancellation of this entry.

At the time the decision appealed from was rendered, the circular of September 24, 1910 (39 L. D., 232-251), was in force and said decision was correct, but since that time said circular has been amended by instructions of June 23, 1911 (40 L. D., 143). Under section 3 of the enlarged homestead act, as construed in the later in-

structions, one who makes homestead entry for less than 320 acres may enter other contiguous lands, subject to the provisions of that act, which shall not, together with the original entry, exceed 320 acres.

The decision appealed from is accordingly reversed.

The application of Fonte to enter this land was filed subsequent to the allowance of Clark's entry, and the same will therefore be rejected.

**RECLAMATION HOMESTEAD—AMENDMENT OF FARM UNIT—  
ADJUSTMENT OF PAYMENTS.**

REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES RECLAMATION SERVICE,  
*Washington, D. C., November 20, 1911.*

THE HONORABLE,

THE SECRETARY OF THE INTERIOR.

SIR: Reference is made to departmental letter of November 10, 1911, ruling upon the legality of certain propositions relative to subdivision of farm units. It was therein found that the Secretary may in his discretion fix a farm unit at not less than ten acres where no existing entry is involved, or he may reduce the area of an existing entry to ten acres upon election of the entryman affected thereby.

In the opinion of this office, each amendment should be reported upon by the engineer in charge of the project affected. If no objection appears, request for authority to make the amendment should thereafter be submitted to the Secretary.

The language of said departmental letter would seem to hold that an entryman who now has ten acres would not be permitted to subdivide because this would necessitate the establishment on the part of the Secretary of the Interior of a farm unit of less than ten acres, which apparently is not intended by this ruling, as the effect would be to prevent subdivision of most entries under the Umatilla project wherein a large number of farm units consist of ten-acre tracts.

The proviso of section 1 of the act of June 27, 1906 (34 Stat., 519), while applicable in terms only to original entries, would apparently not limit the entryman in a voluntary relinquishment if sanctioned by the Secretary.

It is, therefore, recommended that a specific regulation be approved as follows, which does not limit the area of subdivision which may be requested by the entryman:

1. A homestead entryman subject to the Reclamation Act of June 17, 1902 (32 Stat., 388), may relinquish a part of his farm unit and have the payments which had been made on the relinquished part credited on the charges against the retained part, provided that the amendment in question may be allowed without jeopardizing the interests of the government in the collection of the charges against the portion of the tract relinquished.

2. The entryman desiring to make such relinquishment shall submit his application therefor to the project engineer, who will transmit the same with his recommendation through the proper channels to the Director, who, if he finds no objection, will proceed as in other cases of proposed amendments of farm units.

Very respectfully,

F. H. NEWELL, *Director.*

Regulations numbered 1 and 2 approved December 18, 1911:

CARMI THOMPSON, *Acting Secretary.*

### PHOENIX GOLD MINING CO.

*Decided December 1, 1911.*

#### GROUP OF MILL SITES—POSTING OF NOTICE.

Where two or more contiguous mill sites are embraced in a single application for patent, the posting of one copy of the notice and plat within the limits of the group is sufficient, without the necessity of posting a separate copy upon each claim.

ADAMS, *First Assistant Secretary:*

September 2, 1910, the Phoenix Gold Mining Company made mineral entry, serial No. 011633, for the Phoenix and West Side lode mining claims and the Phoenix and West Side mill sites, survey No. 27227 A and B, situate in the Cave Creek mining district, Phoenix land district, Arizona.

It appears from the record that the two mill sites are contiguous and that entry therefor was allowed on the basis of the posting of the copy of the notice and plat upon only one thereof—the West Side. Upon considering the case the Commissioner, in a decision rendered January 23, 1911, stated that it is the settled rule or requirement of his office that where two or more mill sites are embraced in a single application for patent the notice and plat shall be posted on each, and directed that the claimant company be required to show cause why the entry as to the Phoenix mill site should not be canceled for the reason that, among others, no posting had been made thereon.

After further proceedings, not necessary to be here stated, the Commissioner, by decision of April 29, 1911, held that—

Claimant's request for opportunity to repost and republish as to the Phoenix mill site, can not be allowed; for, notice not having been properly posted on the claim, the local office had no jurisdiction, and the entry must be canceled, as to the Phoenix mill site.

He accordingly held the entry to the extent of said mill site for cancellation. The claimant appeals.

The law making specific provision for the sale of public lands of the United States for mill-site purposes, is found in section 2337 of the Revised Statutes, which reads as follows:

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode.

The preliminary requirements as to survey and notice applicable to veins and lodes referred to in the above quoted section are enumerated in section 2325, wherein it is provided that—

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for patent, . . . together with a plat and field notes of the claim or claims in common, . . . and shall post a copy of such plat together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent.

The posting "in a conspicuous place on the *land* embraced in" a "plat of the *claim or claims* in common," of "a copy of such plat," together with "a notice of such application for patent," is, so far as posting upon the ground is concerned, all the law requires to entitle a mineral applicant to a patent to all the ground covered by a group of contiguous lode mining claims held in common and embraced in a single application. On this point Lindley says:

In the case of an application for a group of contiguous claims, there does not seem to be any specific regulation on the subject of posting. The law provided that the posting shall be on the land *embraced in the plat*. As the consolidation of claims is shown on the plat, it might reasonably be inferred that a posting at any conspicuous place within the group would suffice without the necessity of posting on each location within the composite, and so far as we are advised this is the rule followed by the Land Department. (Lindley on Mines, sec. 677.)



In section 653, Snyder on Mines, it is said:

One plat and notice is sufficient for a consolidated claim, but when both lode and mill site are applied for, it should be posted on both.

These observations by Lindley and Snyder are in accord with what has been for many years the uniform practice of the land department respecting posting upon a group of consolidated lode mining claims embraced in one application. In no case in fact, so far as the Department is aware, arising since the right to embrace in one application a group of contiguous lode mining claims has been recognized, has more than one posting within the limits of the area so applied for been deemed necessary. This being true, and a mill site claim being expressly declared by law to be patentable, subject to the same requirements as to survey and notice as are applicable to veins and lodes, the Department sees no reason under the law for requiring more than one posting to be made within the limits of a group of two or more contiguous mill site claims embraced in a single plat and application.

The decision appealed from is accordingly reversed, and, in the absence of other objection, the entry will remain intact as to the Phoenix mill site.

#### MT. WHITNEY ABANDONED MILITARY RESERVATION.

##### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, December 8, 1911.*

REGISTER AND RECEIVER,

INDEPENDENCE, CALIFORNIA.

SIRS: 1. I inclose you herewith a copy of the approved schedule of 1,182.92 acres of land in the Mt. Whitney abandoned military reservation. This reservation was established by Executive Order of September 20, 1883, and was turned over to this Department for disposal under the act of July 5, 1884 (23 Stat., 103), by Executive Order of February 2, 1904. The lands described in the schedule, except Sec. 36, T. 15 S., R. 35 E., were included in the Sierra forest reserve by President's proclamation of July 25, 1905. Sec. 36, T. 15 S., R. 35 E. was included in the Forest Reserve by Executive Order of April 20, 1908. The lands are now a part of the Kern national forest, as described in Executive Order, No. 1116, dated January 30, 1911. All the lands are unsurveyed except Sec. 20, T. 15 N., R. 35 E.

2. A portion of the lands described in the schedule are in Sec. 36, T. 15 S., R. 35 E. All of this section was withdrawn December 18, 1906, under the first form provided in the act of June 17, 1902 (32 Stat., 388), in connection with the Owens River Project. This project

was declared abandoned by the Department on July 12, 1907, but it was directed that the withdrawals continue in force until three years from the date of the passage of the act of June 30, 1906 (34 Stat., 801), giving the City of Los Angeles a preference right to acquire title to the lands withdrawn. On June 17, 1909, the Department instructed you and the district land office at Los Angeles, California, that the three-year period mentioned would expire on June 30, 1909, and that on and after July 1, 1909, all vacant public lands, not applied for under the act of June 30, 1906, and not otherwise reserved, in the areas described in the reclamation withdrawals referred to above, and the departmental orders of July 12, 1907, would be subject to settlement, entry and filing under the public land laws of the United States applicable thereto. The City of Los Angeles has not acquired any rights to lands in said Sec. 36, T. 15 S., R. 35 E., under said act of June 30, 1906.

3. The value of the lands has been fixed by the appraisers at from \$1.25 to \$2.50 per acre, the total appraisal of said lands being \$1,665.95. The appraisement was made in accordance with the provisions of said act of July 5, 1884. The lands, however, being within the limits of the Kern national forest, have been listed as agricultural lands by the Secretary of Agriculture, under the act of June 11, 1906 (34 Stat., 233), as amended by the act of May 30, 1908 (35 Stat., 554), and declared subject to homestead entry under said act by the Secretary of the Interior.

4. Each entryman will be required to pay for said lands the appraised price. The entire amount may be paid at the time of submitting proof, or the amount may be paid in five equal annual installments at the option of the entryman, the first payment to be due one year from the date of acceptance of the proof by you, with interest on deferred payments at the rate of four per cent per annum, payable annually.

5. The schedule describes improvements on some of the lands. The report of the appraisers states that these were placed there by settlers, and, therefore, the entrymen for said lands are not to be charged the value thereof, which is stated on the appraised list.

6. The appraisers reported that they did not find any person who had any prior rights under the act of July 1, 1884, by virtue of having settled on the land prior to January 1, 1884, neither were there any prior rights initiated prior to January 1, 1906, under the act of June 11, 1906.

7. Inasmuch as notice of the listing of these lands under the act of June 11, 1906, has been duly given, no public notice of the appraisement of these lands is deemed necessary. You will, however, give each entryman and applicant for these lands notice by ordinary mail of the appraised price.

8. The appraisers report that none of the lands in the schedule are mineral in character. You will, however, require entrymen to furnish the usual non-mineral affidavit.

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved:

SAMUEL ADAMS,  
*First Assistant Secretary.*

## RECLAMATION—COLLECTION OF WATER-RIGHT CHARGES.

### CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, December 19, 1911.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: Paragraph 65 of the circular approved May 31, 1910 (38 L. D., 620), is hereby amended to read as follows:

Where payment is tendered for a part only of either an annual instalment of water-right building charges or an annual operation and maintenance charge, receivers may hereafter accept the same if the insufficient tender is, in the opinion of the receiver, caused by misunderstanding as to the amount due and approximates the same.

In all cases of insufficient payment accepted in accordance with the provisions of the foregoing paragraph, receipts must issue for the amount paid and the money be deposited to the credit of the "Reclamation Fund," and the water user shall be immediately notified by registered letter that the payment is insufficient and allowed a period of thirty days to make payment of the balance due to complete the charge on which a part payment has been made. If the balance is paid within this period additional receipt must issue therefor, but if not paid within the thirty days, report shall be made to the Commissioner of the General Land Office.

In all other cases where insufficient tenders are made receivers will issue receipts therefor and return the money by their official check, with notice to the water user as to the reason for its return and properly report the transaction in their accounts.

Circular letter "M" of this office dated December 28, 1909, relative to reclamation water-right charges is hereby superseded, in so far as it is in conflict with the above regulations.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved December 19, 1911:

CARMI A. THOMPSON,  
*Assistant Secretary.*

**HOWARD C. HOPKINS.**

*Decided December 20, 1911.*

**UNITED STATES MINERAL SURVEYOR—ADVERSE REPORT BY SPECIAL AGENT.**

In case of an adverse report by a special agent against renewal of the bond of a United States mineral surveyor, he should be notified of the specific charges or causes upon which the adverse report is founded and afforded a reasonable opportunity to make response thereto; and should he deny the charges, a hearing will be had.

**THOMPSON, *Assistant Secretary:***

By letter of July 20, 1910, the surveyor-general of Arizona transmitted to the Commissioner of the General Land Office, for his approval and acceptance, the bond of Howard C. Hopkins as a United States mineral surveyor for the District of Arizona, said bond being a renewal, as required by the act of March 3, 1895 (28 Stat., 764, 808), of a previous bond, accepted by the Commissioner October 25, 1906, under which, and pursuant to an appointment duly made by the surveyor-general, Hopkins had been performing the duties of a mineral surveyor for that District.

Upon considering said bond, the Commissioner, by letter of February 10, 1911, advised the surveyor-general that:

Following the usual practice in such cases, the field service was called on for a report in the matter, and this office is now in receipt of a report that is adverse to Mr. Hopkins, and his bond is herewith returned.

No objection is raised by the Commissioner with respect to the bond itself, hence it appears that his action was based solely upon the matters contained in said report.

From this action, Hopkins appeals. In his appeal, which is an informal one, he says:

I wrote to the United States surveyor-general for Arizona, asking further information and am in receipt of his letter "M" of April 5, 1911, in which he advises me that, in the Commissioner's letter "N" of April 1, 1911, he is informed that special agents' reports are in the nature of confidential and privileged communications, and that their contents will not be furnished, except upon authority of the Secretary of the Interior.

I respectfully represent that, as I am the party chiefly interested in this case, I am entitled to know the charges made by the field service and to be given an opportunity to refute them.

He accordingly prays that, before final action is taken in this case, he be advised as to the nature of the matters set forth in the report upon which the action of the Commissioner is based.

An examination of the record confirms the allegations set forth in the appeal, to the effect that not only was the action complained of taken without any previous notice to Hopkins but that the specific request made by him to be informed as to the basis of said action, in order that he might be in a position to formulate an appeal there-

from, was denied by the Commissioner, on the ground stated by Hopkins.

Section 2334, Revised Statutes, provides that the appropriate United States surveyor-general—

may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey,—

and the Department has held, and the regulations provide, that an appointment made under the provision of said section continues until specifically revoked by the appointing power. Ricard L. Powel (39 L. D., 177); Paragraph 10, Manual of Instructions for the Survey of Mineral lands of the United States.

The ultimate effect of the refusal on the part of the Commissioner to approve the bond of a mineral surveyor is to revoke his appointment for, following the practice of the General Land Office, such action is, in due time, followed by an order requiring the name of such mineral surveyor to be stricken from the rolls.

In *Ex parte* Robert Gorkinski (20 L. D., 283), the Department held that the action of a surveyor-general in suspending a mineral surveyor is subject to the supervisory authority of the Commissioner of the General Land Office, with the right to appeal to the Secretary of the Interior, and, since this decision, the Department has uniformly recognized the right of appeal of mineral surveyors in all cases where their appointments have been revoked by the surveyor-general, or the Commissioner.

By paragraph 4 of the Manual of Instructions for the survey of mineral lands of the United States, approved by the Department October 6, 1908, it was provided that:

The surveyors-general have authority to suspend or revoke the appointments of mineral surveyors for cause. The surveyors, however, will be allowed the right of appeal from the action of the surveyor-general in the usual manner. The appeal must be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office (20 L. D., 283).

This paragraph was, by instructions approved by the Department July 29, 1911 (40 L. D., 215), amended to read as follows:

4. The Surveyors-General have authority to suspend or revoke the appointments of mineral surveyors at any time, for cause, and to suspend or revoke the appointments at such times as the bonds become subject to renewal under the act of March 2, 1895 (28 Stat., 808), for reasons appearing sufficient to sustain a refusal to appoint in the first instance. The surveyors, however, will be allowed the right of appeal from the action of the surveyor-general in the

usual manner. The appeal must be filed with the surveyor-general, who will at once transmit the same, with a full report, to the General Land Office. (20 L. D., 283.)

In the unreported decision of June 23, 1911, in the case of Mineral Surveyor Edward Nissen, which, it is stated in the above instructions, gave rise to the foregoing amendment of said paragraph 4, the Department held, in substance and effect, that the appointment of a mineral surveyor could not properly be revoked, even at such time as his bond might become subject to renewal under the act of March 2, 1895, except as a result of charges of incompetency, dishonesty, default, and the like lodged against him.

The said decisions and regulations, considered in the light of the departmental rules of practice, which require that the notice of appeal in any case shall specifically set forth all alleged errors, whether of law or fact, appearing in the decision complained of, clearly imply that a mineral surveyor shall be notified of the specific charges or causes, which would seem to render his further retention undesirable and be afforded a reasonable opportunity in the first instance to make such response thereto as may be appropriate. It would be inconsistent and illogical to accord a mineral surveyor the right of appeal from an order or decision of the surveyor-general or the Commissioner, the effect of which would be to revoke his appointment, and at the same time to hold that he could properly be denied all knowledge of the charges or grounds upon which such action was based and afforded no opportunity to respond to and disprove the charges, or challenge their sufficiency.

Before final action is taken in this case, therefore, Hopkins will be given notice of the charges to be formulated from the report of the special agent referred to in the Commissioner's decision, and afforded opportunity to make such response thereto as he may desire. Should he deny said charges, a hearing will be ordered before the surveyor-general of Arizona, or some duly qualified person to be by him designated, at which testimony on behalf of both sides may be submitted. The case will then be adjudicated in the light of such testimony.

The Commissioner's action in disapproving the bond, for the reason stated by him, is accordingly reversed, and, pending the proposed proceedings, Hopkins may, if he shall so desire, refile the bond. If it be refiled, further action with respect to it, except on account of some inherent defect therein, will be suspended to await the outcome of the charges against Hopkins preferred by the field service.

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**ROBERTS v. SPENCER.**

Motion for rehearing of departmental decision of October 2, 1911, 40 L. D., 306, denied by Assistant Secretary Thompson, December 20, 1911.

## JOHNSON v. NORTHERN PACIFIC RY. CO.

Decided December 20, 1911.

## WITHDRAWAL—PROVISO TO SECTION 2, ACT OF JUNE 25, 1910—PROTEST.

The purpose of the proviso to section 2 of the act of June 25, 1910, was to protect *bona fide* occupants or claimants of oil or gas-bearing lands, who were in diligent prosecution of work leading to the discovery of oil or gas, against any withdrawal of the land as oil, and has no bearing whatever upon the question of the measure of proof necessary to sustain a protest, charging that the lands are mineral in character, against a nonmineral selection filed prior to the withdrawal.

## NONMINERAL SELECTION—PROTEST—CLASSIFICATION.

A protest against a nonmineral selection, charging that the lands are mineral in character, on which a hearing was held prior to any withdrawal or classification of the land as oil, should be disposed of on the proof submitted at such hearing, and a subsequent withdrawal or classification of the lands as oil may not properly be considered in passing upon that protest.

THOMPSON, *Assistant Secretary*:

This is a motion for rehearing by Henry A. Johnson in the matter of his protest against the application of the Northern Pacific Railroad Company to select the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 28, and SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 29, T. 35 N., R. 84 W., 6th P. M., Douglas, Wyoming, land district, in which the Department by its decision of June 10, 1911, affirmed the concurring actions of the Commissioner and the register and receiver in dismissing said protest.

The protest, filed June 21, 1909, in brief alleged that the lands are mineral in character and not subject to such selection. The hearing thereon was held September 19, 1909. The Department found that the evidence adduced failed to show that the land possesses any substantial mineral values. The tract was withdrawn January 30, 1911, under the act of June 25, 1910 (36 Stat., 847)—from settlement, location, sale, or entry, and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States, subject to all the provisions, limitations, exceptions, and conditions contained in the act of Congress . . . approved June 25, 1910.

No classification of the land as oil or non-oil has as yet been made.

In the motion it is contended that under the decisions of the Department in the case of *Kinkade v. State of California* (39 L. D., 491), the burden of proof was upon the non-mineral claimant in view of the withdrawal above quoted. In answer to this it is sufficient to state that the withdrawal took place long after the testimony had been introduced, and the question of which party should assume the burden of proof must be decided by the conditions existing at the time of the hearing and cannot be affected by a later withdrawal. Further, in *Kinkade v. State of California*, the lands had not

merely been withdrawn but had been classified as oil lands, which renders that case inapplicable.

It is also contended that it was not incumbent upon the protestant to prove that the land possessed "any substantial mineral values" in view of the proviso to section 2 of the act of June 25, 1910. That proviso reads:

That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or applicant shall continue in diligent prosecution of said work.

The purpose of the proviso, as plainly appears from its language, was simply to protect any *bona fide* occupant or claimant of oil or gas-bearing lands who was in diligent prosecution of work leading to a discovery of oil or gas, as against any withdrawal. Such proviso has no bearing upon the question of the measure of proof necessary to sustain the allegations of a protest, on the ground that the lands are mineral in character, against a non-mineral selection filed before the withdrawal.

Upon the merits, the Department finds no error in its former conclusion that the proof fails to sustain the allegations of the protest.

The protestant also requests that final action be not taken on the motion until field investigations conducted by the Geological Survey in the vicinity of these lands, for the purpose of determining its oil or non-oil character, be completed. The Department is informally advised that probably it will be a considerable period of time before such investigations are completed. Further, a subsequent classification of these lands as oil could not be considered in connection with the present protest, which must be determined upon the proof made thereunder. This request accordingly must be denied.

The motion for rehearing is, therefore, denied.

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ALEXANDER P. JACOBS.

*Decided December 21, 1911.*

RECLAMATION HOMESTEAD—REINSTATEMENT—ACT OF JUNE 23, 1911.

Where a homestead entry within a reclamation project was conformed to a farm unit and canceled as to the remainder, at a time when the entryman could not have made five-year proof, the entry will not thereafter be reinstated as to the canceled portion for the purpose of permitting the entryman to submit final five-year proof thereon with a view to assigning such portion under the provisions of the act of June 23, 1910.

THOMPSON, *Assistant Secretary:*

September 9, 1910, the Department affirmed decision of April 13, 1910, by the Commissioner of the General Land Office requiring



Alexander P. Jacobs to adjust his homestead entry made June 18, 1906, at Boise, Idaho, for the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 21, T. 2 N., R. 1 W., B. M., so as to embrace one farm unit.

January 6, 1911, a motion for reconsideration of the former decision was denied by the Department.

By letter of January 21, 1911, the Commissioner of the General Land Office promulgated the latter decision of the Department and the entry was conformed to farm unit "A," or the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of said section upon which the house and all of the improvements of the entryman were located. Thereafter the entryman filed with the Commissioner an application for reinstatement of the canceled portion of his entry, which application was denied by the Commissioner April 6, 1911, and the case was closed.

The claimant has now filed a motion for the exercise of the supervisory power of the Secretary of the Interior and the reinstatement of his homestead entry as to the canceled portion thereof. In said motion it is urged that the entry as to the canceled portion should be reinstated so that the claimant may make final proof and assign that portion under the provisions of the act of June 23, 1910 (36 Stat., 592).

At the time the entry was adjusted to the farm unit the entryman could not have made five-year proof as to residence. He has not as yet made such proof but it is represented that he now has to his credit sufficient residence to enable him to do so. If the entry had not been conformed he would be entitled to make final proof, and, if satisfactory, to assign the farm unit not retained. See case of Sarah S. Long (39 L. D., 297). It is admitted by claimant that under the circumstances he has no legal right to have the canceled portion of his entry reinstated, but he urges that the Secretary in the exercise of his supervisory power may so reinstate same for the purpose of allowing him to make final proof and assign that portion, and in view of certain alleged equities he insists that the Secretary should take such action.

The facts set forth as representing equities are substantially the same as those urged and considered upon the appeal from the action of the Commissioner requiring adjustment of the entry to the farm unit. Practically the only additional point urged is the representation that claimant is now qualified to make final proof.

After careful consideration the Department must decline to allow the application for reinstatement. It is believed that the granting of such request would not only be unwarranted but would be establishing a precedent of far-reaching results, for there are doubtless hundreds of entrymen similarly situated who could, under such ruling, reasonably demand like action in their cases.

The motion is accordingly denied and the record transmitted to the General Land Office.

**WILLIAM E. LECKIE.**

*Decided December 30, 1911.*

OKLAHOMA PASTURE LANDS—COMMUTATION—SECTION 24, ACT OF MAY 29, 1908.

The provision in section 24 of the act of May 29, 1908, authorizing commutation of entries of Oklahoma pasture lands made under the act of June 5, 1906, upon payment of all deferred instalments of the purchase money and a showing of ten months' compliance with law, was not repealed by section 25 of the act of June 25, 1910, amending said section 24.

**THOMPSON, Assistant Secretary:**

William E. Leckie has appealed from decision of May 15, 1911, by the Commissioner of the General Land Office, rejecting final commutation proof submitted December 14, 1910, on his homestead entry, made February 28, 1908, for the SE.  $\frac{1}{4}$ , Sec. 17, T. 3 S., R. 14 W., I. M., Lawton, Oklahoma, land district, under the act of June 5, 1906 (34 Stat., 213).

It is shown by the proof that the entryman built a house upon the land in December, 1909, and established residence about January 15, 1910, the land having been leased for the benefit of the Indians prior to the time of Leckie's purchase. On account of the lease the entryman could not get possession until after the date of the expiration of the lease, December 31, 1909. The improvements placed upon the land are valued at \$2,000, consisting of a house 12 x 28 feet, tenant house 14 x 26 feet, barn 16 x 28 feet, corn crib 14 x 14 feet, 40 shade trees, well and pump, one-half mile hog fence, place all fenced, and 110 acres in cultivation. Entryman was not absent from the time of establishment of residence until the submission of proof. He was therefore resident upon the land for eleven months.

The said tract is a portion of a body of lands known as pasture lands, formerly belonging to the Kiowa, Comanche, and Apache tribes of Indians, and was sold to the highest bidder under the provisions of the said act of June 5, 1906. Some of the lands had been leased for the benefit of the Indians prior to the date of sale, and such was the status of this tract.

Paragraph 31 of the regulations of October 19, 1906 (35 L. D., 239), provides that—

The time during which any entered land is covered by a valid, unforfeited lease after the date of the entry will be deducted from the five years during which the entryman would be required to maintain residence and cultivation if the lands had not been leased, and the entryman will only be required to reside upon and cultivate the land for the remainder of the five-year period, or he may commute by paying all of the deferred payments after an actual residence upon the land for fourteen months.

Section 24 of the act of May 29, 1908 (35 Stat., 456), provided for the sale of the lands remaining unsold in this reservation, and also for the allotment of lands to Indian children who had been born since

the act of June 5, 1906, 160 acres to each child, and it also contained the following provision, namely:

That any person who has heretofore entered any of said land under said act of June fifth, nineteen hundred and six, shall receive patent therefor by paying all the deferred installments of purchase money and proving compliance with the requirements of the homestead laws at any time after the expiration of ten months from the date of his entry.

Section 25 of the act of June 25, 1910 (36 Stat., 861), reads as follows:

That section twenty-four of the act of May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-four), be amended to read as follows:

SEC. 24. That the Secretary of the Interior shall cause an allotment of one hundred and sixty acres to be made under the provisions of the act of June fifth, nineteen hundred and six, to each child of Indian parentage born since that date who has not heretofore received an allotment, and whose father or mother was a duly enrolled member of either the Kiowa, Comanche, or Apache tribe of Indians in Oklahoma and entitled to allotment under the provisions of the act of June sixth, nineteen hundred; said allotments to be made from the tracts of land remaining unsold in the "pasture reserves" in the former Kiowa, Comanche, and Apache Reservations: *Provided*, That if there is not sufficient land remaining unsold in said tracts to give an allotment of one hundred and sixty acres to each child entitled, said allotment shall be made in such areas as the existing acreage will permit, each child entitled to be given his proportionate share, as nearly as practicable.

The Commissioner, in his decision rejecting the proof of Leckie, held that the said act of June 25, 1910, repealed the foregoing quoted provision of section 24 of the act of May 29, 1908, and he accordingly held that fourteen months' residence was necessary in support of commutation proof. This entryman had resided upon the land for only eleven months, and his proof was accordingly deemed insufficient and was rejected.

The correctness of the decision appealed from depends upon whether the ten months' provision contained in the act of 1908 was repealed by the said act of 1910. Where an act is amended "so as to read as follows," undoubtedly the broad general rule is as stated by Sutherland in his work on Statutory Construction, page 442 (Lewis's 2d Edition, 1904), viz: "The amendment operates to repeal all of the section amended not embraced in the amended form." Endlich on the Interpretation of Statutes, page 265, states the rule thus:

It is perfectly clear, that, as to all matters contained in the original enactment, and not incorporated in the amendment, the latter must be held to have the effect of a repeal.

This, however, is not an absolute and unbending rule.

In the case of *Bank of Metropolis v. Faber* (160 N. Y., 200), the court, after referring to the general rule that when a section is

amended "so as to read as follows," the section amended is repealed, says:

That rule is not so absolute and unqualified as not to be made to yield to a contrary intention when it is to be found in the nature of the case, in the language employed, and in the course of contemporaneous legislation on the subject.

It is observed that section 24 of the said act of May 29, 1908, contains provisions for allotting lands to Indian children, and it also provides for the sale of the remaining lands, and it further contains the said provision permitting persons who had theretofore made entry for any of the lands therein mentioned to receive patent upon showing compliance with the requirements of the homestead laws at any time after the expiration of ten months from the date of entry. The later act of 1910 provided only for allotments. It said nothing at all regarding the sale of surplus lands. This was because it had been found that there was not enough lands even for the purpose of allotting the usual 160 acres to new-born Indians. Furthermore, it entirely omitted reference to the requirements concerning entries theretofore made. The said section was introduced as a Senate amendment to a House bill. It was drafted in this Department and was designed solely to provide for allotment of the remaining lands to the Indians in proportionate shares, it having been discovered that there was not sufficient lands remaining to allow each Indian child 160 acres, as provided by the former act. The communications of the Secretary to the respective Houses of Congress were in the following language:

By direction of the President I have the honor to inclose herewith a draft of a bill amending section 24 of the act of May 29, 1908 (35 Stat. L., pp. 444, 456), with the recommendation that it be enacted.

Section 24 of the act of May 29, 1908, authorizes allotments of 160 acres to each child of Indian parentage born since June 5, 1906, whose father or mother was a duly enrolled member of the Kiowa, Comanche, or Apache tribe of Indians in Oklahoma.

Reports from the General Land Office show that there are 26,442 acres in the "pasture reserve" available for allotment. On May 29, 1908, there were 214 children living who were entitled to allotments and others have been born since. It is estimated that the lands available will suffice to give each child now in being about 110 acres of land. It becomes necessary, therefore, to request that the act be amended so as to authorize the allotment of these lands in such manner as to give to each child entitled his proportionate share. The inclosed bill, if enacted, will grant the necessary authority.

The said provision was enacted exactly as drafted and recommended by the Department, and, so far as observed, without discussion in Congress. Considering the history and purpose of this legislation, it does not appear reasonable to conclude that Congress intended to repeal the provision contained in the said act of May 29,

1908, requiring only ten months' compliance with law. This feature was not considered by the Department in recommending the new legislation, and presumably was given no consideration whatever by Congress. The two subjects are only remotely connected, if at all, and it appears proper to conclude that there was no intention or purpose to withdraw or repeal the ten months' provision. Said provision will therefore be given effect. In this view of the law, it appears that this entryman has fully earned patent. The decision appealed from is reversed, and it is directed that patent issue, unless other objection not here considered be found.

### RECLAMATION—BELLE FOURCHE PROJECT—CHARGES.

#### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,  
*Washington, December 30, 1911.*

In pursuance of Section 4 of the Reclamation Act of June 17, 1902 (32 Stat., 388), and of the act of February 13, 1911 (36 Stat., 902), Public Notice for the Belle Fourche Project, South Dakota, is hereby issued as follows:

1. The order of January 24, 1911 [39 L. D., 531], suspending the provisions of prior public notices as to charges, time and manner of payment, is hereby revoked. All lands subject to public notices and orders heretofore issued shall be divided into four classes, A, B, C and D, and shall be subject to the charges and terms of payment as hereinafter prescribed.

2. Class A includes all such public lands entered on or before January 24, 1911, and all such lands in private ownership held under trust deed, or signed under contract with the Belle Fourche Valley Water Users' Association on or before said date upon which but one annual instalment of the charges for building, operation and maintenance was due and unpaid on December 1, 1910; and also those lands upon which the portions of two annual instalments for the building charge were due and unpaid on December 1, 1910, but for which one of said building charge portions was thereafter paid within the time limited by the order of March 9, 1911, on or before March 31, 1911.

3. Lands of Class A, for which water-right application had been filed, shall be subject to the provisions of the public notices and orders heretofore or hereafter issued, at a building charge of \$30 per acre of irrigable land, graduated as follows:

First instalment \$1 per acre; second instalment \$2 per acre; third to eighth instalments, inclusive, \$3 each per acre; ninth instalment \$4 per acre; and tenth instalment \$5 per acre.

First instalments shall become due for lands in the first unit on December 1, 1909, and in the second unit December 1, 1911, and subsequent instalments on December 1 of each year thereafter.

4. Lands in Class A, for which no water-right application has been made, shall, in accordance with the provisions of the contract entered into between the United States and the Belle Fourche Valley Water Users' Association, on February 7th, 1911, be subject to the building charge of \$30 per acre, graduated as hereinbefore described, if water-right application therefor be filed within one year from the date of this notice; but in case of the failure to file water-right application within such time, or to pay the annual instalments, as required by the public notices and orders applicable thereto, the lands shall be subject to the building charge and conditions of payments hereinafter imposed upon lands in Class C.

5. Lands in Class A may, upon application, be transferred to Class B hereinafter described, and become subject to all the charges, terms, limitations and conditions applicable thereto. Such applications, if approved by the project engineer, shall be filed in the local land office.

6. Class B includes all lands which would be included under Class A, except for the fact that the building charge portions of the two annual instalments due and unpaid December 1, 1910, have not been paid, but as to which lands a stay of proceedings looking to a cancellation was obtained by payment, on or before March 31, 1911, of \$1.50 per acre, as allowed by the order of March 9, 1911, said order having provided that the securing of a stay of proceedings would render the land subject to a building charge between \$35 and \$38 per acre of irrigable land. The said charge is hereby fixed at \$35 per acre of irrigable land, graduated as follows: First to third instalments, inclusive, \$1 each per acre; fourth and fifth instalments \$2 per acre; sixth instalment \$3 per acre; seventh instalment \$4 per acre; eighth instalment \$5 per acre; ninth instalment \$6 per acre; tenth instalment \$10 per acre. The date when instalments are due shall, for lands in the first unit, be December 1, 1909; and for lands in the second unit, December 1, 1911; and subsequent instalments on December 1st of each year thereafter.

7. Class C includes all public lands subject to public notices and orders heretofore issued and vacant on and after January 24, 1911, and all lands in private ownership which on the said date were not held under trust deed, or were not signed under contract with the Belle Fourche Valley Water Users' Association.

8. Lands in Class C shall, until further notice, be subject to a building charge of \$40 per acre of irrigable land, payable in graduated instalments as follows: First and second instalments \$2 each per acre; third and fourth instalments \$3 each per acre; fifth and sixth instalments \$4 each per acre; seventh and eighth instalments \$5 each per acre; ninth and tenth instalments \$6 each per acre. For public lands of this class entered after January 24, 1911, the first two instalments shall be paid at the time of entry; the third instalment shall be due December 1 of the following year; and subsequent instalments shall be due on December 1 of each year thereafter.

For lands of this class in private ownership the first instalment shall be due on the date specified in the public notices applicable thereto, and payment of all amounts due in excess of one instalment for building, operation and maintenance shall be made at the time of filing water-right application.

9. In every case where water-right application is filed under the provisions of this notice, any payments heretofore made on account of the building charge shall be credited on the first and subsequent building charge payments for the same tract. If the application becomes subject to cancellation, by reason of failure to make further payment, as required by the Reclamation Act, appropriate action shall be taken for the cancellation thereof and of any entry made in connection therewith, and all rights therefor under the Reclamation Act, as well as any moneys paid thereunder, shall be forfeited.

10. Class D includes all lands now or hereafter owned by the State of South Dakota subject to public notices and orders heretofore issued, and the same shall continue subject to the charge of \$30 per acre of irrigable land, graduated as hereinbefore stated, if water-right application be made within one year from the date hereof. All lands in Class D for which water-right application shall not have been made within the said period of one year shall become subject to the charges, conditions and limitations herein imposed on the lands in Class C.

11. Nothing herein shall be construed as modifying the agreement between the United States and the Belle Fourche Valley Water Users' Association, dated February 7th, 1911, providing for a building charge of \$30 per acre for certain lands therein described but not covered by this notice.

12. The portion of the instalment for operation and maintenance shall, until further notice, be paid in accordance with public notices and orders heretofore issued.

13. An entryman against whose entry there is no pending charge of non-compliance with the law or regulations, or whose entry is not subject to cancellation under the Reclamation Act, may relinquish his entry and assign in writing to a prospective entryman any credits

he may have for payments made on his water-right application, and such assignee shall have the right to continue payment at the same building charge. A private land owner against whose water-right application there is no pending charge of non-compliance with the law or regulations, or whose water-right application is not subject to cancellation, may, in like manner, make written assignment of credits for payments made, and his grantee shall have the right to continue payment at the same building charge. No benefit of a smaller charge than that fixed by the public notice in force at the time of filing water-right application shall accrue for any land, except where the entryman or private landowner holds written assignment made under the conditions herein stated.

14. The stay of proceedings granted by order of March 9, 1911, shall terminate on March 15, 1912.

WALTER L. FISHER,  
*Secretary of the Interior.*

### RECLAMATION—MINIDOKA PROJECT—CHARGES.

#### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,  
*Washington, December 30, 1911.*

1. In accordance with the provisions of the act of June 17, 1902 (32 Stat., 388), known as the Reclamation Act, and the act of February 13, 1911 (36 Stat., 902), authorizing a withdrawal and modification of public notices issued under the Reclamation Act, the following public notice is hereby issued for the gravity unit of the Minidoka project, Idaho. Those lands for which written acceptance of its terms and new water applications are filed in due form, as hereinafter provided, which acceptances and applications when duly filed shall abrogate any former water right applications for such lands, shall be relieved from the provisions and requirements of all public notices and orders heretofore issued therefor, except as may be herein provided.

2. Entrymen or owners whose applications for water rights have been heretofore filed and accepted, and who do not accept the terms and conditions of this notice, may continue to pay the charges as heretofore announced and continue to be guided by the provisions of the public notices and orders previously issued in connection with their lands.

3. Any entryman who, under the order of March 18, 1911 [39 L. D., 529], secured a stay of proceedings looking to cancellation of his entry by making the payments required therein, may, at his option,



be governed by the terms of this notice, or by paying on or before March 15, 1912, the balance of the charges now due in excess of one full installment thereof, may resume payments in accordance with the public notices and orders heretofore issued. In default of action under this paragraph by March 15, 1912, the entry shall be subject to cancellation, without further notice.

4. All entries hereafter made for any of the lands shown on the plats herein described, and all water right applications hereafter filed therefor, shall be subject to the provisions herein contained; provided, that in cases of written assignments of credits for at least one full installment of the charges for building, operation and maintenance paid under the notices and orders heretofore issued, for lands which had not prior to such assignment become subject to the terms of this notice, the assignees or successors in interest may, if they so elect, continue to be governed by such previous notices and orders.

5. The limit of area for which water right application may be made for public lands subject to the provisions of the Reclamation Act is shown for each unit on the farm unit plats of Twps. 9 and 10 S., R. 22 E., Twps. 9 and 10 S., R. 23 E., Twps. 8, 9 and 10 S., R. 24 E., Twps. 8 and 9 S., R. 25 E, Boise meridian, approved by the Secretary of the Interior on June 18, 1910, and amendments thereof, and on file at the local land office at Hailey, Idaho. The limit of area for which water right application may be made for lands in private ownership is 160 acres of irrigable land for each land owner.

6. The term "irrigable land" as herein used shall be understood to mean the irrigable land shown on the farm unit plats enumerated in paragraph 5.

(a) The term "gravity land" as herein used shall be understood to mean any irrigable land for which water can now or in the future may be furnished from the canal system, at the grade of gravity distribution without additional expense on the part of the United States for construction purposes.

(b) The term "high land" as herein used shall be understood to mean any irrigable land situated above the grade of the gravity distribution of the water supply, which would, therefore, require additional works or expense to render it susceptible of irrigation. The lands listed in public notice of May 4, 1911, which are supplied with water by means of the raise in the banks of the C-2 canal and the construction of laterals and other works in connection therewith are classed as "high lands."

(c) No deduction from the area on which payments are required on any farm unit will be made for lands above the grade of the distribution of the water supply, unless such high lands exceed three acres in area.

7. Works providing for the irrigation of certain of the high land areas in the project have been or will be constructed by the United States, as funds become available for such purpose, and the estimated cost of such construction is included in the building charges announced herein. Maps indicating the general location of such lands are on file in the local land office at Hailey, Idaho, and in the office of the U. S. Reclamation Service at Rupert, Idaho; but it is expressly understood that such maps are subject to modification after further investigation. The first instalment of the charges for building, operation, and maintenance for such lands shall become due as provided in paragraph 22. No other construction work by the United States for the irrigation of high lands within the gravity unit is contemplated under the terms and conditions of this notice, but when any entryman or owner shall, by his own effort and expense, by leveling, grading, pumping, or other means, render any of the high land on his farm unit available for irrigation, water will be furnished therefor at the rates and terms provided herein, and the charges on such areas shall become due as provided in paragraph 22.

8. The cost of the construction of the project is in excess of the amount which will be returned by the repayment of the building charges heretofore announced. Acceptance of the terms and conditions of this notice, including the provision for graduated instalments, shall carry with it the agreement to pay the building charges hereinafter stated. Such charges also include the estimated cost of providing works for the irrigation of the certain high land areas referred to in paragraph 7.

9. The building charge for all public land shown on the said farm unit plats for which an acceptance is filed under the terms of this notice shall be \$30.00 per acre, payable in instalments as follows:

1st instalment, \$1.00 per acre; 2nd, \$1.50; 3rd, \$2.00; 4th, \$2.00; 5th, \$2.50; 6th, \$3.00; 7th, \$3.00; 8th, \$4.00; 9th, \$4.00; 10th, \$7.00.

10. Lands in private ownership for which water-right applications shall have been presented at the local land office in due form by qualified applicants on or before March 15, 1912, shall be subject to the \$30 rate payable according to the instalments set forth in paragraph 9.

11. For all land in private ownership, for which water-right applications shall be made in due form by qualified applicants after March 15, 1912, and within one year from the date of this notice the building charge shall be \$40 per acre, payable in instalments as follows:

1st instalment, \$1.00 per acre; 2nd, \$1.50; 3rd, \$2.00; 4th, \$2.50; 5th, \$3.50; 6th, \$4.50; 7th, \$5.00; 8th, \$5.50; 9th, \$6.50; 10th, \$8.00.

12. For all lands in private ownership, for which water right applications shall be made in due form, by qualified applicants more than one year from the date of this notice, and before such time as the Secretary of the Interior shall increase the charge by a subse-

quent notice, the building charge shall be \$40 per acre payable in ten equal annual instalments.

13. For all land for which water right applications have been heretofore made and for which acceptance of this notice shall be filed, accompanied by new water right applications, the first instalment of the building charge shall be due Dec. 1, 1911, and subsequent instalments on Dec. 1 of each year thereafter.

14. All amounts heretofore paid or credited on account of the building charge for any farm unit shall, upon acceptance of the terms and conditions of this notice, be credited upon the building charges for the same farm unit, and applied to the settlement of the instalments as they become due until all of said amount has been applied. The remainder of any instalment and all subsequent instalments shall be due on the dates hereinbefore provided.

15. The operation and maintenance charges per acre for the year 1910 due Dec. 1, 1910, and for all previous years shall be as announced in previous public notices, and no person who has heretofore filed a water right application shall be qualified to accept the terms of this notice until all charges for operation and maintenance due and unpaid on his farm unit under previous public notices and orders have been paid; provided that the terms of this notice may be accepted before April 1, 1912, without prior payment of the operation and maintenance charge for 1911, which is payable on or before April 1, 1912. All amounts in excess of 75 cents per acre of irrigable land heretofore paid on account of the operation and maintenance charge against any farm unit for the year 1911 shall, upon acceptance of the terms and conditions of this notice, be credited upon the operation and maintenance account for the same farm unit, and applied to the settlement of the instalments as they become due until all of such amount has been applied.

16. As to the public lands now unentered and the public lands for which entry is hereafter canceled and new entry made without written assignment of credits, the first instalment of the building charge and the first instalment of the operation and maintenance charge, other than the drainage charge, shall become due on Dec. 1 following the date of the entry thereof; and against the private lands for which water right application has not yet been made, the first instalment of the building charge and the first instalment of the operation and maintenance charge other than the drainage charge, shall become due on Dec. 1 following the date when water right application in due form is made therefor. Subsequent instalments shall in each case become due Dec. 1 of each year thereafter.

17. All entries hereafter made for any of the lands within the gravity unit shall be accompanied by water right applications in due form and all water right applications hereafter filed, whether for

public or for private lands shall be accompanied by the amount of all charges which may have accrued against such lands and remain unpaid or not assigned in writing. Credits shall be allowed for water right charges paid, only when the same shall have been assigned in writing and when the water-right application was uncanceled of record at the date of the assignment.

18. No charges shall accrue against any public lands subject to entry until the date of entry, nor against any private lands for which water right application has not yet been made, until application therefor is made, except that portion of the operation and maintenance charge on account of drainage works, which will be separately stated and announced from year to year as a portion of the operation and maintenance charge, and become due on December 1 of each year. Drainage charges herein and hereafter announced shall accumulate against all the lands in that portion of the project to which such charges apply, regardless of whether the lands be entered or unentered, or whether water right application has been made therefor or not. Before entry is allowed on any such public lands subject to entry, or water right application is accepted for any such public or private lands, payment will be required, of the sum of all unpaid drainage charges which became due in previous years.

19. It is impracticable to determine at this time the ultimate extent of drainage works which will be required to maintain the irrigability of the lands of the project. The cost of such works on the north side of Snake River will be apportioned over all lands on the north side of said river against which other charges under this notice are now apportioned, and subsequent amendment of these areas will be subject to similar future charges. All persons taking advantage of the terms of this notice and filing water right applications hereunder, agree to pay the operation and maintenance charges announced and to be announced by the Secretary of the Interior and agree that such operation and maintenance charges will include the cost of drainage works. Nothing contained in this paragraph shall be construed to change the terms for payment of drainage works by water right applicants who do not accept the terms and conditions of this notice.

20. For lands subject to water right charges under the terms of this notice the portion of the instalment for operation and maintenance due December 1, 1911, shall be seventy-five cents per acre. The operation and maintenance charges for such lands including drainage cost, due on Dec. 1, 1912, and on Dec. 1 of each year thereafter, until further notice, shall be \$1.50 per acre, of which 75 cents is the drainage charge. The operation and maintenance charge, as soon as data are available, will be fixed in proportion to the amount of water used, with a minimum charge per acre whether water is used thereon or not. Water will not be delivered during any year while

the operation and maintenance charge for the previous year or years remains unpaid. The portion of the operation and maintenance charge for drainage for any year shall not exceed one dollar per acre.

21. All building charges are payable at the local land office at Hailey, Idaho, in not more than ten annual instalments, and full payment may be made at any time of any balance remaining unpaid, but final water right certificate and patent will not issue until after certification that full and satisfactory compliance with the requirements of law has been shown as to payment, residence, cultivation, improvement and reclamation.

22. Charges for high lands for which water may hereafter be made available shall become due at such date after water becomes available for their irrigation as may be announced by the Secretary of the Interior.

23. This notice does not apply to the lands irrigated from the South Side pumping unit of the Minidoka Project, but owners or entrymen of lands wholly or partly irrigable by gravity from the South Side Gravity canal may obtain the benefit of this notice as to their gravity areas by filing acceptances as provided herein. No drainage charge shall be apportioned against such lands until the Secretary of the Interior shall determine that drainage works are to be constructed on the South Side and shall announce the charges therefor.

24. The following provisions are hereby established as necessary and reasonable regulations applying to all water users under the project, including those remaining subject to previous public notices and orders:

(a) In order to maintain the efficiency of the distributing or sub-lateral systems not owned by the United States so that all lands entitled to water may receive an adequate supply, the United States will, when necessary, furnish the work, supplies, materials, and services required to properly construct, maintain and operate such laterals or sublaterals as, at any time, give evidence of inadequate attention on the part of the water users deriving a water supply therefrom. The cost of all such work, material and services will be apportioned equitably against the land supplied by such laterals or sublaterals, as part of the instalment of the charges under the Reclamation Act. Such charges shall become due on December 1 of the year in which the work is done. No tract against which such charges may have become due will be entitled to water until same shall have been paid.

(b) In the operation and maintenance of the drainage system of the project, repairs are at times necessitated through accident or negligence on the part of the individual water users, or through damage caused by sublaterals supplying several such water users. In

order that such damages may be promptly repaired, and the cost equitably apportioned, it is hereby ordered that if, after written notice from the project engineer to the responsible individual or proper officer of the district organization, as the case may be, such repairs are not promptly and properly effected, then the United States will supply the necessary labor, material and supplies for such work, and the charges shall be apportioned and collected in the same manner as provided in paragraph 24 (a) and no tract against which such charges may have become due will be entitled to water until same shall have been paid.

(c) In order to insure the delivery of water to all lands entitled thereto, the United States shall at all times have the right to control all headgates and other structures on the project, and shall have the right to possession of the keys to all locks thereon.

25. Acceptance of the provisions of this notice shall be in the following form executed on a copy hereof.

FORM OF ACCEPTANCE.

I, entryman or owner of farm unit \_\_\_\_\_ in Section \_\_\_\_\_, Twp. \_\_\_\_\_ S., R. \_\_\_\_\_ E., B. M., in the Minidoka Project, Idaho, do hereby accept the terms and conditions of the above, and consent to the abrogation of my former water right application, and present herewith a new water right application hereunder.

Date \_\_\_\_\_

Witness to signature:  
\_\_\_\_\_

26. All public notices and orders heretofore issued for the project shall remain in full force and effect except as herein specifically modified.

27. The stay of proceedings granted by orders of March 18 and March 31, 1911 [39 L. D., 529, 530], shall terminate on March 15, 1912.

WALTER L. FISHER,  
*Secretary of the Interior.*

RECLAMATION—NORTH PLATTE PROJECT—PAYMENT.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,  
*Washington, December 30, 1911.*

Whereas, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), works for irrigation and for the control of seep-

age waters have been constructed or are in contemplation at a cost of approximately five and one half million dollars for the irrigation and reclamation of about 100,000 acres for the North Platte Project, Nebraska-Wyoming, and said cost must be repaid by the water-users, as required by said act, in not exceeding ten annual instalments divided into a building charge for the building of the works, and a charge for the operation and maintenance thereof, and

Whereas, public notice of the said charges, the time and manner of payment has been given for two units of the project designated as the First and Second Lateral Districts, the said charges being fixed so as to recover the cost of building, operating and maintaining the project as to the lands in question, as then estimated, and

Whereas, by contract of April 25, 1906, between the United States and the North Platte Valley Water Users' Association and by supplemental contract of June 23, 1909, between the same parties, it was agreed that a building charge of \$45 per acre be imposed upon the lands under the project, and by public notices and orders heretofore issued provision was made for the filing of water-right applications in accordance therewith, and

Whereas, For approximately 34,000 acres in the First Lateral District, wherein water was made available in 1908, payment, in most cases, has been made of \$2 per acre on the portion of the instalment for the building charge of \$45 per acre of irrigable land fixed by said public notice, leaving now due and delinquent, in most cases, the further sum of \$3 per acre upon said building charge, and leaving now due and unpaid thereon two further instalments of \$5 each per acre, and

Whereas, For approximately 32,000 acres in the Second Lateral District, wherein water was made available in 1909, payment in most cases has been made of 50 cents per acre on the portion of the instalment for the building charge of \$45 per acre, leaving now due and delinquent, in most cases, the further sum of \$1.50 per acre upon said building charge, and leaving now due and unpaid two further instalments of \$3 and \$5 per acre respectively, and

Whereas, Under the provisions of the Reclamation Act, most of the homestead entries and water-right applications on public lands, and most of the water-right applications for lands in private ownership in said lateral districts have been subject to cancellation on account of said delinquency in payment of the building charge, but by orders of March 7, and March 24, 1911 [39 L. D., 606], issued under the act of February 13, 1911 (36 Stat., 902), a stay of proceedings was allowed under conditions therein stated, and

Whereas, Said order of March 24, 1911, provided for a water supply to be furnished until June 15, 1911, without prepayment on account

of the charge for operation and maintenance, the sum of 25 cents per acre being required on or before June 15, 1911, to secure a water supply for the remainder of the irrigation season, upon condition that the sum of \$1 per acre be paid on or before December 1, 1911, and

Whereas, The water users have failed to make the payments as required by said public notices for reasons which, in many cases, may have been unavoidable on their part, and it has accordingly been decided to offer such opportunity as may be reasonable and possible under the terms of the said act of February 13, 1911, for the water-users to secure easier terms of payment, and at the same time to recover for the Reclamation Fund, as required by the terms of the Reclamation Act, the cost as now estimated of the building, operation and maintenance of the irrigation works, including necessary additional works to collect and utilize the seepage waters, so far as the location and cost of the same can now be anticipated.

Therefore, The following public notice is issued under the terms of Sec. 4 of the Reclamation Act, and of the said act of February 13, 1911:

1. All applications for water rights heretofore filed under the terms of the public notices and orders heretofore issued may be continued under the terms thereof, if the said public notices and orders issued prior to March 7, 1911, be fully complied with by payment and otherwise on or before March 15, 1912. For lands in the Second Lateral District heretofore rendered subject to public notices for which no water-right application has heretofore been filed, such application may be filed on or before March 15, 1912, at the building charge of \$45 per acre of irrigable land, subject to the terms of the public notices and orders applicable thereto, heretofore or hereafter issued. The purpose of this paragraph is to give all land owners and entrymen thereto entitled further opportunity to secure the benefits of the terms of the contracts hereinbefore referred to, made by the United States with the North Platte Valley Water Users' Association.

2. For the purpose of avoiding the cancellation of entries and water-right applications, for which the entrymen or owners shall have failed on or before March 15, 1912, to comply by payment and otherwise with the public notices and orders under which their water-right applications were made, it is hereby ordered, that for lands in the First and Second Lateral Districts, water-right application at a building charge of \$55 per acre of irrigable land, may be made as amendatory to water-right application heretofore filed, or original water-right application at the same charge shall be made where none has been heretofore filed, except as provided in paragraph 1 for the Second Lateral District.

Application under this paragraph shall be subject to the public notices and orders heretofore or hereafter issued, and the said build-



ing charge of \$55 per acre shall be due and payable in ten graduated annual payments, as the portions of the annual instalments, as follows:

First building charge payments	\$1.00	due	Dec. 1,	1911.
Second	"	"	"	1, 1912.
Third	"	"	"	1, 1913.
Fourth	"	"	"	1, 1914.
Fifth	"	"	"	1, 1915.
Sixth	"	"	"	1, 1916.
Seventh	"	"	"	1, 1917.
Eighth	"	"	"	1, 1918.
Ninth	"	"	"	1, 1919.
Tenth	"	"	"	1, 1920.

3. Where water-right application at the building charge of \$55 per acre, fixed in paragraph 2, is filed for lands in the First and Second Lateral Districts, any payments heretofore made on account of the building charge thereon shall be credited on the first and subsequent building charge payments for the same tract.

4. The portion of instalment for operation and maintenance for the irrigation season of 1911 to be paid on or before December 1, 1911, as required by the order of March 24, 1911, shall be paid on or before March 15, 1912. For the irrigation season of 1912 and subsequent years the portion of the instalment for operation and maintenance shall be \$1.25 per acre until further notice and shall be due annually on December 1 of the preceding year. No water shall be furnished in any year until payment of the portions of the instalment for operation and maintenance then due.

5. Failure to comply with the terms of this and previous public notices and orders shall render existing homestead entries and water-right applications for public lands, or water-right applications for lands in private ownership, subject to cancellation with the forfeiture of all rights thereunder, and of all moneys paid thereon, as provided by the Reclamation Act.

6. This public notice shall not be construed as affecting subsisting water-right applications made at the building charge of \$35.00 per acre.

7. An entryman against whose entry there is no pending charge of non-compliance with the law or regulations, or whose entry is not subject to cancellation under the Reclamation Act, may relinquish his entry and assign in writing to a prospective entryman any credits he may have for payments made on his water-right application, and such assignee shall have the right to continue payment at the same building charge. A private land owner against whose water-right application there is no pending charge of non-compliance with the law or regulations, or whose water-right application is not subject to cancellation, may in like manner make written assignment of credits for payments made, and his grantee shall have the right to

continue payment at the same building charge. Except as specifically provided in this notice, no benefit of a smaller charge than that fixed in the public notice in force at the time of filing water-right application shall accrue for any land, except when the entryman or private land owner holds written assignment made under the conditions herein stated.

8. The stay of proceedings granted by orders of March 7 and March 24, 1911 [*supra*], shall terminate on March 15, 1912.

WALTER L. FISHER,  
*Secretary of the Interior.*

### STATE OF UTAH.

*Decided January 2, 1912.*

#### STATE SELECTION—COAL CLASSIFICATION—RESTRICTED PATENT.

The fact that lands selected by the State of Utah under section 8 of the act of July 16, 1894, were adjudicated by the Commissioner of the General Land Office to be noncoal lands, as the result of a hearing upon a report by a special agent charging that such lands contained coal, does not entitle the State to an unrestricted patent therefor where the lands were subsequently withdrawn and classified as coal; but the State is entitled to perfect the selection and take title to the land only with reservation to the United States of the coal therein, as provided by the act of June 22, 1910.

ADAMS, *First Assistant Secretary:*

The State of Utah has filed a petition to the Department praying for the exercise of supervisory authority in its behalf in the matter of its list of selections filed in the local land office August 22, 1902, under section 8 of the act of July 16, 1894 (28 Stat., 107), which included, among other lands, lots 3, 4, 5 and 6 and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 4; all of Sec. 5; lots 1, 6 and 7 and E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 6; E.  $\frac{1}{2}$  and E.  $\frac{1}{2}$  W.  $\frac{1}{2}$ , Sec. 8; W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 9, T. 17 S., R. 7 E., in said State.

It is alleged that said list was approved by the register and receiver September 10, 1902, but testimony was subsequently taken before the register and receiver, upon report of a special agent that the lands above described contain coal; that, upon the testimony taken at that hearing, the local officers found said lands to be mostly valuable for coal, which decision was reversed by the General Land Office upon the appeal of the State, and, after the lapse of time allowed for appeal without any action being taken by the representative of the Government to secure a review of said decision, the Commissioner, by letter of August 17, 1904, advised the local officers that the decision had become final, and the case was closed. But the selection as to said tracts has not been approved.

July 26, 1906, the lands were withdrawn for examination with a view to their classification as coal and were subsequently so classified,

and a diagram or map of the same was transmitted to the register and receiver showing said lands classified as coal-bearing lands.

The State was advised that it may take patent for the surface only of said lands but, if it submit affidavits by parties having knowledge of the character of the lands showing them to be noncoal in character and request a reclassification, the matter will be submitted to the Geological Survey for consideration.

The State contends that it should not be required to take patent for the surface of said lands only because of the former adjudication of the Commissioner of the General Land Office that the lands in question were not coal lands. Its contention in effect is that the question as to the character of the lands has been formerly adjudicated and is no longer subject to review and consideration by the land department.

There is no merit in the contention. Former adjudication is not a bar to the jurisdiction of the land department to reexamine and inquire into any question affecting the right to the public lands so long as the legal title remains in the Government, and to review, revoke, annul, or modify a former adjudication unless such equitable right or title has vested thereunder as would entitle one to a patent. *Knight v. Land Association* (142 U. S., 161); *Parcher v. Gillen* (26 L. D., 34, 38); *Brooks v. McBride* (35 L. D., 441, 442).

It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. (*Cornelius v. Kessel*, 128 U. S., 456; *Orchard v. Alexander*, 157 U. S., 372, 383; *Parsons v. Venzke*, 164 U. S., 89.) In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. [*Michigan Land and Lumber Co. v. Rust*, 168 U. S., 593.]

But no title had vested in the State by the mere selection and former adjudication by the Commissioner. Both the legal and the equitable title to the lands was in the Government at the time of the passage of the act of June 22, 1910 (36 Stat., 583), providing for the disposal of lands classified as coal, which also provided that selections initiated in good faith prior to the passage of said act may be perfected and title obtained, "with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same."

After the passage of that act, the Commissioner had no authority to dispose of such lands in any other manner, except as therein provided for, having been classified as coal lands by proper authority, and the Department, for like reason, has no authority to direct otherwise.

The petition is denied.

**WINNINGHOFF v. RYAN.**

*Decided January 2, 1912.*

**HOMESTEAD ENTRY—CULTIVATION—CHARACTER OF LAND.**

The homestead law requires cultivation, and land which is so mountainous, rough, broken, heavily timbered, and of such poor quality that it is impossible of cultivation, is not subject to homestead entry.

**ADAMS, *First Assistant Secretary:***

February 23, 1911, the Department entertained a motion for review in the case of Bertha C. Winninghoff v. William L. Ryan, after oral argument by counsel for both parties, in which, by its decision of December 6, 1910, reversing the concurring decisions of the Commissioner of the General Land Office and the register and receiver, it dismissed the contest against Ryan's homestead entry, No. 13904, made February 21, 1906, at Vancouver, Washington, for the SE.  $\frac{1}{4}$ , Sec. 19, T. 7 N., R. 3 E., W. M. The motion has been duly served, and the matter is now ready for action. The Department has again considered the entire record and the exhaustive briefs filed by counsel.

The testimony is voluminous and conflicting. That of contestant's witnesses shows that the land embraced in this homestead is exceedingly mountainous, precipitous, rough, broken with canyons, and impossible of cultivation. The land is very heavily timbered, carrying approximately fifteen million feet of merchantable timber of an estimated value of from one to two dollars per thousand. All of the contestant's witnesses agree that the soil is very poor, being composed of clay and gravel, with numerous rocks intermixed, and would not raise agricultural crops even if the timber were cleared; further, the steepness of the land is such that it would be impossible to cultivate it even if the soil were sufficient. Several of the witnesses are timber cruisers, and some of them were parties having contests against homestead entries in that vicinity. They visited the land at various times in the summer of 1908. The sole improvement found was a small log cabin, unchinked, with a door standing unhung. Across the small creek from this cabin was another built of shakes, with a log addition. They testified that both of these would be uninhabitable during the winter time and rainy season, as the snow would melt and the water would leak in. A small patch of from one-fourth to one-third of an acre had been slashed, *i. e.*, the trees had been cut down, but the stumps were standing, and in this patch there were nine or ten of these stumps and four or five large trees standing. They found no cultivation whatever, the only evidence of that nature being that on top of one of the large stumps the surface had been boxed in by shakes, some vegetable mold gathered and placed there, and a few strawberry plants planted, and also one onion planted, which was supported by being tied to a stick. The

timber was so dense that sunlight could reach the ground for a period not to exceed one hour a day, which would make the growing of crops impossible; the dampness would occasion mold to settle upon the cabins and their contents, and render them unhealthy to live in. The sole means of access to the claim is a difficult and dangerous trail over the mountains from the nearest settlement, some fifteen miles away. The houses upon the land were such as farmers would use for hog pens or chicken houses, and would not be fit places of habitation for a man and his family. There were no domestic fowls on the place, and at the time of their visits, except once, there were no signs of habitation around the cabins, which appeared to be abandoned. There was no chimney to either of the cabins, but in the shake cabin there was a square hole in the roof from which smoke, on one occasion, was pouring. Between this land and the nearest towns there is a large area of vacant public land, upon which the timber has been burned. They found no homesteads in this area, and did not see any homestead until they struck the green timber. They further testify that it would cost \$300 an acre to clear this land of the timber, and that such expenditure would be useless, as the land would have no value for farming after the timber was removed. One of the witnesses testifies to a conversation with Ryan, in which Ryan told him that he was living in Aberdeen, Washington.

Photographs of Ryan's, or his wife's, house in Aberdeen, and of the house in Kalama, to which they apparently later removed, were introduced in evidence.

Notice of the contest was served upon Ryan in Aberdeen, Washington, and also another at Kalama, Washington, while he was there attending as a proof witness in another homestead entry. The directory of 1905, of Aberdeen, showed that Mrs. Ellen Ryan, milliner, and William L. Ryan, timber cruiser, were living at 306 Wishkah Street, and that of 1907 gave simply the address of Mrs. Ellen Ryan.

This testimony further tends to show that it would be much easier to clear the land already burned over than the land embraced in this homestead, and that, from all the conditions surrounding the entry, the witnesses were of opinion that the entryman's sole purpose was to acquire the timber. It is also shown in their testimony that it would be a dangerous place for a man to live with his family, and that the snow in the winter time would be four or five feet deep. It also appears that the only method to get farming implements to the land would be to take them apart and strap the parts to the backs of pack animals, putting them together again upon the land. All produce raised would also have to be packed out, offering the same difficulty as with tools.

Most of the witnesses on behalf of contestee are persons having heavily timbered homesteads in the near vicinity of Ryan's. Their testimony is directly in conflict with that of the contestant's witnesses as to the amount of clearing and the question of whether Ryan had a garden there or not. They contend that the photographs of the clearing taken by the contestant do not show all of the clearing, and are not fair. They do not dispute the heavily timbered character of the land. Some attempt is made to prove that the soil is good and could be farmed after the timber had been cut. The majority of them testify to having seen Ryan living on the land, at various times; some of them had eaten and slept with him in the shake cabin. The log cabin, adjoining the shake cabin, it is testified was used by Ryan as a bath house for the purpose of relieving his rheumatism. The cabin seems to have been well equipped with homemade furniture, *i. e.*, furniture hewn out of the timber which grows upon the land. He also appears to have kept it well supplied with provisions, and also brought in a mattress and springs. They testify that in the cleared space Ryan had a garden for several years, consisting of potatoes, strawberry plants, lettuce and beans, although their testimony is somewhat conflicting as to the exact location of the garden and its contents. They testify that this garden was in existence at the time contestant's witnesses examined the land, and that any person examining the clearing could not have failed to observe it. During the course of the trial one witness went to the land and secured samples of potatoes, onions, strawberry plants and beans, which, it is alleged, came from the Ryan land. The strawberry patch on the stump, it was claimed, was planted there merely for the purpose of amusement or experiment. According to their testimony a county road had been surveyed out, which would lead within two hundred yards of the land, and would furnish an easier method of ingress and egress. Ryan's own testimony is that he first initiated his claim to this land in November, 1897, at which time the log cabin to the east of the small creek was already upon the land; that he constructed the shake cabin in about 1902; that his home has been on the land ever since 1902, at least; that his wife and family lived in Aberdeen, Washington, and removed to Kalama, Washington, after service of the contest notice. He admits that his wife and family never lived upon the land, but claims that his wife refused to do so, as she was desirous of keeping her children in town in order that they might attend school. He states that they had a serious disagreement upon this point, and that his wife has been self-supporting, the houses in Aberdeen and Kalama being rented by her, she paying the rent out of money earned in conducting a small millinery store. It is admitted that no produce has ever been raised on or sold from this particular land, or any other homestead in that vicinity. The witnesses for

contestee contend that it is easier to clear land of green timber than burnt timber. Ryan's testimony is corroborated by his wife, who testified that she visited the land but twice, in the summer of 1906 and the summer of 1907, merely as an outing. At one time she states that in August, 1907, she wrote her husband requesting him to come home, at Aberdeen, and then changes it to read *her* home in Aberdeen. The contestee's testimony is further to the effect that the snow does not lie upon the ground to exceed fourteen or sixteen inches in the winter time, and that Ryan's shake house was at all times water-tight, comfortable and inhabitable. Ryan's business appears to have been that of a timber cruiser and locator. The garden was apparently unfenced, and no domestic animals of any kind, except pack animals used in taking in supplies, were ever upon the land. That Ryan has spent considerable periods of time upon the land is established in his testimony and that of his wife, the testimony of the remaining witnesses merely being to the effect that they saw him there at different times.

In rebuttal, the contestant called attention to the fact that some of the bean plants introduced in evidence were in flower at that time (October); that the potatoes introduced in evidence could not have come from the potato plants, as there were very minute potatoes only beginning to form on the roots; that the sample onion introduced showed the old seed onion, no new onion having formed. The plants also showed the effect of frost, and also, from their appearance, indicated that they had been grown in the shade. The purport of the witnesses' testimony in rebuttal is to the effect that the samples so introduced could not have been raised upon the land in question, as the soil was too poor to raise even the specimens introduced in surrebuttal. The contestee put in testimony to the effect that the soil was sufficient to raise such specimens.

From the above the following conclusions are warranted: The land is exceedingly valuable for its timber, being worth from fifteen to thirty thousand dollars. The register and receiver and the Commissioner found that the land was too rough, broken, and heavily timbered, to be capable of cultivation, and the weight of the testimony substantiates their finding. Ryan appears to have spent a considerable portion of his time upon the land, and if his own mere physical presence thereon is sufficient, the Department's decision is correct. The register and receiver and the Commissioner apparently were not much impressed with the excuse offered by Ryan and his wife for the failure of his family to reside thereon. As their testimony is uncorroborated in that regard, and as they are the chief parties in interest, the Department concurs in the findings below as to that aspect of the case. A small garden patch may have been cultivated by Ryan, but it should be pointed out that the place so cultivated was along a

small creek, where possibly some small amount of level ground might be found. The weight of the testimony shows that crops planted there could not mature, due to the lack of sunlight and the lateness of the season giving them no time to ripen.

It has long been the rule of the Department that the mere fact that lands are heavily timbered does not exclude them from homestead entry. In the case of *Davis v. Gibson* (38 L. D., 265), it was held that land unadapted to any agricultural use is not subject to entry under the homestead law, the reason for the inadaptability in that case being the fact that the land was a shell mound overflowed by tide waters. Logically, there is no distinction between that case and the one here involved, as the heavy growth of timber, the rough character of the land, and the poorness of the soil prevent any adaptation of the land to agricultural purposes, even assuming that agricultural implements could be brought to the land and used when there. So, in the case of *Finley v. Ness* (38 L. D., 394), the Department held that land covered with valuable timber can be entered under the homestead law where it is of such character that it would be suitable for agricultural use if the timber be removed, but that land of a character not adaptable to any agricultural use is not subject to homestead entry. In the case of *Johnson v. Bridal Veil Lumbering Company* (24 Oreg., 182—33 Pac., 528), cited by counsel for the contestee, the Supreme Court of Oregon held that the fact that the land is unfit for cultivation and valuable chiefly for timber, did not prevent homestead entry thereof. The court said:

It might be safely said that a homestead claimant who desired such a tract for a home and agricultural purposes had not exercised very good judgment in the selection, but *if he could grow crops thereon* he would be entitled, under the law, to make his final proof and receive his patent. His right to make final proof and obtain a patent rests *upon his cultivation of the soil* and not upon the exercise of his judgment in the selection of his homestead.

In the case of *J. J. McCaskill Company v. United States* (216 U. S., 504, 510), Justice McKenna states the requirement of the homestead law as follows:

It gives the right of entry of 160 acres of land as a homestead, upon the condition, however, which must be established by affidavit, that the "application is honestly and in good faith made for the purpose of actual settlement and cultivation and not for the benefit of any other person." That applicant will honestly endeavor to comply with the requirements of settlement and cultivation, and does not apply to enter the same for the purpose of speculation. The purpose of the law, therefore, is to give a *home*, and to secure the gift the applicant must show that he has made the land a home. Five years of residence and cultivation for the term of five years he must show by two credible witnesses.



Under the above decisions the lands here involved must be held not subject to homestead entry, as it is impossible to escape the conclusion that the entryman has no purpose of establishing a home and using the land for cultivation, as required by the law, but that his sole purpose is to obtain the valuable timber growing upon the land, which is so heavily timbered that the cost of clearing is prohibitive, and which, even if cleared, would be impossible of cultivation, due to the poor quality of the soil and its rough and broken character. The Department concurs in the finding of the Commissioner and that of the register and receiver, that the contestee did not take this land for a home; that his actual place of residence at the date of entry, and at the date of contest, was with his family in Aberdeen, Washington, until he moved them to Kalama just prior to the hearing; that he failed to establish a *bona fide* residence on the land to the exclusion of his home in Aberdeen, and that his bad faith is clearly shown by the testimony.

The prior decision of the Department is accordingly vacated, and that of the Commissioner, holding the entry for cancellation, is affirmed.

**PARAGRAPH 42 OF MINING REGULATIONS OF MARCH 29, 1909,  
AMENDED.**

**REGULATIONS.**

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,  
*Washington, January 9, 1912.*

REGISTERS AND RECEIVERS,

*United States Land Offices.*

GENTLEMEN: Regulation No. 42 of the mining regulations approved March 29, 1909 (37 L. D., 728, 766), is hereby amended to read as follows:

42. This sworn statement must be supported by a copy of each location notice, certified by the legal custodian of the record thereof, and also by an abstract of title of each claim certified by the legal custodian of the records of transfers, or by a duly authorized abstracter of titles. The certificate must state that no conveyances affecting, or purporting to affect, the title to the claim or claims appear of record other than those set forth.

Outside of the District of Alaska the application for patent will be received and filed if the abstract is brought down to a day reasonably near the date of the presentation of the application and shows full title in the applicant who must as soon as practicable thereafter file a supplemental abstract brought down so as to include the date of the filing of the application. Publication will not be ordered until the showing as to title is thus completed and the local land officers are satisfied that full title was in the applicant on the day of the filing of the application.

In the District of Alaska the application for patent will be received and filed and the order for publication issued if the abstract showing full title in the applicant is brought down to a day reasonably near the date of the presentation of the application. A supplemental abstract of title brought down so as to include the date of the filing of the application must be furnished prior to the expiration of the sixty-day period of publication.

No certificate from an abstracter, or abstract company, will be accepted until approval by the Commissioner of the General Land Office of a favorable report of the chief of field division, or United States district attorney whose division or district embraces the lands in question, as to the reliability and responsibility of such abstracter or company.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

SAMUEL ADAMS,  
*Acting Secretary.*

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**HEFLIN v. SCHNARE.**

Motion for rehearing of departmental decision of September 8, 1911, 40 L. D., 261, denied by First Assistant Secretary Adams, January 15, 1912.

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**JOHN J. NEVILLE.**

*Decided December 5, 1911.*

**ISOLATED TRACTS—DOUBLE MINIMUM LANDS.**

The act of June 27, 1906, authorizing the Commissioner of the General Land Office to order into market and sell at public auction for not less than \$1.25 per acre any isolated or disconnected tract or parcel of public land, not exceeding one quarter section, does not repeal the provision in the act of July 25, 1866, fixing the price of lands within the limits of the grant made by said act to the Oregon and California Railroad Company at not less than the double minimum price, nor the proviso to section 2357 of the Revised Statutes, and therefore does not authorize the sale of an isolated tract within the primary limits of said grant at less than the double minimum price.

*ADAMS, First Assistant Secretary:*

January 21, 1910, the Commissioner of the General Land Office authorized the sale of the N.  $\frac{1}{2}$  NW:  $\frac{1}{4}$ , Sec. 18, T. 47 N., R. 4 W., M. D. M., Redding, California, land district, as an isolated tract.

This sale was ordered upon the application of John J. Neville, and the price fixed at "not less than \$1.25 per acre." The sale was had, at which Neville appeared and bid the minimum price for the land but the register and receiver noted that the land was within the primary grant to the C. P. R. R. Co., and could not be sold for less

than the double minimum price of \$2.50 per acre, and they therefore required Neville to pay this amount for the land. Upon his refusal to bid the amount required, his application was rejected and thirty days given him within which to pay the additional sum necessary to make up the double minimum price.

From the action of the local officers he appealed to the Commissioner, who, on March 23, 1911, by decision of that date affirmed the action of the local officers and required him to pay the double minimum price, and from said decision this appeal is prosecuted to the Department.

The tract in question is within the primary or granted limits of the grant made by the act of July 25, 1866 (14 Stat., 239), to aid in the construction of what was known as the California and Oregon railroad, by the second section of which it was provided:

And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of the public lands when sold.

It is contended in the appeal under consideration that the act of June 27, 1906 (34 Stat., 517), which authorized the Commissioner of the General Land Office to order into market and sell at public auction for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of public land, not exceeding one quarter section, repealed all former acts respecting the price of any tract determined to be an isolated tract and ordered to be sold.

In the case of *United States v. Healey* (160 U. S., 136), the court had under consideration the question as to the effect of the desert-land act where desert lands were applied for under said act but were of the alternate sections remaining to the United States within the primary limits of a railroad land-grant which grant by its terms required disposal of the lands at not less than the double minimum price. In that case the court said, at page 146:

The act of 1877 and the proviso of section 2357 of the Revised Statutes both relate to public lands; the former, to desert lands, that is, such lands—not timber and mineral lands—as required irrigation in order to produce agricultural crops, and the price for which was \$1.25 per acre; the latter, to such lands, along the line of railroads, as were reserved to the United States in any grant made by Congress, and the price for which was \$2.50 per acre. As the statute last enacted contains no words of repeal, and as repeals of statutes by implication merely are never favored, our duty is to give effect to both the old and new statute, if that can be done consistently with the words employed by Congress in each. We perceive no difficulty in holding that the desert lands referred to in the act of 1877 are those in the States and Territories specified, which required irrigation before they could be used for agricultural purposes, but which were not alternate sections reserved by Congress in a railroad land grant. It is as if the act of 1877, in terms, excepted from its operation such lands as are described in the proviso of section 2357 of the

Revised Statutes. Thus construed, both statutes can be given the fullest effect which the words of each necessarily require. In the absence of some declaration that Congress intended to modify the long-established policy indicated by the proviso of section 2357 of the Revised Statutes, we ought not to suppose that there was any purpose to except from that proviso any public lands of the kind therein described, even if, without irrigation they were unprofitable for agricultural purposes. To hold that alternate sections along the lines of a railroad aided by a grant of public lands, being also desert lands, could be obtained, under the act of 1877, at one dollar and twenty-five cents an acre, would be to modify the previous law by implication merely.

In view of this decision the Department is not disposed to reverse the decision of the local officers and the Commissioner of the General Land Office in this case, holding that the sale can not be effected for less than the double minimum price. The decision of the Commissioner appealed from must be and is therefore accordingly hereby affirmed.

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**MARY H. BECKWITH.**

*Decided December 7, 1911.*

**HOMESTEAD FINAL PROOF—CREDIT FOR MILITARY SERVICE.**

While the widow of a soldier who made homestead entry for 160 acres is entitled to have the period of his military service deducted from the required five-year period of residence in proving up *his* claim, she is not entitled to credit for such service in proving up a homestead entry made in her own personal right.

**THOMPSON, Assistant Secretary:**

May 8, 1907, Mary H. Beckwith made homestead entry 29879 (Serial 06420) for the SW.  $\frac{1}{4}$ , Sec. 20, T. 30 S., R. 34 W., Dodge City, Kansas, land district.

She submitted final proof upon said entry December 9, 1909, showing residence of two years and seven months upon the land, with satisfactory improvements and cultivation, and claiming deduction from the five-year residence on account of the service of her deceased husband, Samuel R. Beckwith, in Company G., 150th Regiment, Pennsylvania Infantry, from September 3, 1862, to June 23, 1865, in the war for the preservation of the Union.

Her proof was rejected by the local officers, holding that the period of the army service of her husband can not be deducted from the five-year period of residence required upon her entry. From this decision claimant appealed and, by decision of the Commissioner of the General Land Office of November 1, 1910, the action of the local officers, rejecting the proof, was affirmed, and claimant has appealed to the Department.

It appears from the records of the land department that her deceased husband, Samuel R. Beckwith, for whose military service she claims credit, on May 29, 1905, made homestead entry 23578 for the SE.  $\frac{1}{4}$ , Sec. 17, T. 30 S., R. 34 W., Dodge City land district, Kansas, based on soldiers' declaratory statement, No. 1564, filed by him November 26, 1904, and that his widow, the claimant Mary H. Beckwith, submitted proof on his said entry December 8, 1909, alleging that the entryman died February 10, 1906, and compliance with the requirements of the law by herself after said date.

Upon such proof final certificate issued December 9, 1909. No credit for military service of Samuel R. Beckwith was claimed in connection with his said entry No. 23578.

Section 2307, Revised Statutes, provides that—

In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, . . . shall be entitled to all the benefits enumerated in this chapter—among which benefits are the right to have the period of military service deducted from the five-year period of residence required upon a homestead entry. In this case, however, the soldier-husband had made homestead entry of 160 acres, thus exhausting his homestead right. His widow was entitled to receive the benefit of his military service in proving up his claim, but such credit can not be applied in proving up the entry made in her own personal right.

The decision appealed from is accordingly affirmed.

### CLARENCE A. WOOD.

*Decided December 14, 1911.*

#### SECOND HOMESTEAD—SECTION 2, ACT JUNE 5, 1900.

A homestead entry completed under section 2 of the act of June 15, 1880, by payment of the government price for the land, is not "commuted" within the meaning of section 2 of the act of June 5, 1900, and the entryman is not entitled to the right of second entry accorded by the latter act.

#### THOMPSON, *Assistant Secretary*:

January 31, 1878, Clarence A. Wood made homestead entry at the Norfolk, Nebraska, land office for the NW.  $\frac{1}{4}$ , Sec. 27, T. 23 N., R. 9 W., which tract was purchased by him under the act of June 15, 1880 (21 Stat., 237), and cash certificate issued thereon April 17, 1882. The land was patented thereunder April 20, 1889.

July 17, 1908, said Wood was allowed by the local officers to make homestead entry for the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 1, and the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 12, T. 42 N., R. 14 W., Montrose, Colorado, land district.

March 22, 1910, the Commissioner of the General Land Office held that the entryman had, by his former entry, exhausted his homestead right, and he was allowed sixty days within which to show cause why his said second entry should not be canceled for illegality.

June 3, 1910, entryman filed in the local office his unsworn statement, in which it was alleged that after continuous residence on his original homestead for about four years, he went to the local land office with witnesses prepared to prove "continuous residence and cultivation;" that he was advised by the local officers that no proof was necessary, the cash payment of \$200 being sufficient; that he was in possession of his homestead and could have continued such residence and made five-year proof, but following such advice he paid said sum of \$200 and thus made entry of the land "because it was an advantage to commute the time of residence." This statement was transmitted to the General Land Office.

December 10, 1910, the Commissioner held that said original entry could not be treated as "commuted" within the meaning of the second section of the act of June 5, 1900 (31 Stat., 267), and that relief was not afforded by the act of May 29, 1908 (35 Stat., 465), for the reason that the entry in question was made after the passage of said act; that whatever entryman's intentions may have been, he made final entry of the land embraced in the original entry under the second section of the act of June 15, 1880, *supra*.

It will be noted that the provisions of said section do not require proof of residence, but provide—

that persons who have heretofore, under any of the homestead laws, entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the Government price therefor.

Parties having made cash entry under that act are not entitled to make a second entry under the act of June 5, 1900, *supra*, or other acts allowing second homestead entries, for the reason that such allowance of second entries is only accorded to those persons who had theretofore "made entry under the homestead laws and commuted the same under provisions of section 2301 of the Revised Statutes of the United States and the amendments thereto," which act requires the submission of proof of "settlement and cultivation as provided by law granting preemption rights."

It would appear from departmental construction placed thereon in various decisions that said second section of the act of 1880 is not in fact a "commutation" statute, as entryman urges, but rather a relief statute, allowing persons who had theretofore made homestead entries of "lands properly subject to such entry" but who could not for some reason furnish the necessary proof for final entry, also those

to whom their rights had been attempted to be transferred by *bona fide* instruments in writing, to purchase the lands by paying the minimum price therefor.

The decision appealed from is affirmed.

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**TURK v. MENNING.**

*Decided December 14, 1911.*

**PRACTICE—NOTICE OF CONTEST—SERVICE BY PUBLICATION.**

Service of notice of a contest by publication in accordance with the old Rules of Practice, although not made until subsequent to February 1, 1911, the date upon which the new rules became effective, will be held sufficient where the contest was initiated and personal service sought to be had while the old rules were in force, such service being based upon the effort to secure personal service and failure therein.

**THOMPSON, Assistant Secretary:**

Florian Turk has appealed from the decision of the Commissioner of the General Land Office, rendered June 14, 1911, affirming the action of the local officers of May 12, 1911, requiring contestant to proceed *de novo* for failure to follow the Rules of Practice, in effect February 1, 1911.

On December 12, 1910, Turk filed contest affidavit against homestead entry 09269, made by Charles Menning for the NW.  $\frac{1}{4}$ , Sec. 12, T. 143 N., R. 98 W., Dickinson, North Dakota, land district, alleging that said Menning had never lived upon nor cultivated the land and that he had totally abandoned same.

Upon affidavit filed February 13, 1911, it was ordered that—

Notice of said contest be served upon the defendant by publication pursuant to the Rules of Practice in such cases made and provided.

It appears that this notice was served by publication, under the old Rules of Practice, and, in pursuance thereof, testimony was taken April 15, 1911, before a United States commissioner, the contestant being the only party present.

May 12, 1911, the local officers held that no jurisdiction over the defendant had been acquired by the service since the new Rules of Practice should have been followed in the publication, suspended action for ten days, and suggested that contestant procure new notices and proceed *de novo*. From this decision contestant appealed, and the same was affirmed, as above stated, and the case is now before the Department on appeal from the Commissioner's decision.

The sole point urged in this appeal is one of law, in substance, as follows:

Inasmuch as the contest was started and personal service sought to be had while the old Rules of Practice were in force, they should

govern service of notice by publication, since the right to such service is founded upon a diligent effort to secure personal service and failure therein.

The new rules limit the right to service by publication to cases wherein an affidavit (setting out failure to get personal service, etc.) is filed within thirty days after allowance of application to contest. To hold, therefore, that the new Rules of Practice applied to cases wherein contest was allowed more than thirty days before February 1, 1911, and in which effort was still being made to get personal service at that date would, in effect, require contestant to file a new contest, if he failed to get personal service. Thus, through no fault of his own, a contestant might lose the results of his efforts in a contest regularly initiated and prosecuted under the rules in force at the time same was started. Surely no such result was contemplated by the Department when the new rules were adopted.

While there is no merit therefore in the general proposition submitted by appellant, viz., that the new Rules of Practice apply to govern procedure only in contests instituted subsequent to the enactment and adoption thereof, it does appear that a certain class of cases, here discussed, which were pending on February 1, 1911, are without the purview of the new rules in regard to service by publication.

It further appears that when contestant filed application for leave to serve notice by publication, together with properly executed affidavit in support thereof, the order granting same was entered. No mention was made in said order of the change in the Rules of Practice; it was general in its terms. Contestant proceeded with the publication and made proper and complete compliance with the old Rules of Practice in regard thereto.

The only difference in the two sets of rules, except the time limit for executing and filing the affidavit, as above noted, is that the following additional requirements are found in the new rules:

Rule 9. . . . and a statement that upon failure to answer within twenty days after the completion of publication of such notice, the allegations of said affidavit of contest will be taken as confessed. There shall be published with the notice a statement of the dates of publication.

In the present case, it does not appear whether the register followed the new rules in granting leave to publish. The record does not show whether the affidavit upon which said order was based was "filed within thirty days after the allowance of application to contest and within ten days after its execution."

In any event, it is difficult to see how the entryman's right was in any way prejudiced. At most, there could be but a purely technical objection. The new rules had been in effect but thirteen days when the order for publication was entered.



In the opinion of the Department, the publication herein is held sufficient. The decision appealed from is accordingly reversed and it is ordered that the case be remanded to the local officers with direction to proceed to take such action as is warranted by the record as it stands.

**WUNDERLICH v. SELVIG.**

*Decided December 14, 1911.*

**SETTLEMENT PRIOR TO SURVEY—ACT OF MAY 14, 1880—RELATION.**

Under the act of May 14, 1880, a homestead entry based upon settlement prior to survey relates back to the date of settlement.

**ENLARGED HOMESTEAD—SETTLEMENT PRIOR TO SURVEY—RELATION.**

An entry under the enlarged homestead act, based upon settlement prior to survey upon lands subsequently designated as subject to disposal under that act, relates back only to the date fixed by the Secretary of the Interior in making such designation, or where no specific date is fixed, to the date when the order making the designation is received at the local office.

**SETTLEMENT CLAIM—ENLARGED HOMESTEAD ACT—INTERVENING SETTLER.**

One who made entry under section 2289, Revised Statutes, based upon settlement prior to survey, for the full amount he is entitled to take under that section, can not, in event the land embraced in his entry together with the surrounding land is subsequently designated under the enlarged homestead act, be permitted to enlarge his claim so as to embrace adjoining lands, to the prejudice of the rights of an intervening settler.

**THOMPSON, Assistant Secretary:**

May 5, 1909, an order designating T. 36 N., R. 53 E., M. M., under the enlarged homestead act of February 19, 1909 (35 Stat., 639), was filed in the local land office at Glasgow, Montana. At that time the land was unsurveyed and a plat of survey of said township was not officially filed until April 7, 1910.

On the date of the filing of the township plat of survey Henry Selvig made homestead entry for the NW.  $\frac{1}{4}$ , Sec. 3, said township, under section 2289, U. S. R. S.

April 8, 1910, John Wunderlich presented his homestead application under the said enlarged homestead act for the NE.  $\frac{1}{4}$ , Sec. 4, and the NW.  $\frac{1}{4}$ , Sec. 3, said township, which application was rejected as to the NW.  $\frac{1}{4}$ , Sec. 3, because of conflict with the said entry of Selvig.

May 2, 1910, Wunderlich filed affidavit alleging settlement rights on the land involved in his application and residence thereon since August 15, 1907, and asked for a hearing to determine the respective rights of the said parties. A hearing was accordingly had and as a result thereof the local officers allowed the entry of Selvig to remain intact, and upon appeal the Commissioner of the General Land

Office, by decision of March 18, 1911, affirmed the action of the local officers. Appeal from the Commissioner's decision has brought the case to the Department for consideration.

The testimony shows that Wunderlich has been residing upon the NE.  $\frac{1}{4}$  of section 4 with his family since the year 1907; that on March 9, 1909, he posted notices on each of the four corners of the NW.  $\frac{1}{4}$  of section 3, with a view to claiming that quarter as additional to his original claim under the enlarged homestead act, and it appears that he performed some little work thereon such as putting up stakes at the corners of said quarter section and digging some rocks from said tract; that on May 4, 1909, Selvig went upon said NW.  $\frac{1}{4}$ , Sec. 3, and established settlement thereon.

It appears that the order of designation under the enlarged act was signed by the Secretary of the Interior on April 28, 1909, but same was not received in the local land office until May 5, 1909, as above stated. Section 2 of the instructions of March 25, 1909 (37 L. D., 546), under the said enlarged homestead act, provided that designations thereunder should not be effective until received in the local land office.

The act of May 14, 1880 (21 Stat., 140), permits settlement on unsurveyed lands with intention of claiming the same under the homestead laws, and upon survey and entry the rights of such entryman relate back to the date of settlement. Rights under the enlarged homestead act may be initiated by settlement upon surveyed or unsurveyed lands, but no rights can be acquired thereunder until the date fixed by the Secretary under the designation of the lands as of the character subject to disposal under the said act. Unless some specific date is fixed, as is usual in recent designation orders, the designation is effective only from the date when the order is received in the local land office. In this case it appears that no specific date was set for the taking effect of the designation, and therefore the lands were not subject to any claim under said act until the receipt of the order in the local office.

It will be observed that the claim of Selvig is not under the enlarged act but under section 2289, U. S. R. S. The land in controversy was subject to settlement for a homestead claim under that section at the time he made settlement thereon, but it was not subject to settlement for a claim under the enlarged act. Therefore the prior settlement claim of Wunderlich under the enlarged act was ineffective to prevent the settlement claim of Selvig from attaching under section 2289, R. S.

Wunderlich was residing upon the NE.  $\frac{1}{4}$  of section 4, with his family, and was claiming that quarter section. This was all that he was entitled to hold under section 2289, R. S. After the enact-

ment of the enlarged homestead law he attempted to enlarge his claim by posting notice on the adjoining quarter, the said NW.  $\frac{1}{4}$ , Sec. 3. But this could not have been done legally until May 5, 1909, when the designation became effective, and prior thereto Selvig had legally settled thereon.

Accordingly the decision appealed from is affirmed.

### BLAIR v. JONES.

*Decided December 16, 1911.*

#### PRACTICE—OBJECTIONS TO EVIDENCE—MOTION TO DISMISS.

Objections by contestee to evidence on behalf of contestant on the ground that it is incompetent, irrelevant and immaterial, are waived by a subsequent motion to dismiss by the contestee on the ground that the evidence submitted by contestant is insufficient to sustain the contest.

#### PRACTICE—MOTION TO DISMISS—RIGHT TO THEREAFTER SUBMIT EVIDENCE.

Upon denial of a motion to dismiss a contest for want of sufficient evidence to sustain the charge, the entry should not be canceled without affording contestee an opportunity to submit evidence in support of the entry.

#### PRACTICE—MOTION TO DISMISS—DISCRETION OF LOCAL OFFICERS.

The allowance or denial of a motion to dismiss a contest on the ground of insufficiency of the evidence to sustain the charge is a matter resting in the sound discretion of the local officers under all the facts and circumstances of the case.

#### THOMPSON, *Assistant Secretary*:

Appeal is filed by James Blair from decision of May 22, 1911, of the Commissioner of the General Land Office reversing the action of the local officers and dismissing said Blair's contest against the homestead entry, made October 12, 1909, by Mary E. Jones, for the E.  $\frac{1}{2}$  E.  $\frac{1}{2}$ , Sec. 7, T. 37 S., R. 7 E., Lakeview, Oregon, land district, based upon her application filed September 22, 1909, alleging that her husband John L. Jones settled on these lands July 1, 1903, and resided thereon continuously to his death, February 4, 1907, and that she has so resided thereon since.

These lands were withdrawn January 28, 1905, under the act of June 17, 1902 (32 Stat., 388), for reclamation use by the Government, and by order of restoration of March 23, 1910, were opened to settlement July 2, and to entry August 1, 1910. Said lands were unsurveyed up to September 15, 1909, when approved survey plat was filed.

Blair's contest affidavit filed August 1, 1910, charged noncompliance with law as to residence, cultivation and improvements by said John L. Jones up to his death, and as to cultivation and improvements by said Mary E. Jones since, and as to residence by her up to July 17, 1910, and that she had abandoned said entry for a year prior to initiation of contest and had made her home during that period

in Ashland, Oregon. Hearing was duly had October 10, 1910, both parties appearing with counsel. Upon the conclusion of the contestant's testimony the contestee moved to dismiss the contest and presented no testimony in defense. The local officers found that said Mary E. Jones had abandoned said entry for more than six months and recommended cancellation of the entry. The Commissioner on appeal found that she has resided on said land since July 18, 1910, and held that she thereby cured her prior default, and that, while said entry was improperly allowed because of said withdrawal then embracing these lands, it should be held intact in view of the revocation of said withdrawal and the filing of said contest affidavit.

In September, 1911, the Department heard oral argument in this case and upon consideration of the case held, on September 20, 1911:

This entry was erroneously allowed, because of the subsisting withdrawal then embracing said lands, and whether it should now be held intact, in view of the revocation of said withdrawal, is a matter resting in the discretion of the Department. The entrywoman cannot claim it as of legal right, and there being no showing by her as to grounds for equitable consideration in her favor she should be afforded opportunity to make such showing before final action in the premises.

The case is therefore remanded with direction that she be given opportunity to file within thirty days from notice hereof her affidavit corroborated under oath by two credible witnesses setting forth the facts as to her compliance with law under her alleged settlement and entry; after which the case will be returned to the Department.

Pursuant to the Department's direction there has been filed the corroborated affidavit of said Mary E. Jones, setting forth the establishment of residence on these lands by said John L. Jones July 1, 1903, in a house then built and furnished by him, that he lived there with his family continuously up to his death by drowning February 4, 1907; except for occasional absences while he was at work, his wife or some of his children remaining upon the land; that he made some improvements upon said land each year after settlement, and that said Mary E. Jones, since his death, leaving her with nine children, maintained her home upon this land with occasional absences while she was employed in earning a living up to July 1, 1910, when she brought several of her children to Klamath Falls, Oregon, because of their sickness and returned to the land July 18, 1910, since which date she had remained there and cultivated a garden in that year for the support of her family.

Both the Commissioner in the decision appealed from and the Department in its decision of September 20, 1911, held that the testimony presented by the contestant herein tends to show entire noncompliance with law both by said John L. Jones up to his death, and said Mary E. Jones up to July 18, 1910, and that said Blair settled on these lands, apparently in good faith, on July 2, 1910, under and

conformably to the published order opening said lands to settlement on that day.

It was stipulated at the hearing that any evidence as to said lands prior to the filing of this homestead application shall be considered as excepted to by the contestee on objection as incompetent, irrelevant and immaterial.

The contestee's motion to dismiss upon the contestant's testimony waived her objection to the admission of testimony as to her and her husband's alleged nonresidence on these lands prior to her entry. *Suydam v. Williamson et al.* (20 How., 427, 435; 6 Encyc. of Pl. and Pr., 445).

The local officers committed reversable error in holding this entry for cancellation after, in effect, denying said motion to dismiss, without first allowing the contestee opportunity to present testimony in her behalf, if she desired to do so. *Lein v. Botton* (13 L. D., 40).

This motion to dismiss is in the nature of a demurrer to evidence. The allowance or denial, however, of a demurrer to evidence is a matter resting in the discretion of the court under all the facts and circumstances of the case. And the Supreme Court of the United States stated in the case of *Young v. Black* (7 Cranch, 565), that—

It ought never to be admitted where the party demurring refuses to admit the facts which the other side attempts to prove; and it would be as little justifiable where he offers contradictory evidence, or attempts to establish inconsistent propositions.

The Department is convinced upon the showing made at the hearing and the countershowing made by Mary E. Jones in response to the Department's call upon her, that her motion to dismiss should not be allowed even were the points raised in said motion well taken, which the Department does not decide. As held by the Department in said decision of September 20, 1911, whether this entry should be held intact, its allowance being erroneous, is a matter resting in the discretion of the Department and the entrywoman cannot claim it as of legal right.

Upon the showing made by Blair, that the entrywoman was in default after her entry and did not live on said land until after his settlement thereon, it would appear that her residence on the land beginning July 18, 1910, was induced by such settlement and claim by him, premonitory of his contest, rather than by any *bona fide* previous desire on her part to make her home on these lands. Under such circumstances her default was not cured. *Marsh v. Hughes* (22 L. D., 581). And her entry being erroneously allowed, no reason would appear, under such circumstances, why it should now be held intact in the face of Blair's settlement made in actual good faith.

If, however, there was a *bona fide* establishment of residence on these lands by John L. Jones, as alleged, and a consistent maintenance of such residence thereafter and full compliance with law, as evidently claimed by Mary E. Jones, the fact that the allowance of her entry was erroneous and that Blair had settled on the lands in good faith should not prevent holding the entry intact. Nor should her motion to dismiss the contest and her appeal herein based upon the error of the local officers above stated, such motion not being allowed by the Department, as above held, prejudice her substantial rights in the premises, under the assumed circumstances.

The Department is unable to decide this case upon the record, and further hearing, after due notice to all interested parties, is hereby directed for the presentation of testimony by Mary E. Jones in defence of her entry and such rebuttal testimony as Blair may desire to present, whereupon the case should be further adjudicated.

The case is remanded for action accordingly.

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### SANTA FE PACIFIC R. R. CO. ET AL.

*Decided December 18, 1911.*

#### FOREST LIEU SELECTIONS—SANTA FE PACIFIC CONTRACTS.

Lands covered by the special contracts entered into by the United States and the Santa Fe Pacific Railroad Company, whereby that company conveyed to the government certain lands within the San Francisco Mountains forest reserve as basis for lieu selections under the acts of June 4, 1897, and June 6, 1900, are not subject to the repealing provisions of the act of March 3, 1905, or the restrictions contained in the proviso thereto, but may, in the absence of other objection and upon compliance with the terms and provisions of the contracts, be made the basis for lieu selections.

#### THOMPSON, *Assistant Secretary*:

The Santa Fe Pacific Railroad Company, Joseph W. Gregory, attorney in fact, and M. A. Mitchell, intervener, have appealed from decision of the Commissioner of the General Land Office of June 17, 1911, holding for cancellation the selection of the Santa Fe Pacific Railroad Company for the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 26, T. 10 N., R. 28 E., Walla Walla, Washington, land district.

The facts material to the disposition of the case appear from the record as follows: By deed dated May 27, 1903, acknowledged August 6 and 8, 1903, and recorded in the records of Coconino County, Arizona, October 1, 1903, the Santa Fe Pacific Railroad Company conveyed to the United States as basis for lieu selection under the acts of Congress approved June 4, 1897 (30 Stat., 36), and June 6, 1900 (31 Stat., 614), the SW.  $\frac{1}{4}$ , Sec. 23, T. 20 N., R. 1 E., G. & S. R. M., included within the limits of the San Francisco Mountains forest reserve, Arizona. December 17, 1903, the company, by George

Richey, attorney in fact, filed forest lieu selection 8698 in the Roseburg, Oregon, land office for the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 10, T. 35 S., R. 13 W., W. M., in lieu of the above-described base. The selected land being within 6 miles of record mining claims, the Commissioner of the General Land Office on October 4, 1910, under existing regulations, required publication of notice of selection. December 17, 1904, the local office reported that notice was given to the agent Richey at Bellingham, Washington, and that no action had been taken. January 14, 1905, the Commissioner directed further notice to be given to Richey at Whatcom, Washington, his record address. January 16, 1906, the local land office re-notified Richey at Whatcom by registered mail, and the notice was returned unclaimed. December 30, 1907, the Commissioner canceled the selection for default. January 13, 1908, Frank J. Smith applied to enter the selected land under the timber and stone act of June 3, 1878. July 9, 1908, Richey appeared and asked reinstatement of his selection, alleging that he had paid taxes on the land for four years, and that the notice requiring publication had never been received by him. September 4, 1908, the Commissioner denied reinstatement of the selection 8698 because of the intervening application to enter of Smith. December 2, 1908, Richey appealed from said decision, but on December 28, 1908, dismissed his appeal, and the case was closed.

On March 18, 1911, the Santa Fe Pacific Railroad Company, by Joseph W. Gregory, attorney in fact, filed selection in the local land office under the acts of June 4, 1897, and June 6, 1900, *supra*, assigning as a basis therefor the said SW.  $\frac{1}{4}$ , Sec. 23, T. 20 N., R. 1 E. June 17, 1911, the Commissioner held the selection for cancellation because the same base had been used in selection No. 8698, which selection he found had been canceled through the fault of the selector on account of his failure to comply with the requirement as to publication. Because of this default the Commissioner's decision found that the act of March 3, 1905 (33 Stat., 1264), bars the use of the said SW.  $\frac{1}{4}$ , Sec. 23, as basis for another selection.

The appeal alleges error, first, in holding that the cancellation of selection 8698 was the fault of the selector, and second, in failing to hold the land offered to be an available base because of that portion of the act of March 3, 1905, *supra*, which provides that—

the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired.

The requirement of publication under instructions of July 7, 1902 (31 L. D., 372), made by the Commissioner in the matter of selection 8698 was a proper one. Notice thereof was given to the duly authorized agent of the selector at his record post-office address, and he

failed to comply therewith. The cancellation of said selection was therefore regular and proper. An application by another to enter the selected land having intervened, the subsequently presented application for reinstatement was properly denied, and furthermore the selector acquiesced therein by the dismissal of his appeal. It is therefore held that the first ground of appeal constitutes no reason for reversal of the Commissioner's decision.

The SW.  $\frac{1}{4}$ , Sec. 23, T. 20 N., R. 1 E., acquired by the Santa Fe Pacific Railroad Company as a part of its grant and within the limits of the San Francisco Mountains Forest Reserve, was one of the tracts included in the so-called contracts or agreements between the Secretary of the Interior and the Santa Fe Pacific Railroad Company, being designated as a proper basis for an "unrestricted" selection. The act of March 3, 1905, *supra*, which repealed the forest lieu selection acts of 1897 and 1900, in terms excepted from its repealing provision this and other tracts occupying a similar status by providing that—

the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired.

The acts of June 4, 1897, and June 6, 1900, *supra*, contained no inhibition against the use of lands in forest reserves surrendered as a basis for a lieu selection whether the first selection made failed because of the fault of selector or otherwise. The repealing act of March 3, 1905, however, contains a proviso authorizing a second selection upon the same base where the original selection failed for any reason not the fault of the party making the same. Where selections failed through the fault of the selector the base is no longer subject to be used for another selection. W. E. Moses Land Scrip and Realty Company (34 L. D., 458).

Those lands made the subject of contracts between the Secretary of the Interior and the Santa Fe Pacific Railroad Company and others recognized in the act of March 3, 1905, however, constitute an exception to the general rule above stated, and lands surrendered under the terms of those contracts, although not made the basis of a selection prior to the passage of the repealing act, are and have been recognized as a proper basis for lieu selection. Instructions (33 L. D., 558). The proviso to the act above mentioned relates to the repealing portion of the act and not to the clause thereof excepting from the effect of the repeal the lands covered by the contracts mentioned. It would be illogical to apply the terms of the proviso to selections based upon forest lands covered by said contracts where the original selection has failed through any cause, fraud excepted, and to continue to recognize the contracts as to those lands not heretofore offered as a base. The elimination of private holdings from



national forests was the basic reason for the enactment of the lieu selection acts of 1897 and 1900. Conditions peculiar to the San Francisco Mountains Forest Reserve and other reserves induced the special contracts executed by the Secretary of the Interior and recognized and excepted from the repealing provisions of the act of March 3, 1905. These lands constitute a class distinct and separate from other lands offered or heretofore offered as a basis for lieu selection. They were so recognized by Congress in the repealing act. It is therefore held that lands covered by the contracts in question are not subject to the repealing provisions of the act of March 3, 1905, or to the restrictions contained in the proviso thereto, but may, in the absence of other objection and upon compliance with the terms and provisions of the contracts, be made the basis of lieu selections. The decision is therefore reversed, and the selection returned for further consideration.

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**ISOLATED TRACTS—SECTION 2455, REVISED STATUTES, AS  
AMENDED BY ACT OF JUNE 27, 1906.**

**CIRCULAR.**

**DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., January 19, 1912.**

*Registers and Receivers, United States Land Offices.*

SIRS: The sale of isolated tracts of public lands outside of the area in the State of Nebraska described in the act of March 2, 1907 (34 Stats., 1224), is authorized by the provisions of the act of June 27, 1906 (34 Stats., 517), amending section 2455 of the Revised Statutes.

1. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated.

2. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts, the area of which, when added to the area now applied for, will exceed approximately 160 acres; and that he is a citizen of the United States, or has declared his intention to become such. If

applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

3. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the applications are situated.

4. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

5. No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands, the area of which, when added to the area applied for, shall exceed approximately 160 acres.

6. Only one tract may be included in an application for sale, and no tract exceeding approximately 160 acres in area will be ordered into the market.

7. No tract of land will be deemed isolated and ordered into the market unless, at the time application is filed, the said tract has been subject to homestead entry for at least two years after the surrounding lands have been entered, filed upon, or sold by the Government, except in cases where some extraordinary reason is advanced sufficient, in the opinion of the Commissioner of the General Land Office, to warrant waiving this restriction.

8. The local officers will on receipt of applications note same upon the tract books of their office, and if the applications are not properly executed, or not corroborated, they will reject the same subject to the right of appeal. Applications found to be properly executed and corroborated will be disposed of as follows: (1) If all, or any portion, of the land applied for is not subject to disposition under the provisions of paragraph 7, or by reason of some prior appropriation of the land, the application will be forwarded to the General Land Office with the monthly returns, accompanied by a report as to the status of the land applied for and the surrounding lands, and any other objection to the offering known to the local officers. Upon determining what portion, if any, of the lands applied for should be ordered into the market, the Commissioner of the General Land Office will call upon the local officers and the Chief of Field Division for the report, as next provided for, concerning the value of the land. (2) If all of the land applied for is vacant and not withdrawn or otherwise reserved from such disposition, and the status of the surrounding lands is such that a sale might properly be ordered under

paragraph 7, the local officers, after noting the application on their records, will promptly forward the same to the Chief of Field Division for report as to the value of the land and any objection he may wish to interpose to the sale, and the register will make proper notations on his schedule of serial numbers in the event the application is not returned in time to be forwarded with the returns for the month in which it is filed. Upon receipt of the application from the Chief of Field Division with his report thereon, the local officers will attach their report as to the status of the land and that surrounding, the value of the land applied for, if they have any knowledge concerning the same, and any objection to the sale known to them, and forward the papers to the General Land Office with the returns for the current month.

9. An application for sale under these instructions will not segregate the land from entry or other disposal, for such lands may be entered at any time prior to the receipt in the local land office of the letter authorizing the sale and its notation of record. Should all of the land applied for be entered or filed upon while the application for sale is in the hands of the Chief of Field Division, the local officers will so advise him and request the return of the application for forwarding to the General Land Office. Likewise, should any or all of the land be entered or filed upon while the application for sale is pending before the General Land Office, the local officers will so report by special letter.

10. Upon receipt of letter authorizing the sale, the local officers will note thereon the time when it was received and at once examine the records to see whether the tract, or any part thereof, has been entered. They will note on the tract book, opposite such portion of the tract as is found to be clear, that sale has been authorized, giving the date of the letter. Thereupon the land will be considered segregated for the purpose of sale.

If the examination of the records shows that all of the tract has been entered or filed upon, the local officers will not promulgate the letter authorizing the sale, but will report the facts to the General Land Office, whereupon the letter authorizing the sale will be revoked. If a part of the land has been entered they will so report and proceed as provided below as to the remainder.

The local officers will prepare a notice for publication on the form hereinafter given, describing the land found to be unentered, and fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice, and for the affidavit of the publisher to be filed in the local land office prior to the date of the sale. The register will also designate a newspaper as published nearest to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at

his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the receiver, he must issue receipt therefor, and immediately return the money to the applicant by his official check, with instructions to arrange for the publication of the notice as hereinbefore provided.

If on the day set for the sale the affidavit of the publisher, showing proper publication, has not been filed in the local land office, the register and receiver will report that fact to this office, and will not proceed with the sale.

11. Notice must be published once a week for five consecutive weeks (or thirty consecutive days, if in a daily paper) immediately prior to the date of sale, but a sufficient time should elapse between the date of last publication and date of sale to enable the affidavit of the publisher to be filed in the local land office. The notice must be published in the paper designated by the register as nearest the land described in the application. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The publisher of the newspaper must file in the local land office, prior to the date fixed for the sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by a copy of the notice published.

12. At the time and place fixed for the sale the register or receiver will read the notice of sale and allow all qualified persons an opportunity to bid. Bids may be made through an agent personally present at the sale, as well as by the bidder in person. The register or receiver conducting the sale will keep a record showing the names of the bidders and the amount bid by each. Such record will be transmitted to this office with the other papers in the case.

The sale will be kept open for one hour after the time mentioned in the published notice. At the expiration of the hour, and after all bids have been offered, the local officers will declare the sale closed, and announce the name of the highest bidder, who will be declared the purchaser, and he must immediately deposit the amount bid by him with the receiver, and within ten days thereafter furnish evidence of citizenship, or of declaration of intention to become a citizen, nonmineral and nonsaline affidavit, Form 4-062, or nonsaline affidavit, Form 4-062a, as the case may require. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers.

13. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private entry unless

located in the State of Missouri (act of March 2, 1889, 25 Stats., 854), but may again be offered for sale in the manner herein provided.

14. After each offering where the lands offered are *not* sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved January 19, 1912:

SAMUEL ADAMS,  
*First Assistant Secretary.*

AN ACT To amend an act entitled "An act to amend section twenty-four hundred and fifty-five of the Revised Statutes of the United States," approved February twenty-sixth, eighteen hundred and ninety-five.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act of February twenty-sixth, eighteen hundred and ninety-five, entitled "An act to amend section twenty-four hundred and fifty-five of the Revised Statutes of the United States," be, and the same is hereby, amended so as to read as follows:

"It shall be lawful for the Commissioner of the General Land Office to order into market and sell, at public auction at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents per acre, any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided,* That this act shall not defeat any vested right which has already attached under any pending entry or location."

Approved, June 27, 1906 (34 Stats., 517).

[Form 4-008B.]

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

\_\_\_\_\_  
\_\_\_\_\_, 19\_\_\_\_

To the Commissioner of the General Land Office:

\_\_\_\_\_, whose post-office address is \_\_\_\_\_, respectfully requests that the \_\_\_\_\_ of Section \_\_\_\_\_, Township \_\_\_\_\_, Range \_\_\_\_\_, be ordered into market and sold under the act of June 27, 1906 (34 Stats., 517), at public auction, the same having

been subject to homestead entry for at least two years after the surrounding lands were entered, filed upon, or sold by the Government.

Applicant states that he \_\_\_\_\_  
 (Insert statement that affiant is a native-born or naturalized citizen, or

has declared intention to become such, as the case may be.)  
 citizen of the United States; that this land contains no salines, coal, or other  
 minerals, and no stone except \_\_\_\_\_

\_\_\_\_\_ ; that there is  
 no timber thereon except \_\_\_\_\_ trees of the \_\_\_\_\_ species, ranging  
 from \_\_\_\_\_ inches to \_\_\_\_\_ feet in diameter, and aggregating about \_\_\_\_\_  
 feet stumpage measure, of the estimated value of \$ \_\_\_\_\_ ; that the land is  
 not occupied except by \_\_\_\_\_ of \_\_\_\_\_ post office,  
 who occupies and uses it for the purpose of \_\_\_\_\_, but does  
 not claim the right of occupancy under any of the public-land laws; that the  
 land is chiefly valuable for \_\_\_\_\_, and that applicant desires  
 to purchase same for his own individual use and actual occupation for the  
 purpose of \_\_\_\_\_, and not for speculative purposes;  
 that he has not heretofore purchased public lands sold as isolated tracts, the  
 area of which when added to the area herein applied for will exceed approxi-  
 mately 160 acres. The lands heretofore purchased by him under said act are  
 described as follows:

If this request is granted applicant agrees to have notice published at his  
 expense in the newspaper designated by the register.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tract above described?  
 If so, describe the land by section, township, and range.

Answer \_\_\_\_\_

Question 2. To what use do you intend to put the isolated tract above de-  
 scribed should you purchase same?

Answer \_\_\_\_\_

Question 3. If you are not the owner of adjoining land, do you intend to  
 reside upon or cultivate the isolated tract?

Answer \_\_\_\_\_

Question 4. Have you been requested by anyone to apply for the ordering of  
 the tract into market? If so, by whom?

Answer \_\_\_\_\_

Question 5. Are you acting as agent for any person or persons or directly or  
 indirectly for or in behalf of any person other than yourself in making said  
 application?

Answer \_\_\_\_\_

Question 6. Do you intend to appear at the sale of said tract if ordered, and  
 bid for same?

Answer \_\_\_\_\_

Question 7. Have you any agreement or understanding, expressed or implied,  
 with any other person or persons that you are to bid upon or purchase the land  
 for them or in their behalf, or have you agreed to absent yourself from the sale  
 or refrain from bidding so that they may acquire title to the land?

Answer \_\_\_\_\_

(Sign here with full Christian name.)

We are personally acquainted with the above-named applicant and the land described by him, and the statements hereinbefore made are true to the best of our knowledge and belief.

-----  
(Sign here with full Christian name.)

-----  
(Sign here with full Christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses, in my presence, before affiants affixed their signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by -----); that I verily believe affiants to be credible persons, and the identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me, at my office, at -----, this ----- day of -----, 19....

-----  
(Official designation of officer.)

[Forms 4-348c and 4-348d.]

NOTICE FOR PUBLICATION—ISOLATED TRACT.

PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

-----,  
-----, 19....

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the act of Congress approved June 27, 1906 (34 Stats., 517), pursuant to the application of ----- Serial No. -----, we will offer at public sale to the highest bidder, but at not less than \$----- per acre, at -- o'clock -- m., on the ----- day of ----- next, at this office, the following tract of land:-----

-----  
Any persons claiming adversely the above-described land are advised to file their claims or objections on or before the time designated for sale.

-----,  
*Register.*

-----,  
*Receiver.*

**REVISED REGULATIONS UNDER THE KINKAID ACTS.**

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., January 19, 1912.

*Registers and Receivers, United States Land Offices.*

Sirs: Section 7 of the act of Congress approved May 29, 1908 (35 Stat., 465), amended section 2 of the act of April 28, 1904

(33 Stat., 547), commonly known as the Kinkaid Act, to read as follows:

SEC. 2. That entrymen under the homestead laws of the United States within the territory above described who own and occupy the lands heretofore entered by them may, under the provisions of this act and subject to its conditions, enter other lands contiguous to their said homestead entry, which shall not, with the land so already entered, owned, and occupied, exceed in the aggregate six hundred and forty acres; and residence continued and improvements made upon the original homestead, subsequent to the making of the additional entry, shall be accepted as equivalent to actual residence and improvements made upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same, except in favor of entrymen entitled to credit for military service.

This amendment did not affect sections 1 and 3 of the Kinkaid Act, which read as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after sixty days after the approval of this act entries made under the homestead laws in the State of Nebraska west and north of the following line, to-wit: Beginning at a point on the boundary line between the States of South Dakota and Nebraska where the first guide meridian west of the sixth principal meridian strikes said boundary; thence running south along said guide meridian to its intersection with the fourth standard parallel north of the base line between the States of Nebraska and Kansas; thence west along said fourth standard parallel to its intersection with the second guide meridian west of the sixth principal meridian; thence south along said guide meridian to its intersection with the third standard parallel north of the said base line; thence west along said third standard parallel to its intersection with the range line between ranges twenty-five and twenty-six west of the sixth principal meridian; thence south along said line to its intersection with the second standard parallel north of the said base line; thence west on said standard parallel to its intersection with the range line between ranges thirty and thirty-one west; thence south along said line to its intersection with the boundary line between the States of Nebraska and Kansas, shall not exceed in area six hundred and forty acres, and shall be as nearly compact in form as possible, and in no event over two miles in extreme length: *Provided*, That there shall be excluded from the provisions of this act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise; and that said Secretary shall, prior to the date above mentioned, designate and exclude from entry under this act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid; and shall thereafter, from time to time, open to entry under this act any of the lands so excluded, which, upon further investigation, he may conclude can not be practically irrigated in the manner aforesaid.

SEC. 3. That the fees and commissions on all entries under this act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price. That the commutation provisions of the homestead law shall not apply to entries under this act, and at the time of making final proof the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre included in his entry: *Provided*, That a former home-



stead entry shall not be a bar to the entry under the provisions of this act of a tract which, together with the former entry, shall not exceed 640 acres: *Provided*, That any former homestead entryman who shall be entitled to an additional entry under section 2 of this act shall have for ninety days after the passage of this act the preferential right to make additional entry as provided in said section.

All general instructions heretofore issued under this act, and the instructions issued under the supplemental act of March 2, 1907 (34 Stat., 1224), (32 L. D., 670; 34 L. D., 87, and 546; 37 L. D., 225), are hereby modified and reissued as follows:

1. It is directed by the law that in that portion of the State of Nebraska lying west and north of the line described therein, which was marked in red ink upon maps transmitted with said circular, upon and after June 28, 1904, except for such lands as might be thereafter and prior to said date excluded under the proviso contained in the first section thereof, homestead entries may be made for and not to exceed 640 acres, the same to be in as nearly a compact form as possible, and must not in any event exceed 2 miles in extreme length.

2. Under the provisions of the second section, a person who within the described territory has made entry prior to May 29, 1908, under the homestead laws of the United States, and who now owns and occupies the lands theretofore entered by him, and is not otherwise disqualified, may make an additional entry of a quantity of land contiguous to his said homestead entry, which, added to the area of the original entry, shall make an aggregate area not to exceed 640 acres; and he will not be required to reside upon the additional land so entered, but residence continued, and improvements made upon the original homestead entry subsequent to the making of the additional entry will be accepted as equivalent to actual residence and improvements on the land covered by the additional entry. But residence either upon the original homestead or the additional land entered must be continued for the period of five years from the date of the additional entry, except that entrymen may claim and receive credit on that period for the length of their military service, not exceeding four years.

3. A person who has a homestead entry upon which final proof has not been submitted and who makes additional entry under the provisions of section 2 of the act, will be required to submit his final proof on the original entry within the statutory period therefor, and final proof upon the additional entry must also be submitted within the statutory period from date of that entry.

4. Such additional entry must be for contiguous lands and the tracts embraced therein must be in as compact form as possible, and the extreme length of the combined entries must not in any event exceed 2 miles.

5. In accepting entries under this act compliance with the requirement thereof as to compactness of form should be determined by the relative location of the vacant and unappropriated lands, rather than by the quality and desirability of the desired tracts.

6. By the first proviso of section 3 any person who made a homestead entry either within the territory above described or elsewhere prior to his application for entry under this act, if no other disqualification exists, will be allowed to make an additional entry for a quantity of land which, added to the area of the land embraced in the former entry, shall not exceed 640 acres, but residence upon and cultivation of the additional land will be required to be made and proved as in ordinary homestead entries. But the application of one who has an existing entry and seeks to make an additional entry under said proviso, can not be allowed unless he has either abandoned his former entry or has so perfected his right thereto as to be under no further obligation to reside thereon; and his qualifying status in these and other respects should be clearly set forth in his application.

7. Under said act no bar is interposed to the making of second homesteads for the full area of 640 acres by parties entitled thereto under existing laws, and applications therefor will be considered under the instructions of the respective laws under which they are made.

8. Upon final proof, which may be made after five years and within seven years from date of entry, the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than \$1.25 per acre for each acre, and such proof must also show residence upon and cultivation of the land for the five-year period as in ordinary homestead entries, but credit for military service may be claimed and given under the supplemental act mentioned above.

9. In the making of final proofs the homestead-proof form will be used, modified when necessary in case of additional entries made under the provisions of section 2.

10. It is provided by section 3 that the fees and commissions on all entries under the act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price, viz: At the time the application is made \$14, and at the time of making final proof \$4, to be payable without regard to the area embraced in the entry.

11. In case that the combined area of the subdivisions selected should, upon applying the rule of approximation thereto, be found to exceed in area the aggregate of 640 acres, the entryman will be required to pay the minimum price per acre for the excess in area.

12. Entries under this act are not subject to the commutation provisions of the homestead law.

13. In the second proviso of section 3 entrymen who had made their entries prior to April 28, 1904, were allowed a preferential right for 90 days thereafter to make the additional entry allowed by section 2 of the law.

14. The supplemental act, approved March 2, 1907 (34 Stat., 1224), reads as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all qualified entrymen who, during the period beginning on the twenty-eighth day of April, nineteen hundred and four, and ending on the twenty-eighth day of June, nineteen hundred and four, made homestead entry in the State of Nebraska within the area affected by an act entitled "An act to amend the homestead laws as to certain unappropriated and unreserved public lands in Nebraska," approved April twenty-eighth, nineteen hundred and four, shall be entitled to all the benefits of said act as if their entries had been made prior or subsequent to the above-mentioned dates, subject to all existing rights.

SEC. 2. That the benefits of military service in the Army or Navy of the United States granted under the homestead laws shall apply to entries made under the aforesaid act, approved April twenty-eighth, nineteen hundred and four, and all homestead entries hereafter made within the territory described in the aforesaid act shall be subject to all the provisions thereof.

SEC. 3. That within the territory described in said act approved April twenty-eighth, nineteen hundred and four, it shall be lawful for the Secretary of the Interior to order into market and sell under the provisions of the laws providing for the sale of isolated or disconnected tracts or parcels of land any isolated or disconnected tract not exceeding three quarter sections in area: *Provided,* That not more than three quarter sections shall be sold to any one person.

#### ISOLATED OR DISCONNECTED TRACTS.

15. The sale of isolated tracts within the area affected by the terms of this act is to be governed by the provisions of the act of June 27, 1906 (34 Stat., 517), as amended by section 3 of said act of March 2, 1907, and all sales shall be made in the manner and form hereinafter provided.

16. Applications to have isolated tracts ordered into market must be filed with the register and receiver of the local land office in the district wherein the lands are situated.

17. Applicants must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal, or other minerals; the amount, kind, and value of timber or stone thereon, if any; whether the land is occupied, and if so the nature of the occupancy; for what purpose the land is chiefly valuable; why it is desired that same be sold; that applicant desires to purchase the land for his own individual use and actual occupation and not for speculative purposes, and that he has not heretofore purchased, under section 2455, Revised Statutes, or the amendments thereto, isolated tracts the area of which, when added to the area now applied for, will exceed approximately 480 acres, and that he is a citizen of the

United States or has declared his intention to become such. If applicant has heretofore purchased lands under the provisions of the acts relating to isolated tracts, same must be described in the application by subdivision, section, township, and range.

18. The affidavits of applicants to have isolated tracts ordered into market, and of their corroborating witnesses, may be executed before any officer having a seal and authorized to administer oaths in the county or land district in which the tracts described in the application are situated.

19. The officer before whom such affidavits are executed will cause each applicant and his witnesses to fully answer the questions contained upon the accompanying form and, after the answers to the questions therein contained have been reduced to writing, to sign and swear to same before him.

20. No sale will be authorized upon the application of a person who has purchased under section 2455, Revised Statutes, or the amendments thereto, any lands the area of which, when added to the area applied for, shall exceed approximately 480 acres.

21. Only one tract may be included in an application for sale, and no tract exceeding approximately 480 acres in area will be ordered into the market.

22. No tract of land will be deemed isolated and ordered into the market unless, at the time application is filed, the said tract has been subject to homestead entry for at least two years after the surrounding lands have been entered, filed upon, or sold by the Government, except in cases where some extraordinary reason is advanced sufficient, in the opinion of the Commissioner of the General Land Office, to warrant waiving this restriction.

23. The local officers will on receipt of applications note same upon the tract books of their office, and if the applications are not properly executed, or not corroborated, they will reject the same, subject to the right of appeal. Applications found to be properly executed and corroborated will be disposed of as follows:

(1) If all, or any portion, of the land applied for is not subject to disposition under the provisions of paragraph 22, or by reason of some prior appropriation of the land, the application will be forwarded to the General Land Office with the monthly returns, accompanied by a report as to the status of the land applied for and the surrounding lands, and any other objection to the offering known to the local officers. Upon determining what portion, if any, of the lands applied for should be ordered into the market, the Commissioner of the General Land Office will call upon the local officers and the Chief of Field Division for the report, as next provided for, concerning the value of the land.

(2) If all the land applied for is vacant, and not withdrawn or otherwise reserved from such disposition, and the status of the surrounding lands is such that a sale might properly be ordered under paragraph 22, the local officers, after noting the application on their records, will promptly forward the same to the Chief of Field Division for report as to the value of the land and any objection he may wish to interpose to the sale, and the register will make proper notations on his schedule of serial numbers in the event the application is not returned in time to be forwarded with the returns for the month in which it is filed. Upon receipt of the application from the Chief of Field Division, with his report thereon, the local officers will attach their report as to the status of the land and that surrounding, the value of the land applied for if they have any knowledge concerning the same, and any objection to the sale known to them, and forward the papers to the General Land Office with the returns for the current month.

24. An application for sale under these instructions will not segregate the land from entry or other disposal, for such lands may be entered at any time prior to the receipt in the local land office of the letter authorizing the sale and its notation of record. Should all of the land applied for be entered or filed upon while the application for sale is in the hands of the Chief of Field Division, the local officers will so advise him and request the return of the application for forwarding to the General Land Office. Likewise, should any or all of the land be entered or filed upon while the application for sale is pending before the General Land Office, the local officers will so report by special letter.

25. Upon receipt of letter authorizing the sale, the local officers will note thereon the time when it was received and at once examine the records to see whether the tract, or any part thereof, has been entered. They will note on the tract book, opposite such portion of the tract as is found to be clear, that sale has been authorized, giving the date of the letter. Thereupon the land will be considered segregated for the purpose of sale.

If the examination of the records shows that all of the tract has been entered or filed upon, the local officers will not promulgate the letter authorizing the sale, but will report the facts to the General Land Office, whereupon the letter authorizing the sale will be revoked. If a part of the land has been entered they will so report and proceed as provided below as to the remainder.

The local officers will prepare a notice for publication on the form hereinafter given, describing the land found to be unentered and fixing a date for the sale, which date must be far enough in advance to afford ample time for publication of the notice and for the affidavit of the publisher to be filed in the local land office prior to the date of

the sale. The register will also designate a newspaper as published nearest to the land described in the notice. The notice will be sent to the applicant with instructions that he must publish the same at his expense in the newspaper designated by the register. Payment for publication must be made by applicant directly to the publisher, and in case the money for publication is transmitted to the receiver he must issue receipt therefor and immediately return the money to the applicant by his official check, with instructions to arrange for the publication of the notice as hereinbefore provided.

If, on the day set for the sale, the affidavit of the publisher, showing proper publication, has not been filed in the local land office, the register and receiver will report that fact to this office and will not proceed with the sale.

26. Notice must be published once a week for 5 consecutive weeks (or 30 consecutive days, if in a daily paper) immediately prior to date of sale, but a sufficient time should elapse between the date of last publication and date of sale to enable the affidavit of the publisher to be filed in the local land office. The notice must be published in the paper designated by the register as nearest the land described in the application. The register and receiver will cause a similar notice to be posted in the local land office, such notice to remain posted during the entire period of publication. The publisher of the newspaper must file in the local land office, prior to the date fixed for sale, evidence that publication has been had for the required period, which evidence may consist of the affidavit of the publisher, accompanied by copy of the notice published.

27. At the time and place fixed for the sale the register or receiver will read the notice of sale, and allow all qualified persons an opportunity to bid. Bids may be made through an agent personally present at the sale as well as by the bidder in person. The register or receiver conducting the sale will keep a record showing the names of the bidders and the amount bid by each. Such record will be transmitted to this office with the other papers in the case.

The sale will be kept open for one hour after the time mentioned in the published notice. At the expiration of the hour, and after all bids have been offered, the local officers will declare the sale closed and announce the name of the highest bidder, who will be declared the purchaser, and he must immediately deposit the amount bid by him with the receiver, and within 10 days thereafter furnish evidence of citizenship, or of declaration of intention to become a citizen, nonmineral and nonsaline affidavit, Form 4-062, and purchaser's affidavit, Form 4-093. Upon receipt of the proof, and payment having been made for the lands, the local officers will issue the proper final papers.

28. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre. Should any of the lands offered be not sold, the same will not be regarded as subject to private cash entry (act of Mar. 2, 1889, 25 Stat., 854), but may again be offered for sale in the manner herein provided.

29. After each offering where the lands offered are not sold, the local officers will report by letter to the General Land Office. No report by letter will be made when the offering results in a sale, but the local officers will issue cash papers as in ordinary cash entries, noting thereon the date of the letter authorizing the offering, and report the same in their current monthly returns. With the papers must also be forwarded the affidavit of publisher showing due publication, and the register's certificate of posting.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved January 19, 1912:

SAMUEL ADAMS,

*First Assistant Secretary.*

[Form 4-008C.]

APPLICATION FOR SALE OF ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

To the Commissioner of the General Land Office:

----- of -----, 19-----  
-----, requests that the -----  
of section -----, township -----, range -----, be ordered into market and  
sold under the acts of June 27, 1906 (34 Stat., 517), and March 2, 1907 (34  
Stat., 1224), at public auction, the same having been subject to homestead entry  
for at least two years after the surrounding lands were entered, filed upon, or  
sold by the Government. Applicant states that he -----

(Insert statement that affiant is a  
native-born or naturalized citizen, or has declared intention to become such, as the case  
may be.)

citizen of the United States; that this land contains no salines, coal, or other  
minerals, and no stone except -----

-----; that there is no  
(State amount and character.)

timber thereon except ----- trees of the ----- species, ranging  
from ----- inches to ----- feet in diameter, and aggregating about -----  
feet stumpage measure, of the estimated value of \$-----; that the land is  
not occupied except by ----- of -----

post office, who occupies and uses it for the purpose of -----,  
but does not claim the right of occupancy under any of the public land laws;  
that the land is chiefly valuable for -----  
and that applicant desires to purchase same for his own individual use and

actual occupation for the purpose of ----- and not for speculative purposes; that he has not heretofore purchased public lands sold as isolated tracts, the area of which when added to the area herein applied for will exceed approximately 480 acres. The lands heretofore purchased by him under said act are described as follows:-----

If this request is granted, applicant agrees to have notice published at his expense in the newspaper designated by the register.

(Applicant will answer fully the following questions:)

Question 1. Are you the owner of land adjoining the tract above described? If so, describe the land by section, township, and range.

Answer -----

Question 2. To what use do you intend to put the isolated tract above described, should you purchase same?

Answer -----

Question 3. If you are not the owner of adjoining land, do you intend to reside upon or cultivate the isolated tract?

Answer -----

Question 4. Have you been requested by anyone to apply for the ordering of the tract into market? If so, by whom?

Answer -----

Question 5. Are you acting as agent for any person or persons or directly or indirectly for or in behalf of any person other than yourself in making said application?

Answer -----

Question 6. Do you intend to appear at the sale of said tract if ordered, and bid for same?

Answer -----

Question 7. Have you any agreement or understanding, expressed or implied, with any other person or persons that you are to bid upon or purchase the lands for them or in their behalf, or have you agreed to absent yourself from the sale or refrain from bidding so that they may acquire title to the land?

Answer -----

-----  
(Sign here with full Christian name.)

We are personally acquainted with the above-named applicant and the land described by him, and the statements hereinbefore made are true to the best of our knowledge and belief.

-----  
(Sign here with full Christian name.)

-----  
(Sign here with full Christian name.)

I certify that the foregoing application and corroborative statement were read to or by the above-named applicant and witnesses, in my presence, before affiants affixed their signatures thereto; that affiants are to me personally known (or have been satisfactorily identified before me by -----, -----; that I verily believe affiants to be credible persons, and the (P. O. address.)



identical persons hereinbefore described; that said affidavits were duly subscribed and sworn to before me, at my office, at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
\_\_\_\_\_  
(Official designation of officer.)

[Form 4-093.]

ISOLATED OR DISCONNECTED TRACTS.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

\_\_\_\_\_,  
\_\_\_\_\_, 19\_\_.

I, \_\_\_\_\_ (\_\_\_\_\_),  
(Male or female.)

being first duly sworn, upon oath state that my post-office address is \_\_\_\_\_; that I am the purchaser of \_\_\_\_\_, section \_\_\_\_\_, township \_\_\_\_\_, range \_\_\_\_\_, meridian, containing \_\_\_\_\_ acres, in Nebraska, under the act of June 27, 1906 (34 Stat., 517), as amended by section 3 of the act of March 2, 1907 (34 Stat., 1224); that I \_\_\_\_\_

\_\_\_\_\_ citizen  
(Insert statement that affiant is a native-born or naturalized citizen, or has declared intention to become such, as the case may be. Record evidence of naturalization or declaration of intention must be furnished.)

of the United States; that said purchase is made for my own use and benefit, and not, directly or indirectly, for the use and benefit of any other person; that I have not heretofore purchased under the provisions of said act, either directly or indirectly, any lands, except \_\_\_\_\_  
(Give description of lands heretofore purchased under this act, if any.)

\_\_\_\_\_  
(Sign here with full Christian name.)

NOTE.—Every person swearing falsely to the above affidavit will be punished as provided by law for such offense. (See sec. 125, U. S. Criminal Code, below.)

I hereby certify that the foregoing affidavit was read to or by affiant in my presence before affiant affixed signature thereto; that affiant is to me personally known (or has been satisfactorily identified before me by \_\_\_\_\_),  
\_\_\_\_\_.

(Give full name and post-office address.)

and that said affidavit was duly subscribed and sworn to before me, at my office, in \_\_\_\_\_  
(Town, county, and State.)

within the \_\_\_\_\_ land district, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
\_\_\_\_\_  
(Official designation of officer.)

SEC. 125, U. S. Criminal Code. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United

States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than two thousand dollars and imprisoned not more than five years.

[Forms 4-348g and 4-348h.]

NOTICE OF PUBLICATION—ISOLATED TRACT.

PUBLIC LAND SALE.

DEPARTMENT OF THE INTERIOR,  
UNITED STATES LAND OFFICE,

-----, 19\_\_

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under the provisions of the acts of Congress approved June 27, 1906 (34 Stat., 517), and March 2, 1907 (34 Stat., 1224), pursuant to the application of -----, Serial No. -----, we will offer at public sale to the highest bidder, but at not less than \$----- per acre, at ----- o'clock ----- m., on the ----- day of ----- next, at this office, the following tract of land:-----

-----  
Any persons claiming adversely the above-described land are advised to file their claims or objections on or before the time designated for sale.

-----  
*Register.*

-----  
*Receiver.*

**CALIFORNIA-NEVADA CANAL, WATER AND POWER CO.**

*Decided January 19, 1912.*

**RIGHT OF WAY IN NATIONAL FORESTS—APPROVAL.**

The approval by the Secretary of Agriculture of an application for right of way under the acts of March 3, 1891, and May 11, 1898, for a reservoir site within a forest reservation, does not pass the title to the land covered thereby, but is merely advisory to the Secretary of the Interior and subject to his paramount jurisdiction under said acts.

**RIGHTS OF WAY IN RESERVATIONS—JURISDICTION OF SECRETARY OF INTERIOR.**

The exercise of the jurisdiction of the Secretary of the Interior over applications for rights of way within reservations of the United States involves the exercise of more than a mere legal discretion, and he should look beyond the mere technical sufficiency of the application and in broad view subserve the interests of the whole people.

*ADAMS, First Assistant Secretary:*

This is a motion on behalf of the California-Nevada Canal, Water and Power Company for rehearing in the matter of that company's

application for rights of way under the act of March 3, 1891 (26 Stat., 1095), as amended by the act of May 11, 1898 (30 Stat., 404), for certain reservoir sites designated as the Rhinedollar, the Tioga Lake, the Saddlebag Lake, the Gem Lake, and the Agnew Lake, within the Sierra, now Mono, National Forest, Independence land district, California.

The company's application was denied by departmental decision of October 2, 1911 [not reported], and the motion for rehearing assigns errors of law and fact upon the face of the record.

The conclusions of fact upon which this decision rests are not complicated and no new legal principle was announced.

The Commissioner of the General Land Office had reported that the application in question had been examined and found to be in substantial conformity with the regulations, and the Acting Director of the United States Reclamation Service had reported that the approval thereof would not interfere with any project of that Service. The application had also been referred to the Forester of the Department of Agriculture and had been examined by an engineer in the Forest Service, who had found that the development of commercial power possibilities from an engineering standpoint in connection with the proposed rights of way would far exceed in value the alleged intended use for irrigation, and the Acting Secretary of Agriculture, basing his conclusion on this report, had, in a letter to the Secretary of the Interior, January 25, 1910, expressed the view that unless the power proposed to be generated was to be used in aid of the irrigation project, the applicant was not entitled to the benefits of the act of May 11, 1898. Subsequently, upon an additional showing made to the Forester by the applicant company, and upon a supplemental report by an engineer of the Forest Service, the Secretary of Agriculture, under date of March 3, 1910, made favorable recommendation, stating that upon reconsideration of the matter he was convinced that while the power development theoretically possible in connection with the proposed right of way is large, such development is entirely uncertain and contingent; that "the subsequent showing of facts by the applicant is amply sufficient to overcome the conclusion that the proposed rights of way are in fact sought or intended to be used for power purposes," and that if development of the power possibilities of this region should ever be attempted the enterprise could "be then placed under the provisions of the act of February 15, 1901 (31 Stat., 790)."

But as against these vacillating and somewhat confusing expressions of opinion the Director of the Geological Survey had in no uncertain terms made report to the Secretary of the Interior upon this application, in substance that the water rights claimed by the company appear to be incomplete from an irrigation standpoint, having been taken out rather with a view to power development; that

the application as made contemplates the development of power as well as irrigation in connection with these reservoirs; that the owners of the reservoirs will practically control all power possibilities on the streams to which they are tributary; that the water supply of the proposed reservoirs would support a power proposition of more value than any possible use of it for irrigation, and that complete conservation of the waters of these streams by use of reservoirs for power, together with supplemental storage for irrigation, would bring in annual revenues of \$363,500 from power and \$169,800 from irrigation; that the market for both power and agricultural products must be developed and that it does not appear that the problem of developing the market would be materially greater for the one use than for the other; that the available water supply without storage is sufficient for the irrigation of about 13,000 acres of land and that the fact that a large portion of this water is not at present utilized "casts doubt upon the practicability of the irrigation development proposed."

Upon this state of facts, and upon these reports, the company's application was rejected and approval of its maps withheld. In that decision it was said that the right of way applied for, if granted would carry with it in law the right of possession to and the control of a strip of land fifty feet in width around the margin of the reservoirs; that according to the report of the Director of the Geological Survey the most valuable power sites would be within such grant, and that "the grant would, therefore, in the judgment of this Department embarrass or wholly prevent the development of the power possibilities of this region under any enterprise representing interests adverse to such grantees;" that there is unanimity of opinion that these power sites are of great value; and that "the approval of the maps in question would authorize their development by the grantees thereunder as subsidiary only to the main purpose of irrigation which is without doubt both in design and possibility an enterprise of much less consequence than may be evolved in the development of the power as such under other laws."

And further—

If it be said that the applicant company will develop these properties to their fullest extent in the event of the approval of its maps, and that the public will therefore in any event get the full benefit of such development, the suggested plan involves an admission of design to appropriate a valuable property under a law which does not authorize it. Property in power sites may only be legitimately acquired under the act of March 3, 1891, as amended by the act of May 11, 1898, for subsidiary use in connection with an irrigation project, and the full development of this power would be the main use with irrigation as subsidiary.

Other thoughts were suggested as basis for the conclusion reached, but the specifications upon the motion considered it will not be neces-

sary to more fully refer to the decision. The specifications of error upon the motion are in full as follows:

1. The Honorable Secretary erred in disregarding absolutely the instructions of the President of the United States in regard to the procedure in such cases as the present as shown in circular of instructions issued October 20, 1910 (39 L. D., 309), and at the present time unrevoked.

2. The Honorable Secretary erred in disregarding the finding of the Secretary of Agriculture that the granting of said application will not interfere with the proper occupation of the Mono National Forest nor prevent the operation of the act of February 15, 1901, upon the lands involved. The act of March 3, 1891, vests the authority to determine said fact in said Department of Agriculture and requires the approval of said Secretary of Agriculture, who is the Secretary having jurisdiction over said reservation.

3. The Honorable Secretary erred in directing the applicant to amend said application to bring said application within the terms of the act of 1901 when such amendment would be exactly contrary to the expressed purposes of said applicant who has applied for an *irrigation* right of way and *not* for a *power* right of way, and who has made an irrefutable showing of irrigable lands of the practicability of the project and of the public benefit resulting therefrom.

4. The Honorable Secretary erred in holding that said reservoir sites are chiefly valuable for power and that there is "unanimity of opinion that these power sites are of great value" since there is absolutely no definite clear-cut evidence of *any* value present or remote and, on the contrary, reports of the Geological Survey and of the Engineer of the Forest Service conflict in every respect and present not one particle of credible, clear or convincing evidence of any power value which makes this project more practicable for power than for irrigation.

5. The Honorable Secretary errs in the following conclusions of fact and allegations of fact or suppositions of fact, which are at a variance with the true conditions:

(a) "That the market for both power and agricultural products must be developed and that it does not appear that the problem of developing the market would be materially greater in the one use than the other." In other words that it is just as difficult and the problem is just as great in a new country to establish farms and find an output for agricultural products as it is to establish a power plant and find a market for the power generated.

(b) "That the water rights do not appear to be complete from the irrigation standpoint but that they have been taken out with a view to power developments."

(c) "If it be said that the applicant company will develop these properties to their fullest extent in the event of approval of its maps, and that the public will, therefore, in any event, get the full benefit of such development, the suggested plan involves an admission of a design to appropriate a valuable property under a law which does not authorize it."

(d) "The fact that a large portion of the available water is not *at present* utilized casts doubt upon the practicability of the irrigation development *proposed*."

Sections eighteen and nineteen of the act of March 3, 1891, *supra*, grant "the right of way through the public lands and reservations of the United States" to any duly organized "canal or ditch company formed for the purpose of irrigation." To secure the benefits of this act within a reservation of the United States the applicant

must file with the register of the land office where such land is located a map of its canal, ditch or reservoir. Such map "shall be subject to the approval of the Department of the Government having jurisdiction of such reservation" but it must be approved by the Secretary of the Interior. The Department of Agriculture has jurisdiction over forest reservations for certain purposes and to the end that the right of way applied for may not be so located as to interfere with the proper occupation thereof by the Government, it is within the competency of the head of that department to approve maps of location therein under said act of March 3, 1891, as amended. But title does not pass on such approval, it being only advisory to the Secretary of the Interior whose jurisdiction in the administration of the acts of 1891 and 1898 is paramount.

In the very necessities of the case, whatever might be said as to applications under said acts for right of way upon the unreserved public domain, it may not be successfully disputed that the exercise of this jurisdiction within a reservation of the United States involves the exercise of more than a mere legal discretion. In other words, that discretion may and should look beyond the technical sufficiency of the application and in broad view should subserve the interests of the whole people. The decision in question was made in the exercise of such discretion and the case rests upon its own facts.

In the first place, reference being had to the specifications of error, it should be here stated that the allegation that the Secretary of the Interior abused this discretion in directing the applicant to amend his application to bring it within the terms of the act of February 15, 1901, is wholly without foundation of fact. The Secretary made no such ruling. The suggestion of the Secretary of Agriculture with reference to bringing the project under that act as a future contingency was referred to and alleged equities of the applicant noted in this connection, but no direction was given and no suggestion or advice made on this question, it being merely said of the case in hand that an approval under the act of 1891 would render it difficult, if not impossible, to thereafter place the enterprise under the act of 1901. Nor is it quite understood what is meant by the first specification of error, wherein the Secretary of the Interior is charged with having disregarded absolutely the instructions of the President of the United States in regard to the procedure in such cases, reference being had to the circular of instructions issued October 20, 1910 (39 L. D., 309). That circular reflects the views of the President of the United States not only in law but in fact as to the policy which should be adopted in cases of applications for rights of way under the act of March 3, 1891, *supra*, as amended by the act of May 11, 1898, *supra*, "where the primary and principal use of the right of way is sought for the purpose of irrigation, but where there is involved a development of

electrical power or energy for the purpose of pumping water to lands from streams, reservoirs or wells," and the following direction was therein given to the Commissioner of the General Land Office:

You will promptly take up for consideration all such rights of way now pending in your office and, in cooperation with the Director of the Geological Survey, cause a field investigation and report to be made upon each application by a competent engineer of your office, or of the Survey, and thereafter transmit the entire record to the Department with the joint or separate recommendations of yourself and the Director of the Geological Survey.

The same procedure will be followed in case of such applications hereafter presented. In *all* cases the investigation and report should cover all material facts pertaining to the lands and rights applied for, including irrigation, contemplated and possible, the power possibilities and whether the application is for the main purpose of irrigation.

This case involves a broader question than was therein considered. It may be admitted, for the sake of the argument, that the present intentions of the California-Nevada company are within the law and that its purpose is to develop only such power as would come within the definition of "subsidiary use," but the fact remains that according to the report of the Geological Survey, and in the strong conviction of the Secretary of the Interior, the granting of these rights of way would control the geographical situation and enable this company, entrenched as in that event it would be, behind a perpetual easement, to prevent the development of this power or to postpone such development until it may care to embark in the commercial power business. Perpetual easements in power sites under the guise of irrigation are not in keeping with any well-considered public policy, and it is believed that such would be the necessary consequence of an approval of these maps.

The Department is not greatly impressed with the second specification. It is true that the Secretary of Agriculture found that the granting of said application would not interfere with the proper occupation of the Mono National Forest nor prevent the operation of the act of February 15, 1901, upon the lands involved, but this Department must decline to accept the suggestion that the act of March 3, 1891, vested that officer with authority to finally determine the fact of whether the approval of such a right of way would prevent the operation of the act of February 15, 1901. The Secretary of the Interior must determine that question for himself, and in this case he has done so in part upon suggestions made by the Secretary of Agriculture but largely upon the report of the Director of the Geological Survey, based upon examination in the field, and the expressions to which exception is taken and the findings of fact of which complaint is made are based upon such record. These conclusions of fact are not sufficiently disputed by the record. There is some confusion upon the relative value of the drainage area in

question in the matter of the development for power and for irrigation and some expressions of opinion upon behalf of persons interested in the allowance of this application, and engineers employed by the company as basis for showing in this behalf, but there is nothing which would have justified the Department in rejecting the very precise statements made by the Director of the Geological Survey.

With reference to subdivisions "B" and "C" of specification 5, assigning error upon the conclusion that the water rights of this company do not appear to be complete from the irrigation standpoint but that they have been taken out with a view to power development, and the suggestion that if it be said that the applicant-company will develop these properties to their fullest extent in the event of approval of its maps and that the public would, therefore, in any event, get the full benefit of such development and the statement in the decision "that the suggested plan involves an admission of a desire to appropriate a valuable property under a law which does not authorize it," it will be enough to say that this, as appears from the decision, was stated argumentatively. The Department did not hold that the company's water rights are not complete from an irrigation standpoint nor that it had any present or ultimate intention of developing these properties to their fullest extent as power propositions. The thought intended to be expressed by this language was merely that if this be so the company would still not be entitled to an approval of the applications here presented because such scheme involved in its last analysis the use of the right of way sought for power purposes and that such right of way would have been secured under a law which did not authorize it and which would have conferred upon the grantee company a perpetual easement against the United States.

The company's application for oral argument is noted but it is not thought that according further oral hearing would serve any useful purpose. The company has already been heard exhaustively.

The motion is denied.

#### INSTRUCTIONS.

##### DESERT ENTRIES WITHIN RECLAMATION PROJECTS—RELINQUISHMENT OF EXCESS.

A desert entryman of lands falling within a government reclamation project who seeks to secure water for the reclamation thereof from the project is required by section 5 of the act of June 27, 1906, as a condition precedent to his right to water, to relinquish to the government all of the land embraced within his entry in excess of 160 acres.

*First Assistant Secretary Adams to the Commissioner of the General Land Office, January 20, 1912.*

Under date of July 21, 1911, your office presented the facts respecting the desert-land entry of Miles E. Pearson, covering 322.51 acres



within the La Grande land district, Oregon, made September 30, 1904, and assigned in its entirety to one John D. Rice, May 10, 1906. August 16, 1905, these lands were withdrawn for irrigation purposes in connection with the Umatilla project under the act of June 17, 1902 (32 Stat., 388). February 28, 1911, notice issued that the project would be completed and water right applications would be received March 22, 1911. Only one yearly proof was submitted under this entry. The time for submission of final proof has been several times extended under the act of June 27, 1906 (34 Stat., 520), the last expiring March 22, 1911.

July 30, 1910, Rice assigned 160 acres of the land embraced in his entry to Maggie E. Rice, his wife, which assignment was filed with the Reclamation Service, and under date of June 24, 1911, the Director thereof objected to accepting a partial assignment of the desert-land entry by Rice and in said letter he said:

In the opinion of this office the statute refers to the desert land entry as an entity and only 160 acres of a desert land entry can receive water by virtue of section five of the above act, and that the excess lands in any desert land entry must of necessity be surrendered to the Government, and, instantly thereon, the lands so surrendered come within the provisions of the reclamation act, making such relinquished land subject to entry under the homestead act and in no other way. An assignment of such surplus land was not contemplated by the act, and if made renders neither the land assigned entitled to water under the project, nor the land retained by the original entry entitled to water.

It is because of this objection that the matter is submitted to the Department with request for instructions as to whether a partial assignment can be made of a desert-land entry within a reclamation project and water furnished to the several claimants under such desert-land entry.

This question involves primarily the construction of section five of the act of June 27, 1906, *supra*, by which it is provided:

That where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and the desert-land entryman has been or may be directly or indirectly hindered, delayed or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements

heretofore made on any such desert-land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

Before proceeding with the consideration of this section it should be noted that the inclusion of land embraced in an existing unperfected desert-land entry within a reclamation project in nowise affects the right of a desert-land claimant to perfect title to the lands entered, but before title could be secured it was necessary that the entryman show that he had expended at least \$3.00 an acre in the improvement of the land; that he was possessed of a sufficient water right to reclaim the tract entered; and that at least one-eighth of the tract had been actually cultivated to crops. It was by the performance of these things and the payment of \$1.25 per acre that the right to title under the desert-land law was earned.

The irrigation system relied upon to reclaim the land might have, as was largely the case, depended entirely upon the exertion of the entryman, or others in conjunction with him in its construction. The advent of a Government project might, as it perhaps did in many instances, hinder or delay the efforts of those depending upon individual irrigation systems in a given locality. In recognition of this fact the section above quoted was intended to give relief to desert-land entrymen, and it was first provided that the time during which the desert-land entryman has been or may be hindered, delayed, or prevented from complying with the desert-land law should not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within his desert-land entry made for lands afterwards included within the exterior limits of an irrigation project. In so doing, however, it was provided that—

If the reclamation project is carried to completion so as to make available a water supply for the land embraced in such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise.

But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

Now, what is the condition where the desert-land entryman does not own a water right and reclaim his land under the desert-land law but seeks to secure water in connection with his desert-land entry embraced within the exterior limits of an irrigation project? The law says in such case—

the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise.

That he must surrender, relinquish, or forfeit to the Government all that he holds under his desert-land entry in excess of 160 acres is plain. The act says "and shall *relinquish* all land . . . in excess of one hundred and sixty acres retained." The word "relinquish" as employed in public land technology has a defined meaning and always runs to the United States. The laws nowhere recognize a right to relinquish to another. To accomplish such an end the term always employed is "assign" and had theretofore been employed in respect to desert-land entries. It is but reasonable therefore to assume that the term "relinquish" was advisedly used.

This was the well-defined meaning of the term long before the enactment of the statute under consideration, and, under a well-established rule of construction, unless it is apparent that Congress intended it to have a different meaning, it is to be presumed to have been used in its technical sense. [Hawley v. Diller, 178 U. S., 476, 487.]

In addition, for reasons hereinafter given, no partial assignment was permissible in 1906. In consideration of this relinquishment he is saved the expense of putting in his individual system for the reclamation of the land and is permitted to avail himself of the benefits of the Government's scheme by merely paying the proportionate part assessed against the entry as extended to any private owner or an entryman under the reclamation act.

In this connection I note that your letter states that "a number of partial assignments of desert-land entries afterwards included in reclamation projects have been accepted and others are pending," and you express the opinion that no reason is apparent why the desert-land entryman should be deprived of the right of assigning a part of the land in his entry as they are permitted to do under the act of March 28, 1908 (35 Stat., 52).

Respecting this suggestion it is sufficient to say that the act of March 28, 1908, was passed nearly two years after the act of June 27, 1906, and can not, therefore, furnish any good rule for construction of that act, and the act of 1908 in nowise refers to or by necessary implication affects the act of 1906. Prior to the passage of the act

of 1908, the Department, while permitting assignments of desert-land entries before submission of final proof, recognized the entry only as a unit and did not recognize assignments of a part thereof. Therefore, the act of 1906 could by no fair interpretation be construed as contemplating a relinquishment of the original desert-land entry through assignment of a part.

With the understanding the Department has of this matter the only possible way of assigning or disposing of part of a desert-land entry within a reclamation project so that the parties might avail themselves of the Government water, would be for the desert-land entryman to subject his entry to division into farm units according to the plan of the Reclamation Service for that project; whereupon, should he assign the several units to different persons, if qualified under the homestead law, such persons might relinquish their claims under the desert-land entry and at the same time make reclamation homestead entries for the several farm units. The serious difficulty in this scheme would be that thereby the parties might be held to have exhausted both their desert and homestead rights, but otherwise assignments with the benefits of the Government scheme would be impossible.

You will see that the administration of the act of 1906 is in line with the construction herein given.

### ROSEBUD INDIAN LANDS—STATE SELECTIONS.

#### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, January 22, 1912.*

REGISTER AND RECEIVER,  
*Chamberlain, South Dakota.*

SIRS: Section 1 of the act of May 30, 1910 (36 Stat., 448), provides:

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Rosebud Indian Reservation, in the State of South Dakota, lying and being within the counties of Melleite and Washabaugh, south of the White River, and being described and bounded as follows: Beginning at a point on the third guide meridian west where the township line between townships thirty-nine and forty intersects the same, thence north along said guide meridian to the middle of the channel of White River, thence west along the middle of the main channel of White River to the point of intersection with the line dividing the Rosebud and the Pine Ridge Indian Reservations, thence south along the boundary line between said reservations to the township line separating townships thirty-nine and forty, thence east along said township line to the place

of beginning, except such portions thereof as have been or may be hereafter allotted to the Indians, or otherwise reserved, and except lands classified as timber lands: *Provided*, That any Indians to whom allotments have been made on the tract to be ceded, may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the diminished reservation.

Section 8 of the act, as amended by the act of March 3, 1911 (36 Stat., 1073), provides:

That sections sixteen and thirty-six of the land in each township within the tract described in section 1 of this act, shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the State of South Dakota for such purpose, and in case any of said sections or parts thereof are lost to said State by reason of allotments thereof to any Indian or Indians, or otherwise, the Governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section 1 of this act or within the said Rosebud Indian Reservation, to locate other lands not otherwise appropriated, not exceeding two sections in any one township, which shall be paid for by the United States as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement.

By proclamation of the President, dated June 29, 1911, April 1, 1912, is designated as the first day on which entries under the provisions of the act may be made, and that date must be considered, for the purpose of State selections, as the date of the opening of the lands to settlement. Section 8 of the act, as amended, provides that all indemnity school land selections must be made prior to that date.

The State can not be permitted, under the provisions of the act of May 30, 1910, *supra*, to select lands classified as timber lands, and its right of selection is restricted to not more than two sections, or 1,280 acres, in any one township within the boundaries of the Rosebud reservation. Both base and selected tracts must be within said reservation. Selections should be made on the forms in use for the selections of indemnity school lands, so modified as to indicate that the applications are made under the act of May 30, 1910, as amended by the act of March 3, 1911. Inasmuch as these lands have been examined and classified by the Geological Survey and reported as non-mineral and non-coal in character and the Indians have received their allotments, and that there can be no legal occupancy of the lands, at this time, the requirement that non-mineral and non-occupancy affidavits be filed with each list of selections is hereby waived.

In view of the fact that the claims to these lands by allotment are record claims, and that the unallotted lands will not be subject to homestead settlement during the period within which the State is authorized to exercise the right of selection, the requirements of publication of notice of the selections is waived, and as the tracts to be used as bases for selections are lost to the State by reason of allot-

ments or otherwise, no certificates of the county officers, showing non-sale and non-encumbrance by the State of such base tracts, need be furnished.

Lists of the selections of the lands considered herein, accepted by you, will be given proper serial numbers, and will be transmitted to this office in special letters. Care must be taken to place notations, showing the fact and date of transmittal, in each case, in the column for remarks in the "Schedule of Serial Numbers" for the month in which the lists are accepted and transmitted.

Inclosed herewith is a list of the lands in the Rosebud reservation which have been allotted to the Indians; a list of the lands which have been classified as timber lands, and a list of the sections 16 or 36, or parts thereof, which have been allotted to the Indians and for which indemnity must be selected by the State.

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved:

CARMIE A. THOMPSON,  
*Assistant Secretary.*

## FORTS BRIDGER, SANDERS, AND LARAMIE MILITARY RESERVATIONS—PURCHASE OF GRAZING LANDS.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, January 29, 1912.*

#### REGISTERS AND RECEIVERS,

*Cheyenne and Evanston, Wyoming.*

SIRS: Paragraph No. 2 of the instructions governing the purchase of pasture and grazing lands on the abandoned Fort Bridger, Fort Sanders and Fort Laramie Military Reservations, and Fort Laramie Wood Reservation, in Wyoming, under the act of May 31, 1902 (32 Stat., 283), is hereby amended to read as follows:

2. Persons desiring to avail themselves of the provisions of said act will be required to file an application describing the lands sought to be purchased, and to publish notice of their intention to submit proof in support of such application, as required by the act of March 3, 1879, in preemption and homestead cases. The application to purchase must, in every instance, show (a) that the applicant has exercised the right of homestead entry on land within the same reservation, the number and date of such entry, the description of the land covered thereby, and that such entry is still subsisting, or that he is a resident

and the legal owner of 160 acres therein; (b) that the land applied for is not settled upon, occupied, or improved, and is not valuable for coal or mineral, and that it is nonsaline in character; that the land is suitable for pasture and grazing purposes; its location relative to sources of water supply and the causes which it is claimed render it unfit for cultivation and homestead, and that the land sought to be purchased, with the land which the applicant has since August 30, 1890, entered or acquired under the agricultural land laws, does not, in the aggregate, exceed 320 acres.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

CARMIE A. THOMPSON,  
*Assistant Secretary.*

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EDITH G. HALLEY (NOW SOUTHWICK).

*Decided January 31, 1912.*

SILETZ HOMESTEAD—WITHDRAWAL—REINSTATEMENT.

Where the local officers were directed to cancel upon their records a homestead entry in the former Siletz Indian reservation, as the result of a contest, and the contestant in pursuance thereof filed his application to enter and settled upon the land, such application and settlement are sufficient to except the land from the operation of the President's proclamation of withdrawal of July 13, 1910, under the act of June 25, 1910, notwithstanding notation of the cancellation of the former entry and allowance of contestant's application were suspended on account of proceedings in the courts; and the entry subsequently allowed upon contestant's application is valid and prevents reinstatement of the former canceled entry under the act of March 4, 1911.

ADAMS, *First Assistant Secretary:*

This is a motion for rehearing by Edith G. Halley, now Southwick, in the matter of her petition for reinstatement under the act of March 4, 1911 (36 Stat., 1356), of her homestead entry for the S.  $\frac{1}{2}$  S.  $\frac{1}{2}$ , Sec. 2, T. 10 S., R. 11 W., W. M., Portland, Oregon, land district. Counsel has also filed a request that the matter be orally argued. Rule 82 of Practice, as amended November 6, 1911, permits oral argument, on motion, in the discretion of the Secretary. This matter was orally argued when coming before the Department on appeal, the motion for rehearing raises the same questions as then presented, and the Department accordingly feels that no further oral argument is necessary.

In brief, the facts are that the Halley entry was ordered canceled, upon the contest of Charles W. Lovegren, by the Department's decision of September 21, 1909, adhered to on motion for review December 18, 1909. December 22, 1909, the Department directed a

suspension of action in the case until the Supreme Court of the District of Columbia had disposed of a bill in equity seeking to enjoin action under the decisions of September 21 and December 18. The suit having been dismissed March 7, 1910, the Commissioner was directed, March 10, 1910, to cancel the entry and to notify the local officers by telegram of such cancellation, to make proper notation upon their records and notify the parties. This was accordingly done, the local officers advising Lovegren of his preference right of entry. On March 15, 1910, the Commissioner was directed to wire the register and receiver to suspend further action upon the telegram of March 11, for the reason that the litigation had been reinstated. March 17, 1910, the Commissioner was directed that under the circumstances it appeared proper that any orders regarding the Halley entry should be revoked and the entry reinstated. Lovegren, after receiving notice of cancellation, presented his homestead application for the land, March 24, 1910. This application was suspended by the register and receiver because of the telegram of March 15, 1910. Lovegren, however, settled upon the land April 1, 1910. April 16, 1910, the Commissioner advised the local officers of the Department's directions of March 17, 1910, reinstating the Halley entry, and they, April 21, 1910, rejected Lovegren's application, from which action he promptly appealed. On July 13, 1910, the lands were withdrawn from entry by proclamation of the President under the act of June 25, 1910 (36 Stat., 847), for the purpose of classification and legislation, the proclamation containing the following proviso:

*Provided, further,* That there shall be excepted from the force and effect of this order of withdrawal all lands which are on this date embraced in any lawful homestead entry heretofore made or upon which any valid settlement has been made, and is at such date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made.

The suit in equity having been dismissed, the Halley entry was again ordered canceled by telegram of July 20, 1910, and the Lovegren application allowed and formally made an entry of record January 5, 1911.

The act under which reinstatement of the entry is desired, does not permit reinstatement if another entry is of record covering the land when the application for reinstatement is filed. It is the contention here that Lovegren's settlement being upon land embraced in the Halley entry at the time of such settlement, the land was not excepted from the withdrawal, that the subsequent allowance of Lovegren's application as an entry was erroneous, and that such entry, therefore, is null and void and no bar to the allowance of the Southwick application. Counsel cites, in support of his contentions,



the case of *Wood v. Beach* (156 U. S., 548); *McMichael v. Murphy* (197 U. S., 304); and *James v. Germania Iron Co.* (107 Fed. Rep., 597).

*Wood v. Beach* was one of a series of three cases decided by the Supreme Court (*Ard v. Brandon*, 156 U. S., 537; *Maddox v. Burnham*, 156 U. S., 544) which all involved the rights of homestead entrymen, or settlers in relation to a withdrawal made by the Department of lands within the indemnity limits of a railroad grant. In *Ard v. Brandon*, the settler settled upon the land prior to the withdrawal and immediately presented his homestead application which was erroneously rejected by the register and receiver. The Supreme Court there held that his rights were superior to such withdrawal and the patentee of the railroad company. In *Maddox v. Burnham*, the settler was a mere squatter upon the land with no intention of entering the same at the time he began occupation of the tract. He did not present any application until after the withdrawal and the court held this occupation—the matter being before the passage of the act of 1880 (21 Stat., 141)—did not protect him against the intervening withdrawal. In *Wood v. Beach* the settler entered upon the land after the withdrawal and the court held that such settlement conferred no rights upon him. In *McMichael v. Murphy*, the court held that a settlement on land already covered of record by another entry, valid upon its face, does not give such settler any right in the land, notwithstanding that the first entry might subsequently be relinquished or ascertained to be invalid by reason of facts de hors the record of such entry, and that the party first entering after the relinquishment or cancellation had priority over one attempting to enter prior to such relinquishment or cancellation. In that case, one who settled upon the land covered by a formal entry prior to its cancellation, was held to be inferior in right to the first applicant after the cancellation of the entry. In *James v. Germania Iron Company*, the court held that an entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled and removed. There the scrip location of a certain tract of land had been ordered canceled by decision of the Department. After the decision but prior to notice thereof to the register and receiver and a notation of cancellation upon their records, an application to enter the land was filed. After the notice of cancellation to the register and receiver, another party filed his application. The court there held that the application tendered after notice of cancellation had been given the register and receiver was the first in right, the court holding that no rights to enter or secure the entry of land covered by a prior entry can be acquired by strangers

to the litigation at the local land office before the decision of the invalidity of the prior entry is officially communicated to the local land officers and the prior entry is canceled on the books and plats in their office.

The Department in its instructions of September 24, 1910 (39 L. D., 230), referring to the case of *United States v. Bagnell Timber Co.* (178 Fed. Rep., 795), stated that it would lay down merely the general rule that credit for residence would not be allowed during the time that the land is not subject to entry by the person maintaining such residence, but that it would prefer to adjudicate the several cases that might subsequently arise upon the material facts of each particular case. The case of *United States v. Bagnell Timber Company*, referred to, held that a settler upon land embraced in the formal entry of another, acquired no rights by such settlement, although he later secured an entry and patent for the land. That is, the patent would relate back merely to the date of his entry and not to the date of his settlement.

The present case presents material distinctions from those above cited. The Halley entry had been finally ordered canceled by the land department December 18, 1909; the execution of that judgment by means of notice to the local officers being suspended because of litigation instituted in the courts. However, on March 11, 1910, that judgment was carried into effect, the entry was formally canceled on the records of the land office, and notice of preference right issued to Lovegren. It is true that before Lovegren presented his application, the local officers were directed to suspend action on the judgment of cancellation, due to the reinstatement of the suit in court. Lovegren, who had secured the cancellation of the prior entry, however, promptly presented his application and began his settlement on the tract. At the time of such settlement, the Halley entry had not been reinstated upon the records of the local land office. The action taken by the Department in directing such reinstatement was out of comity to the court, no order of court having been issued to compel it, and was designed to preserve as far as possible the *status quo* pending the litigation as between the Government and Southwick. Such action, however, could not prejudice the rights of Lovegren who was upon the land in pursuance of a final judgment of cancellation secured by him and an invitation by the Government to enter the tract. The reinstatement of the Halley entry, as directed March 17, 1910, was merely for the purpose of making it possible to execute any decree the court might render in the litigation and for that purpose alone, and, upon the dismissal of the litigation, the reason for its reinstatement ceased. Accordingly, when Lovegren's entry was allowed January 5, 1911, Southwick had no rights which were infringed thereby, the matter then becoming solely be-

tween Lovegren and the Government. The Department is accordingly of the opinion that Lovegren, who was a party in interest to the proceedings resulting in the cancellation of the Halley entry, when considered in connection with his application to make entry of land at that time vacant upon the local land office records, made a valid settlement and thereby excepted the land in accordance with the proviso of the withdrawal proclamation of July 13, 1910.

The motion for rehearing is accordingly denied without passing upon the question whether Southwick would be otherwise qualified under the act of March 4, 1911, or not.

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### INSTRUCTIONS.

#### RELINQUISHMENT—ACCOMPANYING APPLICATION TO ENTER.

The practice adopted in some local offices of allowing the filing of relinquishments conditionally will no longer be permitted. Hereafter the filing of a relinquishment of an entry or claim under the public land laws will work a cancellation of the entry or claim and will be at once noted of record, the land being thereby cleared.

*First Assistant Secretary Adams to the Commissioner of the General Land Office, January 31, 1912.*

It is noticed that in many of the local land offices the practice has been adopted of allowing the filing of a conditional relinquishment of an entry or claim, subject to the allowance of an accompanying application for the land involved.

Upon careful consideration of the matter, the Department is of the opinion that such practice often leads to needless litigation, and does not tend to conserve good administration, and should therefore be discontinued. Relinquishments run to the United States alone, and no person can obtain any right thereunder by the mere purchase or filing of same.

You are accordingly requested to direct the local land officers to advise all such parties that hereafter the filing of a relinquishment of any entry or claim under the public land laws within their jurisdiction will be treated as absolute; the cancellation thereof at once noted of record; and the tract embraced therein will be held open to settlement and entry without further action.

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THOMAS M. TRIPPE.

Motion for rehearing of departmental decision of July 17, 1911, 40 L. D., 190, denied by First Assistant Secretary Adams, February 2, 1912.

## NOTATION OF RIGHTS OF WAY ON ENTRY PAPERS.

## INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, February 2, 1912.

REGISTERS AND RECEIVERS,

*United States Land Offices.*

SIRS: Some misapprehension having arisen as to the proper construction of departmental circulars of November 3, 1909 (38 L. D., 284), and January 19, 1910 (38 L. D., 399), governing notation of rights of way on entry papers, you are now instructed that such notations should be made only where your records show that the land involved, or some part of it, is covered by an *approved* application for right of way. In this connection, attention is directed to the decision of the United States Supreme Court in the case of Minneapolis, St. Paul and Sault Sainte Marie Railway Company v. Doughty (208 U. S., 251). Applicants to enter public lands that are affected by a mere pending application for right of way, should be *verbally* informed thereof, and given all necessary information as to the character and extent of the project embraced by the right-of-way application; and, further, that they must take the land subject to whatever right may have attached thereto under the right-of-way application, and at the full area of the subdivisions entered, irrespective of the questions of priority or damages, these being questions for the courts to determine.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

SAMUEL ADAMS,  
*First Assistant Secretary.*

RECLAMATION ENTRY—CANCELLATION OR RELINQUISHMENT—  
WATER RIGHT PAYMENTS.

## CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, February 2, 1912.

REGISTERS AND RECEIVERS,

*United States Land Offices.*

SIRS: Paragraph 61 of the circular of May 31, 1910 (38 L. D., 620), is hereby amended to read as follows:

If any entry subject to the Reclamation Act of June 17, 1902 (32 Stat., 388), is canceled or relinquished, the payment for water-right charges already made

and not assigned in writing to a prospective or succeeding entryman under the provisions of paragraph 62 of the circular of May 31, 1910, are forfeited. All water-right charges which remain unpaid are canceled by the relinquishment or cancellation of the entry except as provided by the specific provisions of public notices applicable to particular projects.

Any person who thereafter enters the same land must, in the absence of an assignment in writing or public notice to the contrary, pay the water-right charges as if the land had never been previously entered. No credit will be allowed in such cases for the payment made by the prior entryman, and the new entryman must pay at the time of filing his homestead application and water-right application, such charges for building and operation and maintenance as are required by the public notice in force at the time on the particular project.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

SAMUEL ADAMS,  
*First Assistant Secretary.*

## HOMESTEAD ENTRY—FEES FOR EXCESS OVER EIGHTY ACRES.

### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., February 2, 1912.*

REGISTERS AND RECEIVERS,

*United States Land Offices.*

SIRS: Your attention is called to departmental decision in the case of *Sorli v. Berg* (40 L. D., 259), which enforces section 2289, R. S., forbidding homestead entries by any person who is the proprietor of more than 160 acres, even though the excess be less than one acre. It follows that the same construction will, when applied to section 2290, R. S., overrule the departmental decision in the case of *Alcide Guidney* (8 Copp's Land Owner, 157), which formed the basis of the present rule for the collection of a fee of only \$5 where the application embraced less than 81 acres. This new rule will require the payment of a fee of \$10 under all applications for all homestead entries which embrace more than 80 acres, and you are, therefore, directed to require payments accordingly under all applications hereafter presented.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

SAMUEL ADAMS,  
*First Assistant Secretary.*

## COLEMAN v. WILSON ET AL.

Decided December 18, 1911.

## KINKAID ENTRY—RECLAMATION WITHDRAWAL—ADDITIONAL ENTRY.

In case of a homestead entry of lands within the territory designated under the Kinkaid Act, made after the passage of said act, at a time when the lands were embraced in a reclamation withdrawal as irrigable lands, which limited the right of entry to 160 acres, the entryman, upon the revocation of the withdrawal, is entitled to enlarge his entry by taking contiguous lands to make up the full area allowed by law.

THOMPSON, *Assistant Secretary*:

The controlling question in the appeals of William E. Wilson and Charles E. Birdsall from the decision of the General Land Office of November 21, 1910, holding for cancellation the homestead entries made September 30, 1909, of lands in sections 5 and 6, township 24 north, range 57 west, and in section 33, township 25 north, range 57 west, Alliance, Nebraska, under the Kinkaid Act, is whether an original entry made after the passage of said act, where the lands at the time of the entry were not subject to the enlarged entry, exhausted the right to make additional entry under said act.

The lands in question were withdrawn May 4, 1904, as lands susceptible of irrigation from a reclamation project, but were restored to settlement August 31, 1909, and to entry September 30 thereafter under the general land laws.

On the date last mentioned William E. Wilson, Charles E. Birdsall, and W. Ray Coleman applied to make additional entries under the act of April 28, 1904 (33 Stat., 547), known as the Kinkaid Act, and the amendatory act of May 29, 1908 (35 Stat., 465), respectively, as follows:

Wilson made entry of the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of said section 5, and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  of said section 6 as additional to original entry made June 19, 1908.

Birdsall made entry of lots 1, 2, 3, 4, 5, and the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of said section 6, and the SE.  $\frac{1}{4}$  of said section 33 as additional to original entry made November 20, 1908.

Applications to make entry of some of said tracts were also made the same day by W. Ray Coleman, Walter R. Preston, and Sydnor J. Fleenor. These applications were in conflict with the entries of Wilson and Birdsall, and to some extent with each other, but need not be considered as they have no bearing upon the question presented by this appeal, in view of the action taken herein.

At the time Wilson and Birdsall made their respective entries the land had been withdrawn as land susceptible of irrigation, under the reclamation act of June 17, 1902 (32 Stat., 388), and the area of entry was limited to 160 acres.

The General Land Office held Wilson's and Birdsall's entry for cancellation, for the reason that they were made subsequent to the Kinkaid Act, which exhausted their right, and held that said entries were thereafter disqualified from making entry of said lands.

This appeal is controlled by the decision of the Department in the case of Earle F. Dunning, decided February 21, 1911, in which it was held that where entry was made of lands within the territory designated in the Kinkaid Act, and said lands were, at date of entry, embraced in a reclamation withdrawal as irrigable lands, which limited the right of entry to 160 acres, the entryman did not thereby exhaust his right under said act, but upon the revocation of the withdrawal would be entitled to enlarge his entry for contiguous lands to the full area allowed by law.

The decision of the General Land Office holding the entries of Wilson and Birdsall for cancellation is reversed, and the case is remanded for further consideration and decision by that office upon the several conflicts.

### COALINGA HUB OIL CO.

*Decided December 20, 1911.*

#### PLACER LOCATION BY CORPORATION—AREA.

A corporation may not lawfully embrace in a single location under the placer mining laws more than twenty acres, either in its own name or through individuals acting in its interest and for its benefit.

#### THOMPSON, *Assistant Secretary:*

This is an appeal by the Coalinga Hub Oil Company from the decision of the Commissioner of the General Land Office of December 6, 1910, making certain requirements as to its mineral entry No. 02095, made April 1, 1910, by and through F. M. Nevins, its agent, at Visalia, California, for the Coalinga Hub Oil Placer, embracing the NE.  $\frac{1}{4}$  of Sec. 22, T. 21 S., R. 15 E., M. D. M., application for patent having been filed December 22, 1909.

It appears from abstract of title filed with the application that on August 15, 1903, eight purported oil locations of twenty acres each were made of the area now applied for, as follows: by Walter Dunham of the Hub Nos. 2, 5, and 8, embracing, respectively, the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ; by F. M. Nevins of the Hub Nos. 1, 4, and 6, embracing, respectively, the E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ; by Fried Bennett of the Hub No. 3, embracing the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ ; and by John Bennett of the Hub No. 7, embracing the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ . March 15, 1904, Dunham conveyed the ground embraced in the Hub Nos. 2, 5, and 8 claims to Mrs. A. Bennett, and on April 5,

1907, Nevins went through the form of relocating the ground embraced in the Hub Nos. 4 and 6 as, respectively, the Lost Dog Nos. 4 and 6 claims. By quitclaim, dated November 2, 1908, and acknowledged November 3, 1908, Frank M. Nevins, F. Bennett, Mrs. F. Bennett, and John Bennett conveyed to the Coalinga Hub Oil Company, the applicant herein, property described as follows:

Placer mining claims Hub Nos. 1, 2, 3, 4, 5, 6, 7, and 8, situate in the NE.  $\frac{1}{4}$  of Sec. 22, T. 21 S., R. 15 E., M. D. B. & M.

This company, it appears, was organized October 22, 1908, a few days prior to the above-mentioned conveyance, by W. H. Dunham, Edwin H. Fallon, B. M. Bussey, Frank M. Nevins, and F. Bennett, all of Coalinga, California.

In a certificate of annual labor, subscribed and sworn to January 23, 1909, by F. Bennett, and duly recorded, it is averred that an expenditure of \$800 was performed—

upon the Coalinga Hub Placer Mining Claims Nos. 1 to 8, inclusive, comprising the NE.  $\frac{1}{4}$  Sec. 22; T. 1 S., R. 15 E., M. D. M. and M. . . . during the year ending December 31, 1909 [8]. Such expenditure was made by or at the expense of Coalinga Hub Oil Company, owner of said claim, for the purpose of holding said claim.

November 24, 1909, the Coalinga Hub Placer location, embracing the NE.  $\frac{1}{4}$  of said Sec. 22, was made, ostensibly by H. C. Kerr, F. M. Nevins, J. McCarter, W. L. Payne, George E. H. Satchell, J. McCain, John Mills, and A. J. Snow. By deed, dated November 27, 1909, and acknowledged December 2, 1909, this location was conveyed to the Coalinga Hub Oil Company, and upon that location the application here in question is based. As before stated, the application was filed by F. M. Nevins as agent of the company, his authority to act as such agent being certified to by George E. H. Satchell, as secretary of the company.

The application for patent recites that prior to the date of the location:

The said locators on or about the first day of September, 1909, had discovered oil within the limits of the said claim at the depth of about 1200 feet, the discovery of said oil having been first made in said well at a depth of 735 feet, at which point of discovery a production of ten barrels per day of light oil was developed. . . .

That said locators and the said Coalinga Hub Oil Company have actually caused to be expended in cash, on said mining claim in the development and improvement thereof, and the drilling of said oil well to a depth of 1200 feet, the sum of at least \$15,000.

In an affidavit executed January 5, 1910, Nevins averred that:

Said land is of little or no value to any purpose whatsoever, except for the mineral contained therein, and which has been ascertained to exist therein by means of the well drilled by the Coalinga Hub Oil Company at a point about nine chains southwest of the northeast corner of the northwest quarter of said Sec. 22.



Evidently regarding the circumstances above disclosed as tending at least to cast a doubt upon the validity or *bona fides* of the 1909 location, the Commissioner in the decision appealed from held that:

If the necessary money for drilling the well above referred to was advanced by claimant company, and if location was made by its stockholders or others for its benefit, only twenty acres of the land could properly be located.

The company was accordingly required "by affidavits of its officers, based on personal knowledge and examination of its books," to show how much money was expended on said well and at what time the same was expended, and by affidavits of each of the locators whether they were stockholders or employees of the claimant company at the time of making discovery and location; how much, if any, of his own funds each locator contributed toward the expense of sinking said well, and whether at time of making discovery and location they were acting directly or indirectly for claimant company.

It appears from the record that the application for patent, the affidavits of posting upon the claim, of labor performed thereon, and of no known veins, and the affidavit required by paragraph 60 of the Mining Regulations, were all executed December 21, 1909, and January 25, 1910, before one H. C. Kerr, a notary public in and for Fresno County, wherein the land is situated. In this connection, the company was required to show that H. C. Kerr, the locator, is not identical with H. C. Kerr, the notary public, before whom these papers were executed, or to show—

by affidavits of qualified officers of the company that said H. C. Kerr was not at the time of administering said oath a stockholder or otherwise beneficially interested in the claimant company.

It appearing also that the affidavit of continuous posting was made by W. M. Zimmerman and W. H. Steel, who are not shown to have been in anywise connected with the company, the latter was required to "furnish new affidavit of continuous posting, in the proper form, made by its duly authorized agent," citing paragraph 51 of the Mining Regulations.

Referring to the objection of the Commissioner first above mentioned, it is, in substance and effect, urged in the appeal that it is not material to the determination of the company's rights herein, who made the expenditures upon this claim, when the money was expended, whether the persons named as locators were stockholders or employees of the company, or otherwise interested therein at the date of the location, or what their respective intentions were at that time, and hence that no substantial reason exists for requiring such matters to be disclosed by the company or the persons named as locators of the claim.

The Department is unwilling to concede the soundness of this contention. Section 2331 of the Revised Statutes prescribes that no

placer location made after May, 1872, shall include more than twenty acres for each individual claimant, and in this regard the rights of a corporation do not differ from those of a natural person. (See Igo Bridge Extension Placer, 38 L. D., 281.) This rule is not limited in its application to a case where an individual seeks in his own name to make a single location for an area in excess of that allowed by law, but extends as well to a case where such individual procures others to act, either independently or in conjunction with himself, in the making for his benefit of a location for a larger area than he himself would be lawfully entitled to embrace in a single location. *Mitchell v. Cline* (24 Pac., 164); *Gird v. California Oil Company* (60 Fed., 531); *Durant v. Corbin* (94 Fed., 382); *Cook et al. v. Klonos et al.* (164 Fed., 529); *Nome and Sinook Company v. Snyder* (187 Fed., 385).

The location here relied upon purports to have been made by eight persons for an area not exceeding the quantity of land that that number of persons might lawfully appropriate by a single location. It appears, however, from the company's own showing, that at or about the time this location was made the company was claiming the entire tract embraced therein under eight separate and distinct asserted locations, of twenty acres each, made in 1903 by four persons; that by means of a well drilled by the company at great expense upon one of these claims (the Hub No. 1) oil was discovered and developed nearly three months prior to the date of the present location; that immediately after said location, and in fact two days before the notice thereof was recorded, the claim was conveyed to the company by the purported locators thereof; that F., or Fried Bennett appears as a locator of one of said twenty-acre Hub locations, and also as one of the organizers of the applicant company to whom he conveyed the claim; that George E. H. Satchell, one of the persons named as a locator of the present Hub claim, is also the secretary of the company; and that F. H. Nevins appears as a locator of three of said twenty-acre Hub claims, upon one of which, the Hub No. 1, the well was drilled; as one of the organizers of the company; and, lastly, as the agent of the company in the present proceeding. These facts, in the absence of a satisfactory explanation thereof, would, in the opinion of the Department, be sufficient to warrant a conclusion that the location in question was made for the exclusive benefit of the company, with a view to enabling it, on the basis of a single discovery, to obtain title not only to the twenty-acre Hub No. 1 claim, upon which the discovery was made, but to the remaining seven twenty-acre claims as well, upon none of which, so far as the record discloses, a discovery has been made. If such were the case, the location was clearly invalid, at least to the extent of the excess in area over and above the twenty-acre area which the company itself might law-

fully have appropriated under a single location. (See cases above cited.)

The purpose of the Commissioner in requiring the showing objected to by the company was evidently with a view, not only to the protection of the interests of the Government, but the rights of the claimant company as well, if by such showing it should be made to appear that the location was in fact made in the sole interests of the locators named. In calling for such a showing the Commissioner was clearly acting in the exercise of the duty and authority conferred upon him by law to see that none but a valid mining location is permitted to be used as the basis for a patent application. In view of the situation disclosed, he was clearly entitled to be informed as to all the facts in the case. The requirements, therefore, to the extent of their possibility of fulfilment, will be complied with, and in default the entry will be canceled as to all except twenty-acres of the area covered thereby.

Respecting the showing required by the Commissioner as to the connection of H. C. Kerr with the company at the times he administered the several oaths in this proceeding, with a view to ascertaining whether he was then qualified to so act, it is sufficient to say that in view of all the facts, the requirement was not an unreasonable one, and that a compliance therewith would impose no serious burden upon the company. If, however, he was for the reasons suggested disqualified from administering any of said oaths, the defect so arising may now be remedied by having the faulty affidavits reverified before some official properly qualified to act. (Stock Oil Company, 40 L. D., 198.)

It is urged by the claimant that the affidavit of continuous posting upon the claim, objected to by the Commissioner because not made by the agent of the company, is sufficient, it being further contended that the regulations do not require that such an affidavit shall be made by any particular person, but that one procured and filed by an agent of an applicant company fulfils all legal requirements. Section 2325 of the Revised Statutes provides that:

At the expiration of the sixty day period of publication, the claimant shall file *his* affidavit, showing that the plat and the notice have been posted in a conspicuous place on the claim during such period of publication—

and paragraph 51 of the Mining Regulations reaffirms this statutory requirement. A corporation patent applicant being incapable of executing such an affidavit, it is believed that its duly authorized agent to apply for patent is, in the absence of an appropriate designation of any other person, its proper representative to act in that behalf. No other person having been so designated to act in this case, there was no error in requiring an affidavit of continuous posting to be executed by the company's agent to be filed.

The decision appealed from is accordingly affirmed.

## ANNIE G. PARKER.

Decided December 29, 1911.

## RECLAMATION WITHDRAWAL—ACT OF FEBRUARY 18, 1911.

The provision in section 5 of the act of June 25, 1910, as amended by the act of February 18, 1911, that upon relinquishment of an entry within a reclamation withdrawal the lands so relinquished shall be subject to homestead settlement and entry under the reclamation act, has reference only to lands covered by second form withdrawals, and has no application to lands withdrawn under the first form.

## ACT OF FEBRUARY 18, 1911—RECLAMATION WITHDRAWAL—INVALID ENTRY.

The act of February 18, 1911, contemplates only entries legally made prior to the act of June 25, 1910, and afterwards relinquished, and has no application where the former entry was one in form only and in legal contemplation a mere nullity, having been erroneously allowed while the lands were embraced in a first form withdrawal under the reclamation act.

ADAMS, *First Assistant Secretary*:

Annie G. Parker has appealed from the decision of the Commissioner of the General Land Office, rendered July 2, 1911, rejecting her homestead application filed April 6, 1911, for the fractional S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 6, T. 7 N., R. 31 E., W. M., Walla Walla, Washington, land district. The land here involved was withdrawn on December 22, 1905, from all forms of settlement or entry under the first form of withdrawal by the Secretary of the Interior in connection with the Yakima Irrigation Project under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and the withdrawal is still in force.

On February 9, 1910, the homestead entry No. 04335 of Luella I. Costrove for the above mentioned land was erroneously allowed, but the same was relinquished by her on April 6, 1911. The application herein contended for was filed on the last mentioned date, and the applicant insists that an entry should be allowed under the act of February 18, 1911 (36 Stat., 917).

The said act, which amended section 5 of the act of June 25, 1910 (36 Stat., 836), reads as follows:

Sec. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and make public announcement of the same: *Provided*, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an act entitled "An act appropriating the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight).

In the decision appealed from, the Commissioner takes the position that the act applies only to lands withdrawn under the second form of withdrawal and does not apply to lands withdrawn under the first form. The sole question, therefore, in this case is one of law, to-wit: the construction of the said act of February 18, 1911.

Appellant claims that the statute itself makes no discrimination in lands withdrawn either under the first form or second form of withdrawal but uses the general term "lands," and, therefore, it was the intention of Congress to except lands withdrawn for any purpose under the original act.

The Department, however, is of the opinion that a careful reading of the section set out above will disclose that the only logical and reasonable interpretation of the act justifies the decision appealed from. It is to be noted that this section provides—

The lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an act . . . . approved June 17, 1902 (32 Stat., 388).

The act referred to is the original reclamation act, which provides in section 3 that certain lands required for irrigation works shall be withdrawn from public entry by the Secretary and restored when in his judgment such lands are not required for the purposes of the act. This is what is known as the first form withdrawal, such as embraces the land here involved. It is, therefore, evident that the section now being construed would not apply to first form withdrawals unless it was specifically so stated. Further, the section under construction clearly deals with land reserved for "irrigation purposes" and not land reserved for irrigation works, as the former only, being what was known as a second form withdrawal, was subject to entry under the homestead laws under certain conditions.

The said act of February 18, 1911, clearly contemplates cases where entries had been legally made prior to the act of June 25, 1910, and afterwards relinquished, and not cases where the former entry was one in form only, but in legal contemplation a mere nullity, as in the case here. It did not contemplate allowance of entries for lands having such status that entry thereof could not have been made, irrespective of the act of June 25, 1910. It simply made the latter act inoperative as to land which had been, prior thereto, properly entered, where such entry was subsequently relinquished.

The decision appealed from is accordingly affirmed.

## JACOB JENNE.

*Decided January 4, 1912.*

## COAL LAND WITHDRAWAL—ACT OF JUNE 22, 1910—SOLDIERS' ADDITIONAL.

The provision in section 1 of the act of June 22, 1910, that lands withdrawn or classified as coal shall be subject to entry under the homestead laws by actual settlers only, the desert land law, to selection under the Carey Act, and to withdrawal under the Reclamation Act, with reservation to the United States of the coal therein, does not include soldiers' additional rights, and soldiers' additional entry of lands withdrawn or classified as coal can not be allowed under that act.

## SOLDIERS' ADDITIONAL—COAL LAND WITHDRAWAL—ACTS JUNE 22 AND 25, 1910.

In case of the substitution of a soldiers' additional right in lieu of a similar right held invalid, the application under the substitute right does not relate back to the date of the original application, but runs only from the date of the substitution; and where at such date the land was embraced in a coal land withdrawal under the act of June 25, 1910, the applicant has no rights entitled to protection under the proviso to section 1 of the act of June 22, 1910.

*ADAMS, First Assistant Secretary:*

June 1, 1911, the above entitled application [Jacob Jenne, assignee of David G. Stanford] was filed in the local land office [Douglas, Wyoming] as a substitute for a prior application for the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 11, T. 40 N., R. 72 W., containing 40 acres, based upon assignment of 40 acres of the right of the said Stanford, who, it is alleged, performed military service during the Civil War for ninety days, and who also made homestead entry at Humboldt, Kansas, for 80 acres on June 5, 1867, which entry was canceled on relinquishment February 14, 1870. The present application appears to have been substituted for the former one because of the invalidity of the claimed right upon which the former application was based.

By decision of June 23, 1911, the Commissioner of the General Land Office rejected the application under consideration because the land applied for was withdrawn June 3, 1910, as coal land, and is now embraced within coal land withdrawal No. 1 (Wyoming), by Executive order of July 13, 1910. The said Executive order of withdrawal reads, in part, as follows:

It is hereby ordered that those certain orders of withdrawal made heretofore on . . . June 3, 1910, in so far as the same include any of the lands herein-after described, be, and the same are hereby ratified, confirmed and continued in full force and effect; and subject to all the provisions, limitations, exceptions, and conditions, contained in the act of Congress entitled "an act to authorize the President of the United States to make withdrawals of public lands in certain cases," approved June 25, 1910, and in the act of Congress entitled "an act to provide for agricultural entries on coal lands," approved June 22, 1910, there is hereby withdrawn from settlement, location; sale or entry, and reserved for classification and appraisalment with respect to coal values all of those certain lands of the United States set forth and particularly described as follows.

The said act of June 25, 1910 (36 Stat., 847), provides that there should be excepted from the force and effect of any withdrawals thereunder all lands which are on the date of such withdrawal embraced in any lawful homestead or desert land entry therefore made or upon which any valid settlement has been made and is being maintained at the date of such withdrawal.

Section 1 of the act of June 22, 1910, reads as follows:

That from and after the passage of this act unreserved public lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the act approved February nineteenth, nineteen hundred and nine, entitled "An act to provide for an enlarged homestead:" *Provided*, That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this act.

No settlement or cultivation is required under a soldiers' additional entry. Such entry is not one of the classes mentioned and can not be made under the body of section 1 of the act above quoted. The applicant insists, however, that his application is protected by the proviso to that section, and that his application should be considered as dating from the time he filed his first application, namely, July 11, 1909, which was prior to the date of said act. This contention is effectively answered by reference to the decision in the case of *Smith v. Whitehead* (39 L. D., 208), wherein it was held that:

An application to locate a soldiers' additional right does not preclude the filing of an adverse application to enter the same land, subject to determination of the validity of the additional right; and in case the additional right be found invalid, the intervening adverse application attaches and bars such substitution of another right in lieu of the one held invalid.

It follows that where substitution is made of a right or scrip supposed to be valid for a prior location which has been found to be invalid, the application under the substitute right does not relate back to the date of the original application, but runs only from the date of the last application under the substitution.

At the time this last application was filed the land had been withdrawn as above stated and as the application does not come within

the exceptions mentioned in the terms of the withdrawal and is not protected by the provisions of the acts referred to the application can not be allowed. Accordingly the decision appealed from is affirmed.

**ALMON A. COVEY.**

*Decided January 10, 1912.*

**PHOSPHATE WITHDRAWAL—PENDING SOLDIERS' ADDITIONAL APPLICATION.**

Where the land embraced in an application to make soldiers' additional entry is subsequently included in a withdrawal for phosphate reserve, the application will be held in suspension pending final determination as to the character of the land; and, if it be found to contain phosphate, the application, although otherwise valid, will thereupon be rejected, but, if found to be nonphosphate and restored to entry, the application will then be allowed, unless other reason exists for its rejection.

**ADAMS, *First Assistant Secretary:***

November 25, 1908, the above application [to make soldiers' additional entry] was filed in the local office at Blackfoot, Idaho, to enter under sections 2306 and 2307, R. S., the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 15, NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 21, T. 16 S., R. 45 E., B. M., containing 80 acres.

The application was based upon the military service and the homestead entry made by Dallas R. Reynolds, deceased.

The land was withdrawn by the Secretary December 9, 1908, for phosphate reserve No. 1, and was included in phosphate reserve No. 2 by Executive order of July 2, 1910, act of June 25, 1910 (36 Stat., 847).

From a decision of the Commissioner of the General Land Office, dated April 10, 1911, rejecting said application on account of the land being withdrawn, this appeal is prosecuted to the Department.

As to the phosphate reserve created by Executive order of July 2, 1910, it is noted that said withdrawal is "for classification and in aid of legislation affecting the use and disposition of phosphate deposits," and is tentative in character. In view of the fact that this application was filed before the tract was withdrawn for phosphate reserve, applicant is, if the application is otherwise valid, entitled to protection unless the land is found to contain phosphate or other mineral or is otherwise withdrawn. This case is therefore remanded to the Commissioner to be held in suspension until final determination of the character of the land. If the land is found to contain phosphate, the application will, although otherwise valid, then be rejected. If, however, the land be found nonphosphate in character and be restored to entry, the application will then be allowed unless other reason exists for its rejection.



The rule of procedure made in the case of John D. Noblitt (unreported) decided August 1, 1911, is modified to the extent herein indicated.

### WESTERN PACIFIC RY. CO.

*Decided January 19, 1912.*

#### RIGHT OF WAY—STATION GROUNDS—ACT OF MARCH 3, 1875.

Section 1 of the act of March 3, 1875, does not make an absolute grant of twenty acres of public lands for station purposes for each ten miles of road, regardless of necessity therefor; but the measure of the right thereby granted is the reasonable necessities of the road, not to exceed either twenty acres to each station or one station for each ten miles.

#### *ADAMS, First Assistant Secretary:*

This is the appeal of the Western Pacific Railway Company from a decision of the Commissioner of the General Land Office, September 16, 1910, adhered to on review February 25, 1911, imposing upon that company certain requirements with reference to its application under the act of March 3, 1875 (18 Stat., 482), for station grounds in section 10, T. 35 N., R. 32 E., M. D. B. and M., Carson City land district, Nevada.

The plat constituting the company's said application was filed in the district land office November 20, 1909, and seeks to appropriate to the company's use for station grounds a twenty-acre tract of land adjacent to the line of its road, 161.63 feet in width and 5390 feet long, and the Commissioner of the General Land Office held that in the absence of controlling reasons showing apparent necessity for the use of station grounds of this length the company would be limited in this instance to grounds 3000 feet in length; but it was accorded opportunity to show that the tract applied for is actually needed for such use to its entire extent or to amend its application bringing it within the suggested limitation.

It further appears that on August 24, 1910, one Elliott G. Springer made homestead entry of certain lands not described in the papers further than that it covered "the entire tract of land in said station ground," and the company urges upon the appeal that if it now files a new map showing grounds limited to the length of 3000 feet it will take the grant upon approval subject to this homestead entry, thus denying the company its legal rights and the opportunity and necessity of properly and economically carrying on its railroad operations.

It appears from informal inquiry in the General Land Office that the map of amended definite location of this company's line of road

through the tract of land here sought for station purposes was filed at the same time the map for station grounds was filed, to wit, November 20, 1909, and that such map of definite location was approved by the Secretary of the Interior September 21, 1910. In accordance with what appears to be the uniform practice of the General Land Office the map for station grounds was held in suspension to await approval of the map of definite location, which accounts for the fact that action on the application for station grounds was delayed.

Section one of the act of March 3, 1875, *supra*, grants in words of present grant to any railroad company organized as therein provided, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same—

the right of way through the public lands of the United States . . . . to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Section three thereof points out "the manner in which private lands and possessory claims on the public lands of the United States may be condemned," and section four thereof is in full as follows:

That any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

The Department is somewhat at a loss to understand the theory upon which this appeal was taken, unless it be the view of the company that it is entitled as matter of right to a grant of twenty acres of land for station purposes for each ten miles of its road without reference to the question of apparent necessity therefor. In other words, it seems to be assumed that the act of 1875 makes an absolute grant, for station purposes, of twenty acres for each ten miles of the road, and that the discretionary powers of the Secretary of the Interior upon the submission of maps thereunder are limited to ascertainment of the fact that the number of station grounds to which the company is entitled has not been exceeded.

The measure of the right given the company is the reasonable necessities of the road, and this being true, there was no error in the decision of the Commissioner of the General Land Office requiring a showing of necessary or reasonable use in support of this application. If there were error at all such error was favorable to the company in permitting it to file an amended map limiting the length of these grounds to 3,000 feet. The Department is not advised upon what showing such amendment was allowed, and it may be, for obvious reasons, that a map of this latter length would not be approved.

The Department will not recognize the right of a railroad company to the approval of maps for station grounds under said act, unless the application is supported by satisfactory proof of reasonable necessity, and the question of intervening adverse rights can not influence this question.

The case is remanded for proceedings not inconsistent with this decision.

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FREDERICK W. McREYNOLDS.

*Decided January 20, 1912.*

NEZ PERCE INDIAN LANDS—SOLDIERS' ADDITIONAL LOCATION.

Lands within the former Nez Perce Indian reservation, opened under section 5 of the act of February 8, 1887, to "actual settlers," and under the act of August 15, 1894, to settlement and disposal under the homestead, town-site, timber and stone, and mining laws only, are not subject to appropriation by location of soldiers' additional rights.

THOMPSON, *Assistant Secretary:*

On November 1, 1909, F. W. McReynolds filed in the local office at Lewiston, Idaho, his application to enter, under section 2306, R. S., lot 2, NE.  $\frac{1}{4}$ , Sec. 23, T. 32 N., R. 1 W., B. M., containing 1.10 acres.

Said tract is part of the former Nez Perce Indian reservation opened to entry by executive proclamation dated November 8, 1895 (29 Stat., 873), under section 5 of the acts of Congress approved February 8, 1887 (24 Stat., 388), and August 15, 1894 (28 Stat., 332).

The act of February 8, 1887, *supra*, after providing for the purchase and release by the Indians of lands not allotted to them in conformity with the treaty or statute under which said reservation was held, provides:

That all lands adapted to agriculture, with or without irrigation, so sold or released to the United States by any Indian tribe, shall be held by the United States for the sole purpose of securing homes to actual settlers, and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person on such

terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further:* That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead.

The act of August 15, 1894, *supra*, provides:

That immediately after the issuance and receipt by the Indians of trust patents for the allotted lands, as provided for in said agreement, the lands so ceded, sold, relinquished and conveyed to the United States shall be opened to settlement by proclamation of the President, and shall be subject to disposal only under the homestead, townsite, stone and timber, and mining laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and subject to the laws of Idaho: *Provided*, That each settler on said land shall, before making final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre for agricultural lands, one-half of which shall be paid within three years from the date of original entry; and the sum of five dollars per acre for stone, timber, and mineral lands, subject to the regulations prescribed by existing laws; but the rights of honorably discharged union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the revised statutes of the United States, shall not be abridged except as to the sum aforesaid.

From a decision of the Commissioner of the General Land Office, dated May 27, 1911, rejecting said application on the ground that the land applied for was not subject to soldiers' additional entry, and also that the evidence of the ownership of the right sought to be used was not sufficiently shown, this appeal is prosecuted to the Department.

Under the act of February 8, 1887, above quoted, it will be noted that land ceded to the Government by the Indians is to be disposed of to "actual settlers." The act of August 15, 1894, did not in any way change or modify the conditions imposed by the act of February 8, 1887. It simply reiterated the conditions imposed by the former act and specified that these lands were to be opened only under the homestead, timber and stone, and mineral land laws. It has been held by the Department that where the land sought to be entered under a soldiers' additional right has been opened under a statute which specifically requires something additional to be done, like the payment of the stipulated price for the land, such land is not subject to a soldiers' additional location, as the conditions imposed are in conflict with the conditions required by section 2306 of the Revised Statutes. In the present case it appears that the land opened was not only subject to a specified price per acre but also to actual settlement, and the conditions are opposed to and in conflict with the requirements of that section of the Revised Statutes permitting the making of soldiers' additional homestead entries. (See Frederick

W. McReynolds, assignee of William H. Littlejohn, decided by the Department May 27, 1911, unreported.)

The decision appealed from is correct and the same is accordingly hereby affirmed.

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### WINNINGHOFF v. RYAN.

Petition for the exercise of the supervisory authority of the Secretary of the Interior to review departmental decision of January 2, 1912, 40 L. D., 342, denied by First Assistant Secretary Adams, February 1, 1912.

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### INSTRUCTIONS.

#### EXECUTIVE ORDER RESTORING WITHDRAWN COAL LANDS—WHEN EFFECTIVE.

Where withdrawn coal lands are, after classification and appraisal, restored by executive order to coal filing and entry, no application, filing, or entry will be received therefor until notice of the order of restoration, with the accompanying classification and appraisals, is received at the local office.

*First Assistant Secretary Adams to the Commissioner of the General Land Office, February 3, 1912.*

Under date of January 26, 1912, you addressed a letter (206098-1912) to the Department directing attention to the provisions of the coal land regulations and circulars bearing upon the restoration to coal filing and entry of lands withdrawn as coal which have been classified and appraised, which regulations, in effect, provide that coal land filings, applications, or entries can be received by the local officers only after the maps and lists showing the classification and appraised price are received by them.

The letter further suggests that these regulations, which were drafted prior to the passage of the act of June 25, 1910 (36 Stat., 847), and were applicable specifically to restorations from departmental withdrawals of coal lands, may be inapplicable to the orders of restoration made following the executive withdrawals under the act cited. The letter concludes as follows:

If the revocation order of the President takes effect from the time when it is signed by him (and such would seem to be the case), then the above-quoted provisions from the several coal land circulars can have no application to lands which have been withdrawn under said withdrawal act and which are subsequently restored under said act to coal filing and entry, because classified as coal lands at fixed prices. It would seem, therefore, that the Presidential order of revocation, restoring the previously withdrawn lands, because the lands mentioned in the withdrawal have been classified as coal lands, and with respect to which the prices at which they may be sold under the coal land laws have been fixed, should expressly state when the restored lands are

subject to disposition under the coal land laws. Then no question would arise, and it is respectfully suggested that, in the future, Executive coal restoration orders provide, in express terms, the date when coal filings, applications and entries may be made upon lands once withdrawn under the withdrawal act and thereafter restored and classified as coal land at fixed prices.

The memorandum of July 6, 1910, regarding procedure in classification provided in part as follows:

(1) The Geological Survey will as heretofore transmit to the General Land Office coal classifications as rapidly as prepared.

(2) The General Land Office will thereupon prepare the necessary letters to the Registers and Receivers, but will not date them until the order of restoration by the President is received, if such order is necessary, because of previous withdrawals, when the letters will be dated and sent to the local offices.

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The general form for the restoration of withdrawn coal lands on account of completion of classification will be as follows:

ORDER OF RESTORATION.

Coal Land Restoration No. —.

So much of the order of withdrawal made heretofore on —, for the purpose of coal land classification, as affects the lands hereinafter described is hereby revoked for the reason that the Director of Geological Survey has classified these lands.

It is clear that until the register and receiver at the local office are in receipt of the classification and appraisals accompanied by notice of the executive order of restoration they are not authorized to receive or accept any coal filings, applications, or entries for lands covered by executive withdrawals, and if any such filings are presented they would necessarily be rejected outright because the withdrawal order appears subsisting and intact upon their official records.

While an executive order of withdrawal is held to be immediately operative, it does not necessarily follow that as soon as the Presidential order of restoration is signed the lands restored thereby become immediately subject to appropriation, filing, application or entry under the coal land laws.

An analogous situation is disclosed in those cases where patents are annulled by judicial decrees, and in this connection attention is directed to the case of Alice M. Reason (36 L. D., 279, 280), where the Department used the following language:

It is the final judgment of a court of competent jurisdiction that operates to revest title to the land in the United States and to restore to the public domain land once patented. No action of the land department is necessary. When and how it becomes open to entry depends, as in respect to all other parts of the public domain, on action of the land department.

In the later case of Hiram M. Hamilton (38 L. D., 597), the Department held (syllabus):

While the legal effect of a final decree of a court of competent jurisdiction canceling a patent issued upon a coal-land entry is to revest title in the Gov-

ernment and restore the land to the public domain, no rights are acquired by the presentation of an application to enter the land until notation of the cancellation upon the records of the local office.

The administrative rule and practice of the land department to the effect that no application or entry will be received or filed for lands covered by an existing entry of record until the notation of the cancellation of that entry has been made upon the plats and records of the local office (29 L. D., 29), is in principle applicable in the matter of executive coal land restorations of classified and appraised lands.

The Department does not perceive any occasion or necessity for the proposed modification of the existing form of the executive order of restoration. The administrative regulations heretofore promulgated governing restorations from departmental withdrawals are unrevoked and are not inapplicable where the lands are restored to coal land appropriation by an executive order.

#### RECLAMATION—BELLE FOURCHE PROJECT—WATER SERVICE.

##### ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, February 3, 1912.*

*Whereas*, the public notice issued for the Belle Fourche project, South Dakota, December 30, 1911 [40 L. D., 327], was in all its parts by section 1 thereof limited to "lands subject to public notices and orders heretofore issued," meaning thereby only those lands shown on farm unit plats for which announcement of water service had been made by said prior notices and orders, and

*Whereas*, it has been represented that water users under the project having lands in private ownership held under trust deed or signed under contract with the Belle Fourche Valley Water Users' Association, which lands were not on December 30, 1911, shown on said farm unit plats nor included in said prior announcements of water service, are apprehensive lest section 4 of the said public notice may apply to or be construed as affecting such lands for which announcement of water service has not yet been made,

*Therefore*, public notice is hereby given that the said public notice of December 30, 1911, has no reference whatever to lands not on the date thereof shown on said farm unit plats nor included in the said prior announcements of water service, but that the same were intended to be, and by paragraph 1 of said public notice were, excluded from the operation of said public notice so that the obligations theretofore existing with reference to them remain unchanged.

WALTER L. FISHER,  
*Secretary of the Interior.*

**RECLAMATION—BELLE FOURCHE PROJECT—PAYMENT.****ORDER.**

DEPARTMENT OF THE INTERIOR,  
*Washington, February 3, 1912.*

By virtue of the authority contained in the act of Congress approved June 17, 1902 (32 Stat., 388), it is hereby ordered that any settler under the Belle Fourche project, South Dakota, who is in financial need, may receive water for irrigation in the season of 1912 without prior payment of the portion of the instalment for operation and maintenance, amounting to 60 cents per acre of irrigable land, subject, however, to the following conditions, viz:

1. Application for such extension of time of payment must be made to the project engineer through the Belle Fourche Valley Water Users' Association not later than February 26, 1912. Such application shall be referred to the project engineer with report and recommendation by the Board of Directors of the Association; and such application shall be allowed by the project engineer only in case he is satisfied that the applicant is in financial need.

2. Payment must be made not later than December 1, 1912, and the amount to be paid shall be 65 cents per acre of irrigable land, instead of 60 cents as provided for by notice of November 26, 1910.

WALTER L. FISHER,  
*Secretary of the Interior.*

**INSTRUCTIONS.****COAL LAND WITHDRAWAL—LIMITED PATENT—ACT OF MARCH 3, 1909.**

The act of March 3, 1909, provides a means whereby nonmineral claimants for lands withdrawn for coal classification, whose claims were initiated in good faith before the lands were classified, claimed, or reported as valuable for coal, may, notwithstanding the withdrawal, proceed to carry their claims to completion, by electing to take limited patent under said act.

**COAL LAND WITHDRAWAL—LIMITED PATENT—ACT OF JUNE 22, 1910.**

The act of June 22, 1910, opened the surface of lands withdrawn or classified as coal lands or valuable for coal to entry under the homestead and desert land laws, to selection under the Carey Act, and to withdrawal under the Reclamation Act; and the proviso to section 1 of said act provides a means whereby persons who prior thereto had in good faith initiated nonmineral entries, selections, or locations upon lands withdrawn or classified as coal may perfect the same under the laws under which they were made, by electing to take a patent for the land excluding the coal deposits.

*First Assistant Secretary Adams to the Commissioner of the General Land Office, February 5, 1912.*

I have your letter of the 19th instant transmitting a proposed form to be used in the matter of elections to receive a limited or surface



patent under a nonmineral entry, location, or selection made of lands classified, claimed or reported as coal.

The reason for submitting this matter is the recent departmental decision, dated January 4, 1912, in the case of Leroy Moore, assignee of George C. Ward. The decision in that case has been modified in a later decision, this day rendered, wherein the decision of January 4, 1912, has been recalled and vacated.

Because of the importance of the questions involved I have given careful consideration to the acts of March 3, 1909 (35 Stat., 844), and the later act of June 22, 1910 (36 Stat., 583), both relating to limited or surface patents, under the nonmineral land laws, for tracts classified, claimed or reported as containing valuable coal deposits.

At the time of the extensive withdrawals made in July, 1906, of lands supposed to be valuable because of their coal deposits, many uncompleted nonmineral entries were embraced within the limits of such withdrawals. Further, under the modification of these withdrawals in December, 1906, agricultural entries were permitted within a withdrawn area. In both instances, under the state of the laws then in force, the nonmineral claimant must have lost had the land ultimately been determined to be valuable for the coal deposits. In this situation, and as the actual classification of the lands must require considerable time, the act of March 3, 1909, was passed, which made it possible, where the nonmineral claim had been initiated in good faith before the lands were classified, claimed, or reported as containing coal deposits, to elect to receive a surface patent, whereupon he might proceed to the completion of his entry as though the withdrawal or the claim respecting the coal deposits had never been made.

There yet remained that large body of nonmineral entries allowed, after withdrawal, which were without protection in the event the lands should be classified as valuable coal land. In the passage of the act of June 22, 1910 (36 Stat., 583), the surface of lands withdrawn or classified as coal lands or valuable for coal, was opened to certain forms of entries, namely, homestead, desert-land, selection under the Carey Act, and withdrawal under the Reclamation Act, and while this made it possible, after the passage of the act, to initiate surface entries of the class described, there remained without protection those entries allowed after the withdrawal in July, 1906, and after the lands had been reported for coal values. It was for the protection of this class that the proviso was added to section one of the act of June 22, 1910—

that those who have initiated nonmineral entries, selections, or locations in good faith prior to the passage of this act, on lands withdrawn or classified as coal lands, may perfect the same under the provisions of the laws under which said entries were made but shall receive the limited patent provided for in this act.

It will thus be seen that the acts of March 3, 1909, and June 22, 1910, have entirely separate and distinct fields of operation, and in the future administration of these laws you will be guided by the construction herein made. This renders consideration of the proposed letter, as submitted by you, unnecessary.

### REGIONE v. ROSSELER (ON REHEARING).

*Decided February 5, 1912.*

#### KINKAID ACT—ADJOINING FARM ENTRY—RESIDENCE.

The Kinkaid act does not give any right of adjoining farm entry nor in anywise extend or enlarge the right of adjoining entry given by section 2289 of the Revised Statutes; and one owning and residing upon a tract within the Kinkaid area, acquired by purchase, has therefore no other or greater right, by virtue of the Kinkaid act, to make adjoining farm entry of contiguous land and acquire title thereto by continuing residence upon the original tract and cultivating and improving the adjoining tract, than is accorded generally by said section 2289.

#### FORMER DEPARTMENTAL DECISION VACATED.

Departmental decision of May 17, 1911, 40 L. D., 93, recalled and vacated.

#### ADAMS, *First Assistant Secretary*:

Motion is filed by D. L. Regione for rehearing in the matter of his contest initiated by affidavit filed February 16, 1910, against the homestead entry made June 28, 1904, by John Rosseler, for the N.  $\frac{1}{2}$  and the SE.  $\frac{1}{4}$ , Sec. 22, T. 15 N., R. 54 W., North Platte, Nebraska, land district, which the Department on May 17, 1911, dismissed, reversing the decision of December 14, 1910, of the Commissioner of the General Land Office, and allowed said Rosseler to transmute his said entry, made as an original homestead entry, to an adjoining farm or additional farm entry, he being the owner in fee of the SW.  $\frac{1}{4}$  of said section. *Regione v. Rosseler* (40 L. D., 93).

Regione charged in said affidavit that Rosseler never established *bona fide* residence, has not maintained residence, and his family never resided on the land, and that he has not cultivated or improved it, but has maintained a home elsewhere. Upon hearing, the contestee moved to dismiss at the completion of the contestant's testimony, and upon the local officers overruling his motion and ordering further hearing for his defense, Rosseler appealed, and upon final hearing and holding by the local officers that the contest charges were sustained, Rosseler again appealed, having presented no testimony in his defense. The Commissioner considering both appeals sustained the local officers in their findings, holding also that the contestee had waived further hearing.

The Department on May 17, 1911, concurred in the findings of fact of the local officers and the Commissioner that the evidence shows

Rosseler's established home was on the SW.  $\frac{1}{4}$  of said section and not upon this entry, but held as matter of law, construing section 2289, Revised Statutes, and the act of April 28, 1904 (33 Stat., 547), known as the Kinkaid Act, that Rosseler possessed the right to make either an adjoining farm entry of these lands, if he acquired said SW.  $\frac{1}{4}$  under other than the homestead law, or an additional farm entry thereof if he acquired said SW.  $\frac{1}{4}$  under that law, and that his residence upon said SW.  $\frac{1}{4}$  inured to his benefit in making either an adjoining farm or an additional farm entry of these lands.

On June 5, 1911, Rosseler filed his application to transmute his entry into an adjoining farm entry in accordance with said decision.

In this motion it is alleged, and not denied by Rosseler in his reply, that said SW.  $\frac{1}{4}$  was acquired by him by purchase and not under the homestead law.

The Department has carefully reviewed the record in this case and adheres to the findings of fact concurred in by the local officers, the Commissioner, and the Department. The testimony tends to show that the house on this entry was unfit for and not adapted to permanent habitancy by Rosseler and his family of two daughters, having but one room and being unplastered and meagerly furnished, and was used by them only occasionally and incidentally, their principal established residence being in the well-constructed, two-room, well-furnished house on said SW.  $\frac{1}{4}$ .

The Department, however, does not adhere to the holding that Rosseler possessed the right to make an adjoining farm entry of these lands under said section 2289, Revised Statutes, as amended by said act of April 28, 1904. Said act amended the general homestead law as to certain lands in this locality to the extent of allowing an area of 640 acres to be entered, either by original or additional entry, and made certain specific provisions amendatory of said law as applied to this locality and to entries under said act, but it did not otherwise change or affect the general homestead law, or assume to do so. By specifying certain exceptions to the general law it impliedly excluded others and may not be extended so as to give rights of entry beyond its specific provisions. It does not give or pertain to any right of adjoining farm entry and does not affect such right as given by said section 2289, of the Revised Statutes.

This entry is and can only be considered as an original homestead entry, subject to the general provisions of the homestead law, requiring residence upon; cultivation and improvement of the lands entered, and to the specific provisions of said act of April 28, 1904. The testimony presented showing noncompliance with law in respect to the charge in Regione's contest affidavit, the entry should be and is hereby canceled.

This motion is, therefore, sustained; the decision of May 17, 1911, is recalled and vacated; and the decision of the Commissioner of December 14, 1910, holding said entry for cancellation is affirmed.

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**RECLAMATION—TRUCKEE-CARSON PROJECT—PAYMENT.**

**PUBLIC NOTICE.**

DEPARTMENT OF THE INTERIOR,  
*Washington, February 8, 1912.*

In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

1. For all irrigable lands shown on the approved farm unit plats of lands under the Truckee-Carson Project, Nevada, the portion of the installment on account of operation and maintenance to become due December 1, 1912, and annually on the same date of each year thereafter until further notice, shall be 75 cents per acre of irrigable land.

2. The regulation is hereby established that no water will be furnished in any year until all operation and maintenance charges then due shall have been paid. Accordingly, no water will be furnished for the irrigation season of 1912 for any lands unless the portions of installments for operation and maintenance which became due December 1, 1911, and in prior years have been paid, and in like manner no water will be furnished in any subsequent irrigation season unless payment has been made of the portions of the installments for operation and maintenance then due and unpaid.

3. Any provisions of previous notices in conflict herewith are hereby modified to the extent of such conflict.

SAMUEL ADAMS,  
*First Assistant Secretary of the Interior.*

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**RECLAMATION—SHOSHONE PROJECT—CHARGES.**

**PUBLIC NOTICE.**

DEPARTMENT OF THE INTERIOR,  
*Washington, February 9, 1912.*

Whereas, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), works for irrigation and for the control of seepage waters have been constructed or are in contemplation for the irrigation and reclamation of lands under the Shoshone project,

Wyoming; the cost thereof must be repaid by the water users, as required by said act, in not exceeding ten annual instalments, divided into a building charge for the building of the works, and a charge for the operation and maintenance thereof, and

Whereas, public notice of the said charges, the time and manner of payment has been given for three units of the project, designated as the first, second and third units, the said charges being fixed so as to recover the cost of building, operating and maintaining the project as to the lands in question as then estimated, and

Whereas, under the provisions of the Reclamation Act most of the homestead entries and water-right applications on public lands, and most of the water-right applications for lands in private ownership in the first and second units have been subject to cancellation on account of delinquency in payment of the building charge, but by order of March 25, 1911 [39 L. D., 538], issued under the act of February 13, 1911 (36 Stat., 902), a stay of proceedings was allowed under the conditions therein stated, and

Whereas, the water users have not made the payments as required by said public notices for reasons which in many cases have been unavoidable on their part, and it has accordingly been decided to offer such opportunity as may be reasonable and possible under the terms of the said act of February 13, 1911, for the water users to secure easier terms of payment, and at the same time to recover for the Reclamation Fund, as required by the terms of the Reclamation Act, the cost of the building, operation and maintenance of the irrigation works, including necessary additional works to collect and utilize the seepage waters, so far as the location and cost of the same can now be anticipated:

Therefore, the following public notice is issued under the terms of section 4 of the Reclamation Act, and of the said act of February 13, 1911:

1. All applications for water rights heretofore filed under the terms of the public notices heretofore issued may be continued under the terms thereof, if the said public notices be fully complied with by payment and otherwise, on or before March 15, 1912.

2. For the purpose of avoiding the cancellation of entries and water-right applications for which the entrymen or owners shall have failed, on or before March 15, 1912, to comply by payment and otherwise with the public notices under which their water-right applications were made, it is hereby ordered that water-right applications at the increased rates herein named may be made as amendatory to water-right applications heretofore filed, and original entries and water-right applications shall be made at the new rates when none has been heretofore filed. The new rates shall apply also in cases where prior entries are canceled and new entries made without

written assignment of credits for payments theretofore made. The portion of the charge on account of building the irrigation system shall be \$50, \$51 and \$52 per acre for the first, second and third units respectively, and shall be due and payable in not more than 10 annual payments, as follows:

	<i>1st Unit</i>	<i>2nd Unit</i>	<i>3rd Unit</i>
First Instalment	\$4.50	\$4.60	\$4.70
Second " "	1.00	1.00	1.00
Third " "	1.00	1.00	1.00
Fourth " "	2.50	3.40	4.30
Fifth " "	6.00	6.00	6.00
Sixth " "	6.00	6.00	6.00
Seventh " "	6.00	6.00	6.00
Eighth " "	6.00	6.00	6.00
Ninth " "	6.00	6.00	6.00
Tenth " "	11.00	11.00	11.00
	50.00	51.00	52.00

Except as to the amount of the building charge, applications under this paragraph shall be subject to the public notices and orders heretofore issued, and the instalments shall be due and payable at the times set forth therein, except, also that the portions of instalments for operation and maintenance shall not accumulate, as therein provided, and the payments for building charges shall be graduated as herein provided.

3. Where water-right application is filed for which the increased building charge fixed in paragraph 2 is applicable, any payments heretofore made on account of the building charges thereon shall be credited on the first and subsequent instalments of building charges for the same tract.

4. The portion of instalment for operation and maintenance shall be \$1 per annum per acre of irrigable land, whether water is used thereon or not. The portion of the first instalment for operation and maintenance shall be due and payable for public land farm units at the time of entry, and for private lands at the time of filing water-right application. No water will be furnished in any year until the operation and maintenance charges then due have been paid.

5. Failure to comply with the terms of this and previous public notices and orders shall render existing homestead entries and water-right applications for public lands, or water-right applications for lands in private ownership, subject to cancellation, with the forfeiture of all rights thereunder, and of all moneys paid thereon, as provided by the Reclamation Act.

6. An entryman against whose entry there is no pending charge of noncompliance with the law or regulations, or whose entry is not

subject to cancellation under the Reclamation Act, may relinquish his entry and assign in writing to a prospective entryman any credits he may have for payments made on his water-right application, and such assignee shall have the right to continue payment at the same building charge. A private land owner against whose water-right application there is no pending charge of noncompliance with the law or regulations, or whose water-right application is not subject to cancellation may in like manner make written assignment of credits for payments made, and his grantee shall have the right to continue payment at the same building charge. Except as specifically provided in this notice, no benefit of a smaller charge than that fixed in the public notice in force at the time of filing water-right application shall accrue for any land, except when the entryman or private land owner holds written assignment made under the conditions herein stated.

7. The stay of proceedings provided for by order of March 25, 1911, shall terminate on March 15, 1912.

8. The public notice of November 25, 1907, opening to irrigation lands in the first unit is hereby amended by revoking the following provision, viz:

For all water-right applications filed in any year on or before June 15, the charges shall be collected for that irrigation season; but when the filing is made subsequent to that date in any year, so much as may be paid on account of operation and maintenance shall be a credit on account of the instalment for the next year.

SAMUEL ADAMS,  
*First Assistant Secretary of the Interior.*

## FORT FETTERMAN MILITARY RESERVATION—GRAZING LANDS.

### REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, February 10, 1912.*

REGISTER AND RECEIVER,

*Douglas, Wyoming.*

SIRS: Paragraph No. 3 of the regulations approved May 8, 1901 (30 L. D., 601), governing the purchase of pasture and grazing lands on the abandoned Fort Fetterman Military Reservation in Wyoming under the act of March 3, 1901 (31 Stat., 1085), is hereby amended to read as follows:

Persons desiring to avail themselves of the provisions of said act will be required to file applications therefor, describing the lands sought to be purchased, and to publish notice of their intention to submit proof in support of such applications as required by the act of March 3, 1879, in preemption and

homestead cases. The application to purchase must in every instance show: (a) That the applicant, prior to March 3, 1901, has exercised the right of homestead entry on land within the said reservation, the number and date of such entry, the description of the land covered thereby, and that such entry is still subsisting; (b) that the land applied for is not settled upon, occupied or improved, and is not valuable for coal or minerals; that the land is suitable for pasture or grazing purposes; its location relative to sources of water supply, and the causes which it is claimed render it unfit for cultivation and homestead; and that the lands sought to be purchased, with the land which the applicant has, since August 30, 1890, entered or acquired under the agricultural land laws, does not in the aggregate exceed three hundred and twenty acres.

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved:

CARM A. THOMPSON,  
*Assistant Secretary.*

### ALASKA TREADWELL GOLD MINING CO. ET AL.

*Decided February 12, 1912.*

#### ALASKA—RIGHTS OF WAY—SECTION 4, ACT OF FEBRUARY 1, 1905.

Section 4 of the act of February 1, 1905, granting rights of way for dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals within and across the forest reserves of the United States, applies to and is operative in forest reserves in the District of Alaska.

#### ADAMS, *First Assistant Secretary:*

On July 31, 1911, the Alaska Treadwell Gold Mining Company, the Alaska Mexican Gold Mining Company, and the Alaska United Gold Mining Company filed in the local land office at Juneau, Alaska, application, under the provisions of section 4 of the act of February 1, 1905 (33 Stat., 628), for right of way for the construction and maintenance of a dam, reservoir, tunnel, pipe line, transmission line, and power house within the limits of the Tongass National Forest. Said right of way is stated to be sought for the main purpose of generating electricity for noncommercial purposes.

September 5, 1911, the Commissioner of the General Land Office refused to entertain the application, on the ground that section 4 of the act of February 1, 1905, *supra*, is not applicable to Alaska. Appeal from this action asks reversal, on the ground that Alaska is a regularly organized Territory of the United States, and any general legislation applies thereto unless specifically excluded by statute.

The act of May 17, 1884 (23 Stat., 24), provided a civil government for Alaska and extended the mining laws of the United States



thereto, but stated that "nothing contained in this act shall be construed to put in force in said district the general land laws of the United States." By specific acts of Congress the town-site laws, the coal-land laws, and the homestead laws have been extended to Alaska. The act of Congress approved June 6, 1900 (31 Stat., 321), provides, section 26, that "the laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the district of Alaska."

Under the provisions of section 24 of the act of March 3, 1891 (26 Stat., 1103), authorizing the President of the United States to "set apart and reserve in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations," the Tongass and other national forests have been created and set apart and reserved, and have been recognized and provided for by Congress in annual appropriations for their use, maintenance, and protection.

The United States Court for the district of Alaska has ruled that the laws of the United States relating to mining claims and rights incident thereto, as extended to Alaska by the acts of May 17, 1884, and June 6, 1900, *supra*, also extended to Alaska that section of the act of Congress of July 26, 1886, which gave prior appropriators of water flowing across the public lands to be used for mining purposes a qualified title thereto. *Revenue Mining Company v. Balderston* (2 Alaska, 363):

Section 4 of the act of February 1, 1905, provides:

That rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals within and across the forest reserves of the United States are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated.

The rights and uses described within said section, with the exception of municipal use, are all for purposes connected with or incident to mining, and on this ground might be held to be operative in the district of Alaska, and not excluded from operation by the provisions of the act of 1884, *supra*, which, in effect, declares the general land laws of the United States not applicable. However, said section 4 of the act of February 1, 1905, is not an act generally applicable to all public lands and reservations of the United States, but is specifically applicable only to "the forest reserves of the United States" and "subject to the laws of the State or Territory in which said reserves are respectively situated." As hereinbefore pointed out,

Congress has made the laws relating to the creation and maintenance of forest reserves applicable to Alaska, and such reservations have been established and are being maintained therein. Section 4 of the act of February 1, 1905, being applicable within all such reservations in any State or Territory applies to and operates in forest reserves in the district of Alaska.

In view of the foregoing it is held that applications under the said section 4 of the act of February 1, 1905, which conform to the requirements of that statute may be granted across lands within national forests or forest reservations in Alaska. The premises upon which this decision is based and the conclusion reached render it unnecessary to consider the question raised in the appeal as to whether general laws relating to public lands apply to Alaska unless specifically excluded therefrom.

With reference to the application in the case at bar, the maps and other papers are not before the Department, but if, as stated, they seek a right of way "for the main purpose" of generating electrical power for noncommercial purposes, this showing does not meet the requirements of the statute in question, as it only authorizes the granting of rights of way for the purposes therein specified, and not for other uses or purposes, even though the latter may be subordinate to the purposes specified in the act.

The record is herewith returned for action in accordance with the views herein expressed.

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### DESERT ENTRIES—EXTENSION OF TIME—ACT OF FEBRUARY 28, 1911.

#### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington, February 13, 1912.*

#### REGISTERS AND RECEIVERS,

*Walla Walla, North Yakima, and Vancouver, Washington.*

SIRS: Annexed is a copy of the act of Congress approved February 28, 1911 (36 Stat., 960), entitled "An act authorizing the Secretary of the Interior to grant further extensions of time within which to make proof on desert-land entries in the counties of Benton, Yakima, and Klickitat," in the State of Washington.

1. All applications for the benefit of this act must be supported by the affidavits of the applicants and at least two corroborating witnesses made before an officer legally authorized to administer oaths in connection with the entry in question and set forth the facts on account of which the further extension of time is desired.

2. Such applications and affidavits must be filed in the local land office of the district wherein the lands are situated for transmission, with the recommendation of the register and receiver, to the Commissioner of the General Land Office.

3. You are directed to suspend any application that may be considered defective in form or substance, and allow the applicant an opportunity to remedy the defects or to file exceptions to the requirements made, advising him that upon his failure to take any action within a specified time, appropriate recommendations will be made. Should exceptions be filed, they will be duly considered with the entire record. In transmitting applications for the benefit of this act, you will report specifically whether or not there is any contest pending against the entry involved, and if a contest is pending, you will transmit the application to the Commissioner of the General Land Office by special letter without action thereon, making due reference to this paragraph.

Very respectfully,

SAMUEL ADAMS,  
*First Assistant Secretary.*

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SUSAN A. LEONARD.

*Decided February 14, 1912.*

SETTLEMENT CLAIM ON UNSURVEYED LAND—JURISDICTION OF LAND DEPARTMENT.

The land department has full authority and jurisdiction, either on its own motion or at the instance of others, to inquire into the *bona fides* of a claimed settlement upon public land, notwithstanding the land is yet unsurveyed and no entry based upon such settlement claim has been allowed.

THOMPSON, *Assistant Secretary:*

Susan A. Leonard has filed motion for rehearing in the matter of departmental decision of December 28, 1911, sustaining the action of the Commissioner of the General Land Office rejecting final proof offered November 3, 1910, and holding for cancellation her homestead entry made October 1, 1909, for the N.  $\frac{1}{2}$  N.  $\frac{1}{2}$  (lots 1, 2, 3, 4), Sec. 4, T. 20 N., R. 10 E., W. M., Olympia, Washington, land district.

The said land was withdrawn August 25, 1906, and placed in a national forest by proclamation of March 2, 1907. The plat of survey was filed August 25, 1909. The entrywoman based her claim upon the alleged settlement of her deceased husband, Cornelius Leonard, who it is alleged settled upon the land in 1902, and who died in the spring of 1905.

By letter of December 7, 1908, the Commissioner of the General Land Office ordered a hearing based upon an adverse report by a

forest officer against the settlement, charging that none of the land had been cleared or cultivated and that the claimant had never established and maintained residence thereon. The local officers found in favor of the claimant but the Commissioner reversed that action and held that the husband had not established bona fide residence upon the land prior to his death and that the widow did not prior to withdrawal for forestry purposes establish and maintain residence thereon. The Department affirmed the action of the Commissioner as above stated.

In support of the motion for rehearing, among other assignments of error, it is urged that the proceeding initiated against this claim was unauthorized and illegal for the reason that the land had not been surveyed at that time and no entry had been made. This contention is without merit. In departmental instructions of May 15, 1907 (35 L. D., 565), it was held:

By virtue of its jurisdiction over the public lands, involving their care as well as their disposition, the land department may at any time, of its own motion or at the instance of others, wherever it appears or is charged that claims asserted under any of the public-land laws are merely colorable and are used to cloak unlawful timber cutting, illegal fencing, the wrongful exclusion of bona fide settlers or claimants, or otherwise to the subversion of those laws, inquire into and determine those questions and thereupon take such further action as may be appropriate and necessary to enforce its jurisdiction and preserve the rights and interests of the public.

In this connection see also instructions of June 26, 1907 (35 L. D., 632). Furthermore, this claim might well have been rejected and the entry canceled upon the showing made in the final proof offered by the claimant.

It is not deemed necessary to refer specifically to the other assignments of error. The facts were elaborately stated in the decision of the Commissioner, and the Department is convinced that the husband had not prior to his death established a bona fide residence upon the land, and further that the widow did not after his death and prior to the withdrawal of the land, establish and maintain a residence thereon as required by the homestead laws. Unless the husband had, prior to his death, a bona fide settlement claim, the widow could not predicate a claim thereon as his widow so as to relieve her from the usual requirement of residence for original claim. There being no sufficient claim upon which she could make entry as widow of the alleged settler, it was incumbent upon her to perform residence and cultivation in her own right, which she did not do, at least prior to the withdrawal for forestry purposes.

The motion is accordingly denied.

## JOHN H. PARKER.

*Decided February 21, 1912.*

## TIMBER AND STONE ENTRY—RESERVOIRS AND DITCHES.

In view of the statutory provisions requiring reservations in patents under the timber and stone act of all vested and accrued water-rights and ditches and reservoirs used in connection therewith, reservoirs and ditches constructed for use in connection with mining operations are not such improvements as will prevent acquisition of the land upon which they are located under the timber and stone act.

THOMPSON, *Assistant Secretary*:

May 17, 1907, James H. Parker filed his timber and stone sworn statement, No. 5210, at La Grande, Oregon, for the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of Sec. 26, T. 11 S., R. 39 E., W. M. Final proof was made August 23, 1907, final receipt No. 11791, endorsed "Register's certificate not yet issued," issuing the same day. March 23, 1908, the Commissioner of the General Land Office directed the register and receiver to issue notice of charges upon the report of a special agent, as follows:

1. That the land is mineral in character.
2. That said lands are covered by the valid mining claim of one Fred Wunder, and are in his possession and occupation.

Hearing thereon was held January 27, 1909, the register and receiver thereupon rendering a decision finding that the charges made had been proved by a preponderance of the evidence. By decision of January 23, 1911, the Commissioner affirmed the recommendation of the register and receiver, and held the entry for cancellation, from which action the claimant has appealed to the Department.

After careful consideration of the entire record, the Department is unable to concur in the conclusions below. The testimony on behalf of the Government discloses that on August 26, 1903, Fred Wunder, Sr., and seven others, located a placer mining claim known as the Buffalo Gulch placer mining claim, which embraced, as far as is here material, 45 acres in section 23 of the above township, 72.5 acres in the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of section 26, and 12.5 acres in the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of section 26. On the lands in section 23, outside of the limits of the timber and stone entry, the mining claimant had several buildings and a garden, and had conducted some placer mining. All the gold ever produced from the mining claim came from that part of it in section 23. The only mining, so to speak, ever attempted on that part of the claim outside of section 23, was the washing of a piece of ground about 100 feet square in the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of section 26, which was done in about the year 1895. The testimony of some of the mining locators is to the effect that they got pay at this excavation, but went down below in section 23 to work, as otherwise the tailings

from above would cover their good ground in section 23. There is also some further testimony to the effect that they had prospected in the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of section 26, and found gold, but the exact places where these prospects were obtained, or the amount of gold so found, does not appear. It further appears that in their workings in section 23 no values have been produced for the last two or three years. A stream, called Buffalo Gulch, runs through the timber and stone claim from the south to the north, the land rising abruptly to the south. There is not a particle of evidence on behalf of the Government of any mineral ever having been found on the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of section 26. The mining claimant had three small reservoirs located in the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of Sec. 26, across this stream or gulch. The water so collected was conducted by ditches to the land in section 23, where it was used in connection with the mining thereon. There is a dispute in the testimony between the witnesses for the Government and those of the claimant as to whether the boundaries of the placer mining claim had been marked upon the ground, or not.

The claimant's testimony shows that while he was advertising proof of his timber and stone claim he was informed by Fred Wunder, Sr., and his son, that his timber and stone claim took in their mining improvements and garden. He advised them that if that were true he did not desire to purchase the land. Thereafter he examined the land, in company with a surveyor, and it was discovered that all of Wunder's improvements, except the reservoirs and ditches above referred to, were not upon the timber and stone claim at all. As to the reservoirs, he was evidently of the opinion that his acquisition of the land under the timber and stone law would not interfere with Wunder's use of the reservoirs and ditches. The claimant further had the land examined by four or five experienced placer miners who prospected in the reservoirs and along the gulch. The result of their prospecting discloses that in about half the pans they would find very fine, minute colors, such as would be called specks, requiring about seventy-five to one hundred and fifty colors to make one cent. All of them unite in stating that the land is valueless as a placer mining proposition; that its value would not exceed one cent per cubic yard at bedrock, which value would tempt no reasonable man to work it as a placer mine. The land bears, however, from two to two and one-half million feet of pine timber, and undoubtedly is more valuable for the timber than for any other purpose.

The Department, on the testimony so stated, is of the opinion that the land in question is essentially nonmineral in character, and chiefly valuable for its timber and stone, and that therefore the first charge has not been sustained. As to the second charge, it is clear, from the first finding, that the mining claim, as to the lands in section 26, here involved, is not a valid placer location. The sole question,

therefore, remains, whether the reservoirs and ditches located upon the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  are such improvements as will prevent the acquisition of the land under the timber and stone law.

The act of June 3, 1878 (20 Stat., 89), provides, in section 1, that—  
nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, . . .  
*And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

The act of July 26, 1866 (14 Stat., 253), above referred to, was substantially carried into the Revised Statutes as section 2339, and reads:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is hereby acknowledged and confirmed.

Section 2340, Revised Statutes, further provides:

All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

In harmony with the above provisions, patents granted under the timber and stone law state that the grant is—

subject to any vested and accrued water-rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts.

From the above it is clear that if the mining claimants have acquired a right to the use of the water, reservoirs and ditches, under the customs, laws, or decisions of the courts of Oregon, such rights are fully safeguarded to them.

Section 2 of the act of June 3, 1878, provides that any person desiring to avail himself of the provisions of said act, must file with the register a written statement in duplicate, showing, among other things, that the land "contains no mining or other improvements, *except for ditch or canal purposes*, where any such do exist, save such as were made by or belong to the applicant." Section 3 further requires the furnishing of satisfactory evidence at the time of filing

proof, "that the land is of the character contemplated in this act, unoccupied and without improvements, *other than those excepted*, either mining or agricultural."

The statute therefore contemplates that lands containing improvements shall not be acquired under the timber and stone law except in the case of two classes of improvements: (1) those constructed for ditch or canal purposes, and (2) those belonging to the applicant himself. Congress evidently was of the opinion that the right to the use of ditches and reservoirs was sufficiently safeguarded by section 1 of the act.

It must accordingly be held that the reservoirs and ditches in this case are not such improvements as would prevent the acquisition of the land under the timber and stone law. The decision of the Commissioner is accordingly reversed, and, if no other objection appear, final certificate and patent will issue.

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**ELBERT L. SIBERT.**

*Decided February 26, 1912.*

**HOMESTEAD ENTRY—AMENDMENT—ACT OF FEBRUARY 24, 1909.**

The act of February 24, 1909, with respect to amendment of entries, is limited to cases of mistake in description at the time of making an entry whereby the entryman's intent was defeated, but is mandatory and obligates the land department to allow change of entry in such cases.

**AMENDMENT—DISCRETIONARY POWER OF SECRETARY AND COMMISSIONER.**

The act of February 24, 1909, making it mandatory upon the land department to allow amendments of entries in certain cases, does not limit or take away from the Commissioner of the General Land Office or the Secretary of the Interior the discretionary power theretofore vested in and exercised by them to permit amendment of entries in other proper cases.

**AMENDMENT OF HOMESTEAD ENTRY TO EMBRACE LAND ORIGINALLY DESIRED.**

Where at the time of making a homestead entry the entryman was prevented from taking the technical quarter-section desired by him because of an existing entry covering part thereof, but made entry of the remainder of such quarter-section together with sufficient adjoining land to make up 160 acres, he may, upon removal of the obstructing entry, be permitted to adjust his entry to the technical quarter-section in accordance with his original desire, provided his application to so amend is filed within one year from the date of his original entry.

**THOMPSON, Assistant Secretary:**

Elbert L. Sibert appealed from decision of the Commissioner of the General Land Office of May 13, 1911, denying his application to amend his homestead entry to include N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 32, T. 145 N., R. 98 W., Dickinson, North Dakota.

September 13, 1909, Sibert made entry for S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 32. July 21, 1910, he applied to amend his entry to ex-



clude E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , and to embrace all the NE.  $\frac{1}{4}$ , which the local office forwarded to the Commissioner, with recommendation it be allowed. The Commissioner denied the application as not showing a case within instructions of April 22, 1909 (37 L. D., 655), governing amendment of entries.

The ground on which amendment was asked is thus stated in the application:

At the time I made homestead entry I had already looked over the NE.  $\frac{1}{4}$  of said Sec. 32, also the E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of said section 32, T. 145 N., R. 98 W., and intended to make homestead entry for the NE.  $\frac{1}{4}$ , but upon arrival at the U. S. Land Office I found that the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  had been filed on by another party, so I then took the land at present embraced in my homestead entry. Since date of my entry, however, the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of said Sec. 32 has been relinquished back to the Government and I now desire to change my entry so as to embrace the N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  instead of E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of said Sec. 32, T. 145 N., R. 98 W.

Also the E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  of said Sec. 32-145-98 is better adapted to grazing than for agricultural purposes and not as suitable for agricultural purposes as I supposed at the time of filing thereon and it would not be practicable to endeavor to use the same for agricultural purposes. Precaution was taken to avoid a mistake in the character of the land.

The act of February 24, 1909 (35 Stat., 645), was to amend section 2372, Revised Statutes, and applies only to cases of mistake in description at time of an entry whereby the entryman's intent was defeated. The present is not such a case, and that act has no reference to it. That act is mandatory and obligates the land department to allow change of entry in such case. It is the entryman's right when such facts are shown, but it does not limit or take away the discretion of the Commissioner or Secretary to grant similar relief in proper cases. Such power has always existed, and the act referred to does not take it away, as it is not a grant or limitation of power, but a mandate giving a right to the entryman, and imposing a duty on the land department. This continuance of the discretionary power, unimpaired, is recognized and affirmed by the instructions of April 22, 1909, which provide (37 L. D., 658):

However . . . . the Department will allow amendments of entries made under laws which require settlement, cultivation, or improvement of the land entered in cases where, through no fault of the entryman, the land is found to be so unsuitable for the purpose for which it was entered as to make the completion of the entry impracticable if not impossible.

Sibert got the land he then understood he was applying for, so there was no mistake defeating his then present intent, but that intent was forced by the obstacle of an existing entry which prevented his taking part of what he then desired, and compelled him to take land less suitable to his intended use. That obstacle is now removed. His application was timely upon removal of the obstructing entry and within a year after his own. The amendment not only effectuates his original purpose and desire, but also conforms to the established

policy of the land laws for subdivision and disposal of lands in compact square units of entire quarter sections.

It may be admitted that the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 32, is not so entirely unsuitable for agricultural purposes as to make completion of this entry wholly "impracticable if not impossible," as it has some utility for grazing, and Sibert might to some extent change his preferred vocation of tillage of the soil to that of stock raising, which is an agricultural industry, but, in view of the Department, there is not sufficient reason to compel a change from his preferred mode of industry and manner of life. It is more conformable to just regard for Sibert's preferred mode of life, and to his original desire, to allow such amendment as conforms to them and against which no obstacle or adverse interest now exists.

The decision is reversed and the amendment is allowed.

### NORTHERN PACIFIC RY. CO.

*Decided February 28, 1912.*

#### NORTHERN PACIFIC GRANT—SELECTIONS UNDER ACT OF JULY 1, 1898—NOTICE.

Selections by the Northern Pacific Railway Company under the provisions of the act of July 1, 1898, are within the purview of the circular of February 21, 1908, which requires the selector or locator in all cases of applications to locate scrip, warrants, certificates, soldiers' additional rights, or lieu selections of public lands, to post and publish for a period of 30 days a notice describing the land located or selected; and where publication and posting of notice of a selection under that act has been made in accordance with said circular, further publication and posting covering such of the selected lands as are within six miles of a mineral entry, claim, or location, in conformity with the circular of July 9, 1894, should not be required.

#### THOMPSON, *Assistant Secretary*:

The Northern Pacific Railway Company has appealed from decision of the General Land Office requiring it to make publication in conformity with the circular of July 9, 1894 (19 L. D., 21), of lands selected by it under the provisions of the act of July 1, 1898 (30 Stat., 620), within six miles of a mining claim of record. Appellant insists that the purpose of the circular of July 9, 1894, has been subserved by the posting and publication of notice of the selection in conformity with the circular of February 21, 1908 (36 L. D., 278), which requires the locator or selector in all cases of applications to locate scrip, warrants, certificates, soldiers' additional rights, or lieu selections of public lands, to post and publish for a period of thirty days a notice describing the land located and selected in order that persons claiming same or desiring to show it to be mineral in character may have opportunity to file objections thereto and to establish their interest therein or the mineral character of the land. The circular of July 9, 1894, *supra*, which requires railroad companies in all cases where the land selected is within six miles of a mineral entry, claim,

or location to file an affidavit as to the character of the land and to publish and post for sixty days a notice of the selection, issued prior to the passage of the act of July 1, 1898, and had particular reference to selections within definite place or indemnity limits of grants. Selections under the provisions of the act of July 1, 1898, are not confined to definite limits but may be made in any State or Territory through which the railroad extends. They are more in the nature of lieu selections, and clearly fall within the scope of the instructions of February 1, 1908, which require notice of the selection to be given by publication and posting without regard to whether or not the selection is within six miles of a mining claim of record. In such cases where the locations or selections are not confined to specified sections or within definite limits, it was deemed necessary and proper that notice of the selection should be given in *all* cases and not limited as was the case with ordinary indemnity selections to those cases where the lands were in the vicinity of known mining claims.

Selections like the one involved are therefore held to be governed by said circular of February 21, 1908, and if in this case notice has been given in the form and manner required by said instructions, further publication and posting should not be required.

The case is remanded for further consideration by the General Land Office under the views herein expressed.

## RECLAMATION—SUNNYSIDE UNIT, YAKIMA PROJECT—WATER SERVICE.

### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

*Washington, February 29, 1912.*

In pursuance of the provisions of section 4 of the act of Congress approved June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

1. Water will be furnished from the Sunnyside unit, Yakima project, Washington, under the provisions of the Reclamation Act in the irrigation season of 1912 for irrigable lands shown on farm unit plats of T. 8 N., R. 23 E.; T. 8 N., R. 24 E.; T. 8 N., R. 25 E.; T. 9 N., R. 23 E.; T. 9 N., R. 25 E., Willamette Meridian, approved by the Secretary of the Interior February 19, 1912, and on file in the local land office at North Yakima, Washington.

2. A supplementary list to accompany said plats and showing all lands now ready for irrigation in the Sunnyside unit has been filed in the said local land office showing in separate columns the area in each legal subdivision or farm unit opened to irrigation in the years 1909, 1910, 1911 and 1912, and the additional lands for which water will be furnished in 1913 and subsequent years will be shown on further supplemental lists to be duly filed in the said land office.

3. The terms of this notice shall not apply to any unentered lands shown on said farm unit plats except the public lands shown on said plats in Sec. 4, T. 8 N., R. 23 E., W. M., not heretofore shown on any list as open to water-right application but now shown on the accompanying list. Public notice as to other unentered lands will be given at a later date, and in the meantime such lands shall remain reserved from all forms of entry. Homestead entries will be received upon unentered lands in Sec. 4, T. 8 N., R. 23 E., W. M., at the aforesaid land office on and after April 1, 1912.

4. The United States has recently taken over a private irrigation system in the Prosser division of the Sunnyside unit, and the owners of all lands having certain rights and interests therein and who desire to obtain the benefits of storage connected with the Sunnyside unit, and other benefits due to the improvements of the irrigation system, shall be allowed on account of such rights and interests a credit of \$21 per acre for such lands and may file water right applications at a building charge of \$31 per acre of irrigable land therein. All lands of this class are indicated on the farm unit plats and lists hereinabove referred to. The said building charge shall be paid in equal annual installments not exceeding ten.

5. The regulation is hereby established for the entire Sunnyside unit that the United States does not undertake to supply water within less than 60 days from the date of acceptance of any water-right application.

6. Except as otherwise provided herein, homestead entries, applications for water rights, the charges, time and manner of payments shall be governed by the terms of the public notice of March 15, 1911, for the Sunnyside unit.

SAMUEL ADAMS,  
*First Assistant Secretary of the Interior.*

**DRAINAGE OF SWAMP AND OVERFLOWED LANDS IN MINNESOTA.  
ACT OF MAY 20, 1908.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, February 29, 1912.*

REGISTERS AND RECEIVERS,

*Cass Lake, Crookston, and Duluth, Minnesota.*

SIRS: With reference to the instructions of June 3, 1908 (36 L. D., 477), and the act of May 20, 1908 (35 Stat., 169), you are further instructed as follows:

1. The act in question extends the State drainage laws to two classes of public lands in the State of Minnesota, namely, lands

which are subject to entry and entered lands for which no final certificates have issued. Section 3 of the act provides for the enforcement of charges against any unentered lands, or lands covered by an unpatented entry, by sale of the lands in the same manner and under the same proceedings as such charges would be enforced against lands held in private ownership.

2. Under sections 5 and 6 of said act, purchasers of lands at such sale must have the qualifications of a homestead entryman and not more than 160 acres can be sold to any one purchaser, even if he purchases from the State. The act makes provision for the issuance of patent to individual purchasers, but the law does not provide for the issuance of patent to the State for any lands bid in by the State. The State, however, can sell the lands bid in by it to qualified individuals, who may make the payments and submit proof of their qualifications, required by section 5 of the act of May 20, 1908, *supra*, to the register and receiver of the United States local land office and thereby secure patent under said act.

3. A person who makes a homestead entry for 40 or 80 acres of lands would have a right to purchase at a sale of the lands enough lands to make up 160 acres, provided he is so qualified under the homestead law, one of the conditions of the act being that every purchaser at the sale of the lands shall have the qualifications of a homestead entryman. If such homestead entryman has not proved up on his homestead entry the lands purchased by him must adjoin his original entry. If he has proved up on his homestead entry he would be qualified under section 6 of the act of March 2, 1889 (25 Stat., 854), to enter enough additional land to make up 160 acres.

4. A purchaser for lands which were opened with the requirement that the settler thereon must pay a fixed price for the land in addition to complying with the homestead law, which lands were affected by the free homestead act of May 17, 1900 (31 Stat., 179), would not in such case be required to pay the price per acre under which the lands were originally opened.

5. Persons who have existing homestead entries in other parts of the country would not be qualified homestead entrymen and, therefore, would not be entitled to purchase at a sale of the lands in question. A person, however, who has entered and acquired title to less than 160 acres would be qualified to purchase so much additional land as when added to the quantity previously entered would not exceed 160 acres.

6. Persons who are the owners of more than 160 acres are not qualified to make a homestead entry in the State of Minnesota and, therefore, would not be qualified to purchase land at a sale of lands under said act of May 20, 1908.

7. There is no provision in the law which requires residence on the land purchased under the act, or cultivation or improvement thereof.

8. When a statement of the sale of lands has been filed in your office in accordance with the provisions of section 4 of the act, you will at once make proper notes thereof on the records of your office and also furnish this office a copy of such statement and from the time of the receipt of such statement you will consider the land as withdrawn from homestead entry. During the period of 90 days after the sale, the purchaser has the right to pay you the proper amounts as mentioned in section 6 of the act, and, should he do so, you will issue cash certificates and receipt therefor. At the end of said period, in case the purchasers at the sale shall be in default in the matter of payments, the lands may be purchased by any person having the qualifications of a homestead entryman by paying the amounts required as specified in said section 6. If the lands are Indian lands, you will deposit the price paid for the land to the credit of the proper Indian fund.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

SAMUEL ADAMS,  
*First Assistant Secretary.*

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FRANK X. MANN.

*Decided January 4, 1912.*

COAL LAND WITHDRAWAL—INTERVENING HOMESTEAD ENTRY—ACT OF JUNE 22, 1910.

Where subsequent to an executive order of withdrawal of coal lands, subject to the provisions of the act of June 22, 1910, but prior to notice of such withdrawal at the local office, homestead entry is allowed for lands covered by the withdrawal, the entryman will be required to amend his entry so as to make it subject to the provisions of said act.

ADAMS, *First Assistant Secretary:*

Frank X. Mann has appealed to the Department from decision of March 7, 1911, by the Commissioner of the General Land Office, requiring amendment of his homestead entry, made July 13, 1910, for the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 23, and N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 26, T. 22 N., R. 12 E., B. H. M., Lemmon, South Dakota, land district, so as to make the entry subject to the provisions of the act of June 22, 1910 (36 Stat., 583).

The land applied for was included in South Dakota coal-land withdrawal No. 1, made by Executive order of July 7, 1910. It was not stated in the Commissioner's decision that the said withdrawal

was in terms made subject to all of the conditions and limitations of the said act of June 22, 1910, but an examination of said order shows that it was made subject to the provisions of that act as well as the act of June 25, 1910.

Said order by its terms became effective upon the date of issuance, notwithstanding the fact that notice of same was not transmitted to the local land office until a later date, and after the date the application of Mann was filed. State of Utah (33 L. D., 510); Hiram C. Smith (33 L. D., 677).

As this application was filed in the local land office subsequently to the withdrawal of the land as coal land, entryman was properly required to amend his application so as to make the entry subject to the provisions of the act of June 22, 1910, *supra*.

The decision appealed from is accordingly affirmed.

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#### FRANK X. MANN.

Motion for rehearing of departmental decision of January 4, 1912, 40 L. D., 440, denied by Assistant Secretary Thompson, March 19, 1912.

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#### NORTHERN PACIFIC RY. CO.

NORTHERN PACIFIC GRANT—AREAS COVERED BY GLACIERS—ACT OF MARCH 2, 1899.

The grant of public lands made to the Northern Pacific Railway Company by the act of July 2, 1864, does not include areas covered by glaciers, and such areas in the Mount Rainier National Park or Pacific National Forest may not therefore be accepted as bases for lieu selections by said company under the provisions of the act of March 2, 1899.

*First Assistant Secretary Adams to the Commissioner of the General Land Office, January 9, 1912.*

In an undated communication reporting progress, under the act of March 2, 1899 (30 Stat., 993), in the matter of adjustment of land grants to the Northern Pacific Railroad Company, within the Mount Rainier National Park and the Pacific Forest Reserve, you ask whether areas covered by glaciers, but which would fall in odd-numbered sections were surveys extended over same, may be used by the railroad company as basis for lieu selections under the exchange provisions of said act.

Section 3 of the act of Congress approved July 2, 1864 (13 Stat., 365), granted to the Northern Pacific Railroad Company, its suc-

cessors and assigns, for the purpose of aiding in the construction of a railroad and telegraph line to the Pacific Coast—

every alternate section of public land, not mineral, designated by odd numbers to the amount of 20 alternate sections per mile on each side of said railroad line as said company may adopt, through the Territories of the United States, and 10 alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office.

Section 3 of the act of Congress approved March 2, 1899, *supra*, authorized the Northern Pacific Railroad Company, upon filing with the Secretary of the Interior of a proper deed of release and conveyance to the United States of lands within the Mount Rainier National Park and the Pacific Forest Reserve—

which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, . . . to select an equal quantity of nonmineral public lands.

The area involved is, approximately, 17,318 acres, and it is contended on behalf of the company that to refuse to allow selections in lieu of this area would not only be contrary to the plain purpose of Congress in providing for the relinquishment, but would be violative of the contract entered into between the Department and the company when the former accepted the deed of release, whose words of conveyance included not only the title of the company, present and prospective, under the granting act, but any right, title, or interest which the company might otherwise have. It is contended that as glaciers are moving bodies or frozen snow upon the earth's surface, there must be beneath a body of land, the title to which passed to the company on definite location of its road. It is also stated that prior to relinquishment, the company contemplated cutting and marketing the ice from the glaciers and the establishment of a pleasure resort upon the summit of Mount Rainier, which, it is contended, indicates that if the exchange of these areas for lands outside the park be not accepted by the Government, the glacial areas "will still remain in the possession and ownership of the railway company and subject to its use and disposition."

The answer to the question propounded by you, therefore, depends upon whether or not the areas covered by the glaciers passed, or would pass, to the company, after identification by survey.

The arguments submitted on behalf of the company, as above set forth are not determinative of the question involved. These areas were not specifically described in the deed of release, nor has there been any intimation on the part of this Department that same would be accepted as valid base for lieu selections. The mere fact that



glacial deposits are underlaid by earth or rocks does not in itself make them subject to the grant to the railway company, for the same fact is true as to the beds of rivers and lakes, and as stated by the decision of the Supreme Court of the United States in the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 538), the grant "is of alternate sections of public land; and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws."

The fact that the company may have contemplated asserting a claim to or making use of these glacial areas does not vest it with title thereto if such title was not conveyed by the railroad grant.

The beds of streams more than three chains in width or so deep, swift, and dangerous as to be impassable, and lakes and ponds of over 25 acres area are, under the laws and rules governing the survey of public lands, meandered for the purpose of defining the sinuosities of the banks and to ascertain the quantity of public lands in the adjacent surveyed areas subject to settlement and sale. It would be possible in those cases, as well as in the cases of glacial areas, to extend the lines of survey over such areas, but they are not so surveyed because they do not contain disposable public lands.

A glacier is defined by Scott in his work on Geology as—

A stream of ice which flows as if it were a very tough and viscous fluid and does not merely glide down a slope as snow slides from the roof of a house. Glaciers play a very important part in keeping up the circulation of the atmospheric waters and produce geological results of an extremely characteristic kind. . . . In places where the excess of snow can not be disposed of (in other ways) glaciers are formed and thus keep up the circulation of the waters by carrying the surplus snow down to lower levels at which it can melt. . . . A glacier moves in much the same way as a river but at a very much slower rate.

According to Le Conte, a typical glacier may be divided into two parts—

a great amphitheatrical part in which the snows are gathered and an icy tongue or glacier proper which runs from the amphitheatre or cirque down the valley; or we may regard water as existing in four conditions: first as light snow; then as we go down as neve or granular snow—half snow, half ice; then a solid glacial ice, and finally as a river.

The crest or peak of Mount Rainier is a perpetual snow-covered area, from which flow glaciers in many directions, and from the faces or lower ends of these glaciers flow streams or rivers. The glacial streams or areas, like rivers or lakes of water, have definite banks or boundaries, and are underlaid by beds of earth or rock. Like rivers of water they have a continual flow or motion from the central glacial field towards the lower levels. The surface is of ice, unsafe and unsuitable for habitation or occupation, and like the beds of streams, does not afford a suitable or permanent place for the location of

section corners or survey monuments. Such areas do not possess the qualities or characteristics of lands ordinarily surveyable and disposable under the public-land laws of the United States, but, as shown, resemble more nearly rivers and streams, which, under the law and rules, are not surveyed or disposed of by the United States through sale or grant.

As stated by the Supreme Court in the *Bardon* case, *supra*, the grant conveyed to the company only lands *in place*; that is, such areas within the specified limits as possessed fixity, and such other physical characteristics as render them susceptible of sale or disposition to those who might in some manner occupy or use the same for a purpose consistent with the intent of the laws providing for their disposition. These glacial areas or rivers of ice do not have such fixity and are not susceptible of such occupation or use. There was no undertaking by the United States that the quantity of land granted should equal any fixed number of acres and the company was entitled thereunder only to such lands as may be found to be in fact covered by the grant. *Sioux City and St. Paul Railroad Company v. United States* (159 U. S., 349, 372).

The Department is convinced that it was not the intention of Congress that such areas should be surveyed or disposed of as a part of the public lands of the United States, and that the grant to the Northern Pacific Railway Company did not convey the same. If there be any doubt in the construction of the granting act in this respect it must be resolved against the railroad company under the settled rule that such statutes are to be strictly construed against the grantee. *Wisconsin Central Railroad v. United States* (164 U. S., 190).

You are therefore advised that, in the opinion of the Department, no areas falling within glacial fields or streams in the Mount Rainier National Park or Pacific National Forest may be accepted as basis for lieu selections by the Northern Pacific Railroad Company under the provisions of the act of March 2, 1899, *supra*.

#### EDWIN COLLINS.

*Decided January 11, 1912.*

#### SCHOOL INDEMNITY SELECTION—ENTRY OF BASE LAND.

Land within a school section assigned by the State as base for indemnity selection is not subject to entry, selection, or other appropriation under the public land laws until the selection is approved and title to the base land reverts in the United States.

#### THOMPSON, *Assistant Secretary*:

Edwin Collins appealed from decision of the Commissioner of the General Land Office of May 10, 1911, rejecting his application for

homestead entry for SW.  $\frac{1}{4}$ , Sec. 36, T. 44 N., R. 5 W., Coeur d'Alene, Idaho.

The land is within the Coeur d'Alene Indian Reservation, opened to settlement and entry by act of June 21, 1906 (34 Stat., 335), whereby sections 16 and 36 were granted to the State for common schools.

At a time not stated by the Commissioner, the State filed indemnity school selection based on this tract, which selection has not been approved and is yet pending.

November 1, 1910, Collins applied for homestead entry, which the local office rejected for conflict with the State's school grant. That action the Commissioner affirmed.

The appeal alleges error because the State has made indemnity selection and "the probability of approval of the selection is so great that the base lands are virtually free from claim by the State."

There was no error in the decision. Legal title to a tract of land relinquished to the United States as base for a selection does not pass until the selection is approved. Before that time the State may recede from its selection and take the land in place, or, for sufficient reason, the Commissioner may reject the selection, leaving the title of the State to its school land base unaffected by the attempted selection. The case here presented, pending a selection, is in principle substantially like that in *Maybury v. Hazletine* (32 L. D., 41, 42; same case, 33 L. D., 501), under act of June 4, 1897, wherein the Department held that land relinquished to the United States as base for a selection is not subject to appropriation, entry, or selection under the public land laws until the relinquishment is approved and title tendered to the United States is accepted. Title had not become vested in the United States to the land applied for by Collins by the mere relinquishment of the State. The title was merely *sub judice*, and it was due to State that the title should not be incumbered while its selection was pending, so that should the selection be rejected the State would be restored to its entire title, unclouded by any act of the United States.

It is not fair to the State, nor is it good administration to permit the entry upon a mere probability, however strong, that the State's selection will be approved.

The decision is affirmed.

EDWIN COLLINS.

Motion for rehearing of departmental decision of January 11, 1912, 40 L. D., 444, denied by Assistant Secretary Thompson, March 23, 1912.

## JOHN B. DAY.

Decided January 17, 1912.

## ENLARGED HOMESTEAD—ADDITIONAL ENTRY—CULTIVATION.

The provision in section 4 of the enlarged homestead act requiring proof of cultivation of at least one eighth of the land the second year and one fourth thereafter, contemplates one eighth or one fourth of the area of the additional entry made under said act, and not of the combined area of both the original and additional entries, where the original entry was made under the general homestead law; but such cultivation may be made anywhere within the limits of the combined entries—entirely on the original entry, entirely on the additional, or partly upon each.

## ENLARGED HOMESTEAD—ADDITIONAL ENTRY—CULTIVATION OF ORIGINAL ENTRY.

Cultivation of an area sufficient to meet the requirements as to the additional entry will not relieve the entryman from also meeting the requirements of the general homestead law as to cultivation upon the original entry.

## ENLARGED HOMESTEAD—ADDITIONAL ENTRY—RESIDENCE AND CULTIVATION.

Residence and cultivation upon the original entry prior to the date of the additional can not be credited to the latter so as to allow final proof thereon prior to the expiration of five years from the date thereof; but title to the additional entry must be earned by residence upon either the original or additional for the full period of five years and cultivation of the area fixed by the statute.

ADAMS, *First Assistant Secretary*:

John B. Day has appealed from the decision of the Commissioner of the General Land Office rendered May 5, 1911, rejecting, in so far as it relates to the additional entry, the final proof submitted by him July 14, 1910, for his homestead entry No. 2334 made June 14, 1904, for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 32, T. 33 N., R. 65 W., and enlarged homestead entry No. 02864 made May 8, 1909, for the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , same section, township and range, Douglas, Wyoming, land district.

It appears that entryman established residence upon the original homestead entry September 30, 1904, and the proof shows satisfactory compliance with the law, so far as this entry is concerned.

We have here to consider, however, a case where an original homestead entry was made in 1904 under section 2289, R. S., and upon which the *usual* requirements as to residence and cultivation must needs be complied with in order to obtain patent, and also an entry of land contiguous to the former entry and made by virtue of the right conferred in the act of February 19, 1909 (35 Stat., 639), under which certain *special* requirements as to the area of cultivation were imposed.

The entire cultivation shown was as follows: in 1905, 5 acres; 1906, 5 acres; 1907, 5 acres; 1908, about 20 acres; 1909, 63 acres; 1910, crop not harvested, 63 acres.

The Commissioner held that the entryman—

had not cultivated the required number of acres, except for the years 1909 and 1910, and for that reason said proof cannot be accepted as covering both entries. It is, therefore, rejected so far as it relates to the additional entry.

The result reached is the correct one, but the decision is based in part upon an erroneous construction of sections 3 and 4 of the enlarged homestead act of February 19, 1909, *supra*.

The Commissioner in the decision appealed from says:

In accordance with the requirements of said act and the instructions issued thereunder, the proof must show that at least one-eighth of the combined area of both entries has been continuously cultivated to agricultural crops, other than native grass, beginning with the second year of the entry, and that at least one-fourth of the combined area of both entries has been continuously cultivated to agricultural crops other than native grass, beginning with the third year of the entry.

The sections of the above mentioned act, material for construction herein, read as follows:

Sec. 3. That any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

Sec. 4. That at the time of making final proofs as provided in section twenty-two hundred and ninety-one of the Revised Statutes the entryman under this act shall, in addition to the proofs and affidavits required under the said section, prove by two credible witnesses that at least one-eighth of the area embraced in his entry was continuously cultivated to agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-fourth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry.

Under the above sections, the area of cultivation required, consisting of one-eighth the second year and one-fourth thereafter for three years, refers to the area of the *entry made under this act* and not to the "combined area of both entries," where the first entry was made under the general homestead law. In other words, if the additional entry made under this act consists of 80 acres, as in this case, the law requires cultivation of 10 acres the second year and 20 acres thereafter for three years. But this requirement does not relieve the entryman from such additional compliance with the law on his original entry as would ordinarily enable him to perfect his title thereto, just as if he had made no additional entry.

It is provided, however, that this specially required area of cultivation may be of land embraced in the original entry. So long as the required amount is cultivated, the land so used may be entirely in the old entry, entirely in the additional entry, or partly in each.

The decision of the Commissioner also necessarily implies that residence upon and cultivation of the original entry, before the date of the additional entry, may be credited to the later entry so as to allow final proof thereon prior to five years from the date thereof. There is nothing in the act to warrant such a conclusion. Section 4

provides that a certain area must be cultivated *beginning* with the second year of the entry. There was clearly no intention on the part of Congress to *present* this additional land in return for something already done on another entry. It must be *earned* by residence upon one entry or the other and the cultivation of a certain acreage.

A concession is made in favor of "homestead entryman of lands of the character herein prescribed upon which final proof has not been made" in that they need not move their habitation from the old homestead but may continue to reside thereon and cultivate it and such residence and cultivation "shall be deemed as residence upon and cultivation of the additional entry" which must be contiguous thereto. These acts, however, must be performed subsequent to the date of the entry under this act in order to be credited thereto.

For the reasons stated the result reached in the decision appealed from is accordingly affirmed.

### H. B. PHILLIPS.

*Decided January 19, 1912.*

#### SOLDIERS' ADDITIONAL—ASSIGNMENT—RIGHT OF ASSIGNEE.

Where an assignment of a soldiers' additional right expressly limits location of the right upon a certain designated tract of public land, such assignment is special and does not give the assignee the right to locate other public land than the tract so designated; and where, under an erroneous ruling of the land department then in force, he is denied the right to enter the land so designated and acquiesces in such action, and the land passes from the jurisdiction of the land department, neither he nor anyone claiming through him by virtue of such assignment has thereafter any right to locate any other tract of public land thereunder.

#### ADAMS, *First Assistant Secretary*:

This is the appeal of H. B. Phillips from a decision of the Commissioner of the General Land Office, April 19, 1911, rejecting his application to locate, under section 2306 of the Revised Statutes, an alleged unsatisfied portion of the soldiers' additional right of Jesse F. Elmore, upon 20 acres of land, being the E.  $\frac{1}{2}$  E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 28, T. 9 N., R. 14 E., Sacramento land district, California. While of no special materiality upon the question presented by this record, it may be well to here state that the irregular outlines of this tract are due to the fact that part of the NE.  $\frac{1}{4}$  of said section is covered by a mining claim.

Phillips claims this right by assignment of one F. W. McReynolds, who claimed it by assignment of one N. P. Chipman, who claimed it as assignee of the said Jesse F. Elmore, the soldier, by virtue of his substitution as the attorney-in-fact under a power executed by Elmore to one Charles D. Gilmore, May 28, 1875, and the location

of the right upon a tract of land at Susanville, California. That location failed and the entry allowed thereunder was canceled for invalidity, and under date of August 2, 1903, one William C. Wilson, who claimed and was adjudged to be assignee of Elmore through one William E. Moses, who claimed under assignment from Elmore, dated April 24, 1902, located the right upon 37.61 acres of land at Helena, Montana, which location was passed to patent June 14, 1904. Under this state of facts the Commissioner of the General Land Office, citing a decision of the Court of Appeals of the District of Columbia, at its April Term, 1910, in the case of Francis M. Walcott, appellant, *v.* Richard A. Ballinger, Secretary of the Interior, appellee, held in substance and effect that upon the failure of the Susanville entry, and upon the subsequent assignment of the right to Moses, and the issuance of patent upon the Helena location made thereunder, the right was satisfied and that Phillips has no right, title, or interest therein.

The said Jesse F. Elmore was sometime the owner of a soldiers' additional right to enter 80 acres of land, he having, prior to the adoption of the Revised Statutes, performed the requisite military service and made original homestead entry for 80 acres of land, and it appears that he, in the exercise of this right, located May 28, 1875, 40 acres adjoining the land covered by his original entry, and that both of these entries were patented to him under final certificate 2347, September 10, 1875. Again, on May 28, 1875, notwithstanding the fact that Elmore had entered or did on that day enter 40 acres of land in the exercise of such right, he executed a power of attorney appointing one Charles D. Gilmore his attorney-in-fact to locate and enter at the United States land office at Susanville, California, his "additional homestead . . . for the following described public lands, to wit: Lots 1 and 2, Sec. 18, T. 28 N., R. 6 E., M. D. M.," and to sell "the same the said described premises or any part or parcel thereof." In the exercise of this power, August 7, 1875, entry was made in the name of Elmore, by Chipman, for the land described in the power, being 78.09 acres. This entry was canceled January 24, 1877, after due notice to the parties in interest, upon the ground that the soldiers' additional right had been fully satisfied by the aforesaid additional entry made by Elmore, it being the ruling of the land department at that time that one additional entry satisfied the right without regard to the acreage embraced therein. This action was apparently acquiesced in by the parties in interest. No appeal was taken therefrom to the Secretary of the Interior and no resort was had to the courts to correct the now admitted error of this ruling. Thereafter long drawn out proceedings were had before the Commissioner of the General Land Office and before the Secre-

tary of the Interior in which it was sought to purchase that land under section two of the act of June 15, 1880 (21 Stat., 238), and the aforesaid power of attorney figures as basis of those proceedings. It is said, and for the purposes of this case may be admitted, that this power of attorney was in the files of the General Land Office before and at the time of the allowance of the entry to Wilson and the issuance of the final certificate and patent upon such entry, and it is urged that the land department, therefore, at this time had notice by its own records that the right was claimed adversely under the power of attorney of May 28, 1875, and contended, in effect, that the Walcott case is not controlling.

In every material aspect the Walcott case (*supra*) is on all fours with the case under consideration. That was a case in which the power of attorney involved was in almost the identical words of that here under consideration. It was executed to the same man, Charles D. Gilmore, by one Shadrach Duer, and during the same month of the same year that the Elmore power was executed, and location was made by the same N. P. Chipman who located the Elmore right herein. The legal effect was certainly the same. The proceedings had thereon with reference to the original location by the assignee of the soldier were the same. That location, as this one, had been canceled because the soldier had previously thereto in part exercised the right in person, and it had been held that the additional right had been exhausted. The case was also the same in that through subsequent assignment by the soldier the right had been fully satisfied. In the course of said decision the court said:

The power of attorney from Duer to Gilmore must be treated as an assignment only of Duer's *additional right to make the California entry*. While the instrument granted a power of substitution, it accorded to Gilmore only the right to substitute another party who could in turn exercise the right conferred on him by the terms of the power of attorney. But what was that right? It was limited to an entry in Duer's name of the lands specifically described in the instrument—the California entry subsequently sought to be made by Chipman.

\* \* \* \* \*

A mere glance at this instrument discloses its purpose. It granted to Gilmore or his assigns whom he might substitute the right to enter in Duer's name the particular tract of land therein described, and no other. There is no doubt but that it constituted a special assignment of Duer's right to that extent. It can not, however, be distorted into an authority to Gilmore or the relator, as his assignee by mesne conveyance, to enter the land here in question. It was not executed by Duer for that purpose, and the rights of relator at most must be measured by the rights of Gilmore, whose rights, so far as the land was concerned, were limited by the subsequent action of his assignee Chipman to the California entry.

This presents the question of whether or not Chipman lost all his rights by the failure to pursue his California entry. We think he did. Undoubtedly, by his delay in making the entry and his failure to give the Government notice



of the Duer power of attorney, he lost his right to assert his claim against the Government for more than forty acres. As to the remaining forty acres, he was estopped by Duer's Missouri entry. *Henry Walker*, 25 L. D., 119. What remedy he may have had against Duer to impress the Missouri land with a trust in his favor, had he proceeded with diligence, it is unnecessary to decide. That he was estopped to that extent against the Government is here conceded.

It is the right of the relator to enter forty acres of land in lieu of that which was abandoned by Chipman with which we are here concerned. It is clear that Chipman, by failing to pursue the remedy provided when his entry was refused by the Commissioner of the General Land Office, lost his rights under the power of attorney. If he had availed himself of the right afforded him, and of which he had notice, to appeal to the Secretary of the Interior, and had again been refused the right to make the entry, the same remedy now pursued by relator was open to him to test the correctness of the Department's ruling. All subsequent holdings of the courts disclose that his contention would have been upheld. *Webster v. Luther*, *supra*.

It is clear that the fact of want of notice to the land department was not controlling upon the question of the scope of the power. That fact only went to applicant's right to pursue the land originally located. The controlling fact was that other land had been afterwards patented in full satisfaction of the right upon a subsequent assignment by the soldier, the original assignment having been special, and it being held that the soldier had the right to afterwards make a general assignment of the right, the special assignment having failed under closed though erroneous rulings of the land department. Moreover, it appears that the land department had notice by record of the assignment in the *Walcott* case as much as it had in this case, but the court treated it as unimportant. Under the facts stated in said decision the ruling would have been the same even if land had not been patented in full satisfaction of the right, because it was held by the court that the first assignment was limited to a location upon the land described, and that that land having since passed from the jurisdiction of the land department, there was nothing for it to operate upon. The assignee's recourse, if he had any, was against his assignor, or, perhaps, as suggested by the court, by charging the legal title holder of that tract in trust for the benefit of such assignee by timely proceedings in court.

The Department adheres to the position taken by it in the *Walcott* case; and upon the authority thereof and of the judgment of the Court of Appeals therein, the decision appealed from is affirmed.

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#### H. B. PHILLIPS.

Motion for rehearing of departmental decision of January 19, 1912, 40 L. D., 448, denied by First Assistant Secretary Adams April 1, 1912.

**RICHMOND v. DAVIDSON.**

*Decided January 24, 1912.*

**DESERT LAND ENTRY—ANNUAL PROOF—CONTEST.**

Where a desert land entryman submits first year proof prior to the expiration of one year from the date of the entry, and contest is thereafter and within such period initiated against the entry, charging failure of the entryman to make the required first year expenditure as set forth in the proof, he is not thereby precluded from thereafter submitting further first year proof showing expenditures made upon the land at any time within the first year period.

**THOMPSON, Assistant Secretary:**

Nettie Richmond has appealed to the Department from the decision of the Commissioner of the General Land Office of April 27, 1911, reversing the action of the local officers and dismissing her contest against desert land entry 03179, made July 27, 1909, by Harold C. Davidson for lots 5, 6, 7, and 8, Sec. 6, T. 13 N., R. 25 E., 142.85 acres, North Yakima, Washington, land district.

It appears from the record that Davidson submitted first yearly proof January 24, 1910, showing an expenditure of \$150 in clearing 30 acres of the land of sage brush on lots 7 and 8 of his entry. The items of expenditure are not given in such proof and it is probably insufficient on its face but was accepted by the local officers.

March 25, 1910, Richmond filed contest affidavit against said entry, alleging:

*First.* That the land embraced in said entry contains 142.15 acres; that said contestee has submitted his first annual proof of expenditure, and made oath that he had expended the sum of one dollar for each acre embraced in said entry the first year after the entry was made, when in truth and in fact he has not cleared to exceed twelve acres of the land of sage brush; that the actual value of clearing said amount of land of sage brush is not more than six dollars per acre; that there is no other work done upon said land, or improvements made thereon save the clearing of said twelve acres of sage brush.

No evidence was submitted to support either the second or third charge of said affidavit and no further attention need be given to them.

The hearing was before the local officers in May, 1910, both parties appearing in person, with counsel and witnesses.

May 10, 1910, contestee submitted a second proof upon the land and, as it was within one year from date of his entry and set up improvements made only during the first year of his entry, he was clearly entitled to file same when he did file it and to sustain the showing by evidence at the hearing. In the second proof, he corrected certain errors admitted to have been made in the first proof, and he clearly had a right to so do.

Upon consideration of the record, it is found that the facts shown by the testimony are clearly and sufficiently set forth in the decision of the Commissioner and a just conclusion reached therefrom in the finding that an expenditure of \$148, in accordance with the desert land law, is shown by the contestee to have been made upon the land embraced in his entry within one year from the date thereof.

It is contended upon this appeal that the submission of proof within less than six months from date of entry and the filing of the contest affidavit thereafter and within about eight months from the date of the entry precluded claimant from making further showing as to expenditures upon the land in the submission of his first annual proof. This contention is without merit. The only requirement of the statute is that claimant shall expend one dollar per acre upon his land during the first year after making his entry, and this claimant is shown to have made such expenditure.

The decision appealed from is affirmed.

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### BROOKS v. CANFIELD.

*Decided January 25, 1912.*

#### SECOND HOMESTEAD—ACT OF FEBRUARY 8, 1908—SETTLEMENT CLAIM.

The act of February 8, 1908, providing for second homestead entries, can not be given a retroactive effect to protect the prior settlement claim of one disqualified to initiate a valid settlement, to the prejudice of a valid intervening adverse settlement claim.

#### THOMPSON, *Assistant Secretary*:

Ephraim D. Brooks has appealed from the decision of the Commissioner of the General Land Office of April 12, 1911, reversing the decision of the local officers, and finding that claimant Colden R. Canfield was the prior settler upon and entitled to make homestead entry, No. 01840, for the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 29, T. 6 S., R. 9 W., within the former Siletz Indian Reservation, and further that said Canfield was entitled to make this his second homestead entry, under the act of February 8, 1908 (35 Stat., 6).

The land here in controversy was opened to homestead entry on April 22, 1909. On that day at 10 a. m. Colden R. Canfield filed homestead application, No. 01840, for the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 29, alleging that he established his actual residence thereon April 18, 1907; that he had since continuously resided thereon with his family and cultivated the land; that he had made valuable improvements thereon of the value of \$700; and that when he so established his residence on said land he was the sole occupant thereof.

The application was accompanied by his affidavit stating that he had made a former homestead entry on the 14th day of April, 1906,

when he filed homestead application, No. 15930, at the Portland, Oregon, land office, but that he had relinquished the same on the 27th day of March, 1907, and that said entry was not canceled for fraud or abandonment, or relinquished for a consideration, and he claimed the right to make the second entry then applied for, under the act of February 8, 1908.

On the same day (April 22, 1909) at 2.50 p. m. Ephraim D. Brooks filed homestead application, No. 01867, for the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of the same section, alleging that he first settled upon the land May 18, 1907, by building and repairing fence and repairing a house theretofore owned by one H. Glaze, a former homestead squatter, from whom he purchased the house then on the land and its contents, together with the relinquishment of said Glaze; that he moved his family thereon May 27, 1907, and has since continuously resided thereon and cultivated the same; that his improvements are of the value of \$850; and that on May 18, 1907, there was no other occupant of the land.

The rights of the parties being in conflict as to all the lands embraced in Brooks's application, except the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of said section, a hearing was duly ordered and had before the local officers who, on September 29, 1910, found that claimant Brooks was entitled to the land by virtue of his prior settlement thereon.

Upon appeal to the Commissioner, the point of Canfield's qualifications at the time he settled was raised. It was insisted at length that the act of 1908 did not apply, because the rights of an adverse settler, to wit, claimant Brooks, had attached before the said act of 1908 became effective to allow Canfield to make a second entry. The Commissioner, however, held that the act of 1908 was applicable. Further, he reversed the local officers and decided that Canfield was the prior settler.

From the testimony it appears that claimant Canfield settled upon three 40's in section 30 and one 40-acre tract in section 29 not involved in this controversy, on April 18, 1907. He claims, however, that on the evening of May 20, 1907, he decided to give up the three 40's in section 30 and take the other three 40's in section 29 now in dispute. Whatever may have been his mental acts and whenever they took place, there can be no doubt that he posted notices of his claim to the land here in controversy on an old building on the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of section 29 on the evening of May 20, 1907; that on May 21 he worked about the place and that on May 22 he installed himself as a settler and had made his home there continuously up to the time of the hearing. The testimony is conclusive upon that point. Although there is great conflict in the testimony, which comprises some 300 pages, it is not necessary at this time to review it at any great length. A thorough examination shows that the same is substantially set

forth in the decision appealed from. The Commissioner has found that claimant Brooks made no settlement on the land until May 27, 1907, and at that time Canfield was on the land following up his actual settlement, made May 20, 1907. The Department concurs in this finding of fact.

Such being the case, and as both claimants here are basing their rights on actual settlement on unsurveyed land, it is material to consider their qualifications at the time when actual settlement was made. The right of claimant Brooks to make homestead entry on May 27, 1907, has not been challenged. Claimant Canfield's qualifications are seriously questioned because of his former homestead entry noted *supra*. His status at the time he made settlement therefore must be determined. The showing made in his behalf is briefly stated as follows: His former entry of record was made April 14, 1906, after a careful examination of the land. He was a native of Ohio, and unfamiliar with agricultural conditions and possibilities of steep and rugged land in Oregon. There were not to exceed 12 or 15 acres of comparatively level land upon the said quarter section. An attempt was made to raise a crop, but he discovered that the quality of the soil was inferior and crops could not be grown successfully. In the spring of 1907, he abandoned the land and formally relinquished the same March 27, 1907. It was later patented to one Graves under the timber and stone act. On May 20, 1907, about two months after his formal relinquishment, he settled upon the land here in controversy. He also relies upon the fact that before taking these various steps he sought legal advice and further wrote to the receiver at Portland, who advised him that his right to make a new homestead entry would be determined upon receipt of his application to enter the land desired whenever said land became subject to entry, as it was then unsurveyed. He settled upon the land in good faith, made valuable improvements, and has since occupied it as a home with his family.

The question of whether he had exhausted his homestead right could not be determined until he made application for a second entry. He made such application as soon as he could, to wit, on the first day the lands were opened to entry, having in the meantime settled on the land he wanted and lived there for a period of two years.

Before this application for a second entry was made, and hence before it could be determined whether he was legally entitled to a second entry, but after his settlement on the land here involved, the act of 1908 was passed. This act is as follows:

That any person who, prior to passage of this act, has made entry under the homestead laws, but from any cause has lost, forfeited or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for a second home-

stead under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished the former entry for a valuable consideration.

The terms of this act are clear, but even conceding that Canfield has upon the showing made brought himself within its provisions, it can not be maintained with any show of reason that such application can be accepted in the face of valid adverse claim, initiated prior to the acquisition of a superior right in Canfield. This act has no retroactive effect which will operate to cure a defective right based upon a claim of prior settlement, and at the same time cut off and defeat the assertion of a superior adverse claim. While the Department has held that the status of an applicant is to be determined as of the date of his application (James W. Lowry, 26 L. D., 448; Winborn *v.* Bell, 33 L. D., 125), it has never been held or intended that an application to enter when based upon a claimed settlement right would be accepted where it was shown that the right claimed by virtue of such application was subject to a superior right initiated prior thereto. In other words, one disqualified to initiate a valid settlement right can not claim the privilege of having his status as an entryman determined as of the date of his application to protect such invalid settlement right. The right will only be protected from the date the impediment to its initiation is removed, and the right attaches. If before the disqualification to make settlement is removed a superior right intervenes, such right, in all equity and justice, will be recognized and protected. Short *v.* Bowman (35 L. D., 70).

The finding on the evidence has established that the claimant Brooks's settlement on the land dates from May 27, 1907. The act of February 8, 1908, therefore, can not be invoked to remove any disqualifications under which Canfield may have been at the time of the Brooks settlement. If, on May 27, 1907, there was no way by which an entryman could relinquish a homestead acquired after the act of April 28, 1904 (33 Stat., 527), and become qualified to make a second entry, then the claimant Brooks must prevail. The same would be true if Canfield relinquished his former entry for a valuable consideration, or if it had been canceled for fraud.

The sole question remaining, therefore, is one of law: Was Canfield entitled to make a second homestead entry prior to May 27, 1907, when claimant Brooks established himself upon the land? It is very evident from the record that this question was not directly raised at the hearing, because counsel for both parties were under the impression that the act of 1908 was controlling. Upon appeal, however, the importance of this question is recognized and many pages of the voluminous briefs are devoted to its consideration.

Claimant Canfield in answer to this point, now first raised on appeal, files certain affidavits seeking to establish, in substance, that the land of his former entry was unfit for agricultural purposes; that he had tried to farm it and failed, and subsequently it was patented to one Graves under the timber and stone act. He further alleges that he was unacquainted with lands in that vicinity; that he was deceived as to its character and quality, and that he relinquished it without consideration.

Such affidavits might, in a clearly meritorious case, present a situation calling for the exercise of the equitable powers of the Department. Marmaduke William Mathews (38 L. D., 406).

This extraordinary power is rarely invoked, however, and in the opinion of the Department the facts of this case do not warrant its exercise herein. Especially is this true in view of the fact that to do so would be to deprive claimant Brooks of all right to the land. He settled upon the land but seven days after Canfield, having bought a relinquishment of a former settler, has made valuable improvements, and continued to reside there with his family in good faith and under claim of right since May 27, 1907. Further, he examined the land with a view to settlement (although he performed no act of settlement) before Canfield settled thereon, May 20, 1907. He left the land to go to Portland for his family, and upon his return a week later, found Canfield established on one of the 40's in question.

It also appears that there are certain suspicious circumstances connected with Canfield's relinquishment of his former entry which materially discount his affidavit in regard thereto. Canfield paid \$150 to one Holman for being located on his original entry. In March, 1907, he relinquished it without consideration, as he says. However, one Connelly subsequently located a man named Graves thereon, and received \$250 from him. It does not appear by what authority Connelly disposed of the relinquishment or received the \$250 therefor. This same Connelly soon thereafter located Canfield on his first claim in the Siletz (section 30) and Canfield paid him \$200 for so doing. (Canfield's testimony, pages 175 to 178.)

All the transactions of Canfield relative to his several claims from the time of making his first entry and the relinquishment thereof down to the evening of May 20, when he alleges having dropped the three 40's in section 30 and taking the three 40's in section 29, weigh against his good faith and militate against any right he might otherwise have to invoke the equitable powers of the Department mentioned *supra*.

In the opinion of the Department, therefore, the act of February 8, 1908, does not apply to remove Canfield's disqualifications as of date of May 27, 1907, and the circumstances of this case do not war-

rant special action by the Department to that end. It is accordingly ordered that the homestead application of Canfield, in so far as it conflicts with the application of Brooks, should be rejected, and the application of Brooks allowed for the lands in controversy.

The decision appealed from is reversed.

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**HENRY A. SCHROEDER.**

*Decided January 29, 1912.*

**RECLAMATION HOMESTEAD—ENTRY BY SUCCESSFUL CONTESTANT—BUILDING CHARGE.**

A successful contestant of an entry within a reclamation project will be required, in making entry in exercise of his preference right, to pay the building charge obtaining at the time his application is filed, and is not entitled to the rate in effect when the former entry was made nor to credit for the payments made by the former entryman.

*ADAMS, First Assistant Secretary:*

February 4, 1909, William Miller made homestead entry No. 781, serial No. 0786, Carson City, Nevada, land district, for farm unit "D", the S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 10, T. 20 N., R. 24 E., M. D. M., within the Truckee-Carson irrigation project, subject to the provisions of the act of June 17, 1902 (32 Stat., 388), and on January 20, 1911, the entry was canceled by the Commissioner of the General Land Office as a result of the contest initiated by Henry A. Schroeder. On February 18, 1911, Henry A. Schroeder filed homestead application 05773, for the above described lands, accompanying the same with a water right application in duplicate at the \$22 rate for building, and the 1909 and 1910 installments of the building charges as evidenced by receipt No. 750177. It appears that the building charges for land within this project have been raised to \$30 per acre.

From a decision of the Commissioner of the General Land Office, dated April 14, 1911, requiring claimant to pay the construction charges at the rate of \$30 per acre, this appeal is prosecuted to the Department.

The only question presented upon this appeal is whether or not a successful contestant of an entry within a reclamation project is entitled to the rate obtaining at the time the original entry was made, or is only entitled to the rate obtaining at the time he applies to enter the land under his preference right of entry. At the time Miller's entry was canceled it was not subject to cancellation for failure to pay water right or construction charges. The regulations of May 31, 1910 (38 L. D., 620), Sec. 21, provide:

All persons holding land in homestead entries made under the reclamation act must, in addition to paying the water right charges, reclaim at least one-half of



the total irrigable area of their entries, as finally adjusted for agricultural purposes, and reside upon, cultivate, and improve the land embraced in their entries for not less than the period required by the homestead laws. Any failure to make any two payments when due or to reclaim the lands as above indicated, or any failure to comply with the requirements of the homestead laws and the reclamation act to residence, cultivation and improvement, will render their entries subject to cancellation and the money already paid by them subject to forfeiture whether they have filed water right applications or not.

It is contended in the appeal that the present entryman in the exercise of his preference right obtained by the successful contest of Miller's entry should be subrogated to all the rights of Miller and be credited with the payments made by him as well as receiving water at the rate obtaining at the time the original entry was made.

Section 2 of the act of May 14, 1880 (21 Stat., 140-141), provides that:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption homestead or timber culture entry he should be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed a period of thirty days from date of such notice to enter said land.

It has been held by the Department that the right given under this statute is in the nature of a reward to an informer but it can not be construed to give him any pecuniary right as contended for in this appeal. The entryman in this case is entitled to a period of thirty days from notice of the cancellation of said entry within which to apply to enter this land but the payments made by the former entryman can not be credited to him, nor is he entitled to the lower rate per acre for building charges, but must pay the charges obtaining at the time his application to make entry is filed.

The decision appealed from is correct and the same is accordingly hereby affirmed.

### LOOMIS S. CULL.

*Decided January 29, 1912.*

#### FINAL PROOF NOTICE—REPUBLICATION—COSTS.

The cost of republication of notice of intention to submit final proof must be paid by the register where the defect necessitating republication might have been avoided by proper diligence on his part.

*ADAMS, First Assistant Secretary:*

Loomis S. Cull, register of the United States land office at Rapid City, South Dakota, has appealed to the Department from the decisions of the Commissioner of the General Land Office of April 25, 1911, and June 13, 1911, holding him responsible for payment for

republication of final proof notice upon homestead entry 017368, made June 24, 1909, by Joseph F. Cotter, for the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 22, and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 27, T. 6 N., R. 12 E., B. H. M., Rapid City, South Dakota, land district.

Such republication became necessary because of a misdescription of the land embraced in the entry. The error consisted in describing the tract in Sec. 22 as the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  instead of W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ . The error first appears in the notice of intention to make proof, filed by Cotter.

In departmental instructions of August 11, 1909 (38 L. D., 131, 135), it is said:

Thirteenth. The law imposes upon registers the duty of procuring the publication of proper final-proof notices, and charges the claimant with no obligation in that behalf, except that he shall bear and pay the cost of such publication. Registers should accordingly exercise the utmost care in the examination of such notices and in the comparison thereof with the records of their offices, to the end that they may not go to the printer containing any erroneous description of the entered land, or designating an officer not authorized to receive the proof, or that they shall not be for any other reason insufficient. It is equally important that a notice correct in all of these particulars shall not be published in a newspaper manifestly disqualified as a means of publication and clearly incapable of bringing the notice to the attention of the people dwelling in the vicinity of the lands to which it relates.

Neglect of the duty above defined, resulting in a requirement of republication, should not visit its penalty upon the claimant. In all such cases, therefore, the register by whom the publication was procured will be required to effect the necessary republication at his own proper expense. If an error is committed by the printer of the paper in which the notice appears, the register may require such printer to correct his error by publishing the notice anew for the necessary length of time, and for his refusal to do so may decline to designate his said paper as an agency of notice in cases thereafter arising.

The contention made upon this appeal that the above quoted instructions are without authority of law has been carefully considered and no reason is found to change such instructions.

The record is in possession of the register and he should see that the descriptions are correct before directing publication.

In this appeal it is said:

That in reason the register would have the same right to require the clerk (making the mistake) to reimburse him for such fees as he might have to pay for republication of notices as the Department has to require such payments to be made by the register.

No such question is before the Department in this case, but, if such question is presented to the land department showing the clerk or person in Government employ responsible for the error, it will have careful consideration.

The decision appealed from is affirmed.

**KNIGHT v. HEIRS OF KNIGHT.**

Petition for exercise of supervisory authority to reconsider departmental decisions of November 21, 1910, 39 L. D., 362, and, on review, February 6, 1911, 39 L. D., 491, denied by Assistant Secretary Thompson, February 2, 1912.

**LEROY MOORE.**

*Decided February 5, 1912.*

**SOLDIERS' ADDITIONAL—HONORABLE DISCHARGE—PREVIOUS DESERTION.**

The right of an enlisted man who was honorably discharged to an additional entry under section 2306 of the Revised Statutes is not affected by the fact that he deserted from a prior enlistment.

**WITHDRAWAL—CLAIM OR REPORT OF COAL VALUE.**

A withdrawal of lands for coal classification constitutes a claim or report of coal value within the meaning of the act of March 3, 1909.

**WITHDRAWAL—SOLDIERS' ADDITIONAL APPLICATION—ACT OF MARCH 3, 1909.**

A withdrawal of lands for coal classification, subject to the provisions of the acts of June 22, and 25, 1910, does not defeat a pending application to locate a soldiers' additional right, presented prior to June 22, 1910, or bar a right under the act of March 3, 1909, to take a limited patent for the land, where the application was filed in good faith prior to any classification, claim, or report that the land is valuable coal land.

◦ **ADAMS, *First Assistant Secretary*:**

Appeal is filed by Leroy Moore from decision of February 13, 1911, of the Commissioner of the General Land Office, holding for rejection said Moore's application filed November 19, 1909, under section 2306, Revised Statutes, as assignee of George C. Ward, to make entry of the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 15, T. 35 N., R. 70 W., Douglas, Wyoming, land district; containing 40 acres, based upon said Ward's alleged military service for more than ninety days during the War of the Rebellion and honorable discharge therefrom and his homestead entry made November 19, 1869, of the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 31, T. 6 N., R. 27 W., and the S.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 36, T. 6 N., R. 28 W., in the Clarksville, Arkansas, land district, containing 131.38 acres, canceled on relinquishment, April 5, 1875.

Said lands so applied for were withdrawn June 3, 1910, from coal filing or entry, and are now included in coal land withdrawal under Executive order of July 13, 1910.

The record shows that the Adjutant General of the War Department reported herein, as to the alleged service of said Ward, that he first enlisted for nine months and was mustered on January 22, 1863, in Company K, 2nd Nebraska Cavalry, deserted therefrom July 17, 1863, and on October 28, 1863, was mustered into Company I, 6th Illinois Cavalry, for three years, from which organization also he

deserted April 20, 1864, and on May 30, 1864, enlisted in Company C, 1st Missouri Cavalry, and served therein and in Company A of that regiment, to which transferred, to June 12, 1865, when discharged; and that said enlistments in Company I, 6th Illinois Cavalry, and in Company C, 1st Missouri Cavalry, were in violation of the 22nd, now 50th, Article of War.

The Commissioner held in the decision appealed from that the same conclusion should be reached in this case as in the case of Clarke I. Wyman (38 L. D., 164), in which the Department held that no rights accrue, under the statutes relative to soldiers' additional homestead rights, from military service where the soldier deserted after the enlistment following discharge for such reenlistment from a prior service; the Commissioner holding also that this application can not be considered as such entry as would except the lands applied for from the operation of said coal withdrawal, citing Thomas A. Cummings (39 L. D., 93).

This case is essentially different from that of Wyman, cited, and a different rule applies. In Wyman's case, the final separation of the soldier from the service was by desertion. In the present case, Ward's final separation from service was by regular discharge. In such case, the character of the discharge is not affected by the fact of the soldier's desertion from prior service and his voidable reenlistment under which such discharge was given, and he is not by reason of such desertion and voidable reenlistment disqualified as to his soldiers' additional homestead rights under the statute. Natalbany Lumber Company, Ltd. (40 L. D., 225).

Said withdrawal order of July 13, 1910, provided that the withdrawals thereby made shall be subject to all the provisions, limitations, exceptions and conditions contained in the act of June 25, 1910 (36 Stat., 847), and also to those contained in the act of June 22, 1910 (36 Stat., 583). In view of the limitations of the acts of June 22 and 25, 1910, this application could not have been respected had it been filed subsequently to said withdrawal; but the material fact in this case is that when the application was filed, November 19, 1909, the lands had not been withdrawn, classified, or otherwise claimed or reported as being valuable for coal, and for aught that is shown in the record now before the Department, the location was presented in good faith; and subsequent withdrawal of the land as affecting this application is only material in so far as such withdrawal may be considered as amounting to a claim or report of coal value, and as thus reckoned the case falls clearly within the provisions of the act of March 3, 1909, whereby it was provided that "any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal,

may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same."

Should, therefore, Moore elect to receive a limited patent under the act of March 3, 1909, his application may be considered; otherwise his application will stand rejected.

The decision appealed from is accordingly reversed, and the record remanded for further proceedings not inconsistent with this decision.

This decision is in lieu of the decision rendered in this case bearing date January 4, 1912, which is hereby recalled and vacated.

### DESERET IRRIGATION CO. ET AL. v. SEVIER RIVER LAND AND WATER CO.

*Decided February 5, 1912.*

#### RIGHT OF WAY—APPLICATION IN CONFLICT WITH APPROVED RIGHT.

The mere fact of an outstanding approved right of way will not prevent the approval of a conflicting application for right of way; but in such case the conflict should be given proper weight in determining whether approval should be given to the later application, especially where the previous right of way had been actually utilized.

#### ADAMS, *First Assistant Secretary:*

This is the appeal of the Deseret Irrigation Company, the Melville Irrigation Company, and the Oasis Land and Irrigation Company, hereinafter designated the Allied Companies, from a decision of the Commissioner of the General Land Office, June 15, 1910, dismissing their joint protest against the application of the Sevier River Land and Water Company, hereinafter designated the Dover Company, for right of way under the provisions of the act of March 3, 1891 (26 Stat., 1095), for a reservoir site along the Sevier River and located in the SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , Sec. 21, T. 17 S., R. 1 W., Salt Lake City land district, Utah, and denying said Allied Companies' application, filed in the district land office June 17, 1909, under the same act, for an enlargement of what is known as the Sevier Bridge Reservoir Site, which application contemplates the building of a dam 80 feet high, located on the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , Sec. 1, T. 17 S., R. 2 W., within the same land district.

It appears that on June 29, 1906, the Secretary of the Interior approved a map filed by the Deseret Irrigation Company under the provisions of said act of March 3, 1891, in connection with its application for right of way for a reservoir along the Sevier River. Ac-

ording to this map the dam in said reservoir was to be 60 feet high and located in the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 1, T. 17 S., R. 2 W., and the reservoir was to extend up the river to a point in the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , Sec. 21, T. 17 S., R. 1 W., such point being, according to said map, the southernmost extremity of the proposed reservoir.

The Allied Companies succeeded to all rights under this approval.

April 4, 1908, Alexander E. Winters, J. A. Faust and A. T. Saunders filed in the district land office, under the provisions of said act of March 3, 1891, an application for right of way for a reservoir site along the Sevier River. According to the map so filed the dam is to be located apparently just below the southernmost point of the said approved reservoir site of the Deseret Irrigation Company, as indicated by that company's said approved map, and upon the SW.  $\frac{1}{4}$  of Sec. 21, T. 17 S., R. 1 W., as above stated. The site of this proposed reservoir is substantially the same as that of a reservoir shown on a map which had theretofore and on May 8, 1893, been approved to the Leamington Land and Water Company, under the same act, which right of way was then outstanding, but which was subsequently relinquished to the United States. The Dover Company has succeeded to whatever rights may have been acquired by the filing of the Winters-Faust-Saunders application.

The protest of the Allied Companies is put upon several grounds. It is alleged that said companies are the owners of extensive and valuable water rights upon the Sevier River, by virtue of appropriations in the year 1892 covering all of the then unappropriated waters of said river; that upon the approval of the application of the Deseret Irrigation Company for said reservoir site that company began the construction of a dam, perfecting plans to immediately complete it to a height of 66 feet for the impounding of waters in said reservoir to the height of 60 feet, which has since been done and the waters so appropriated put to a beneficial use. That even then that company contemplated increasing the height of said dam beyond 66 feet and the consequent extension of its reservoir over such lands as would necessarily be covered by such height of dam as might be thereafter attained; that said dam was completed to a height of 66 feet and that a spillway was constructed the bottom of which is 60 feet above the bed of the river; that the Dover Company has no valid appropriation of the waters of said river, no lands to irrigate, and no scheme of irrigation; that said company knew, and its predecessors in interest knew, of the intentions of the Deseret Irrigation Company and of the Allied Companies with reference to its dam as constructed and as contemplated and knew that such dam as actually constructed would back up and had backed up the waters of said reservoir upon the proposed dam site of the Dover Company,

and that therefore the application of Winters *et al.* was made and is still prosecuted in bad faith.

Answering this protest, the Dover Company denies that upon the presentation of the application for right of way it, or its predecessors in interest, knew of the plans of the Allied Companies to increase the height of their dam, or the capacity and scope of their reservoir; denies that said Allied Companies are the owners of the unappropriated waters of said river; shows that the Dover Company's proposed dam site is not within the area covered by the map approved to the Deseret Irrigation Company; that it has large interests in lands within its proposed irrigation system; and *prima facie* that it is the owner of sufficient water rights to put such scheme of irrigation into effect.

As matter of fact, while the record discloses that the proposed dam site of the Dover Company is not within the contour lines of the reservoir right of way approved to the Deseret Irrigation Company it also discloses a wide divergence of opinion upon the question as to what extent the waters of such reservoir, taking into consideration the height of the dam already constructed by said company, will flood the proposed right of way of the Dover Company.

It is without doubt true that when the waters of such reservoir reach a height on said dam of 60 feet, corresponding to the height of the spillway thereon, such waters will flood a considerable portion of the proposed Dover reservoir. It is also undeniably true, that if the pending application of the Allied Companies to increase the height of this dam to 80 feet be allowed, the waters impounded in their reservoir would cover such area of the proposed Dover reservoir as to totally destroy the availability of the proposed Dover reservoir dam site.

To a better understanding of the situation it is necessary to state here that the survey and filing, the basis of the Dover Company's application, are prior in point of time to the application of the Allied Companies for an enlargement of their reservoir site, and upon this priority the decision of the Commissioner of the General Land Office, from which this appeal is taken, is based, the Commissioner finding that the application of the Dover Company was made in good faith and that *prima facie* ownership of water rights had been shown, the case being determined by the Commissioner upon the single question of priority of application.

A motion has been filed by the Dover Company to dismiss the appeal of the Allied Companies upon the ground that it is filed out of time and grossly violative of the Rules of Practice, without reason. Upon this motion it will be enough to say that because of the large interest involved, because the United States is in truth and in fact

a party in interest in matters of this sort, and especially because of certain agreements and correspondence between the litigants, both before and after the decision of the Commissioner of the General Land Office was rendered, looking to a compromise of these interests and adjustment of equities, said motion will not receive further consideration and the case will be disposed of on its merits.

In the argument of this case numerous questions are raised: (1) as to the extent of the right of way carried by the approval given to the Deseret Irrigation Company's application, June 29, 1906; (2) whether in law and in fact the Dover Company's application conflicts therewith; (3) whether the approval to the Leamington Land and Water Company constitutes a bar to the approval of the Dover Company's application; and (4) whether, under the entire showing, this Department should not give approval to the application for the enlargement of the Sevier Bridge site in preference to the prior Dover Company's application.

In disposing of these contentions it is sufficient to say that, other considerations being favorable, the mere fact of an outstanding approved right of way would not prevent this Department from giving approval to a conflicting application for right of way. The conflict, however, might and should be given proper weight in determining whether approval should be given to a later application covering a portion of the same ground, especially where the previous right of way had been actually utilized.

It may not be successfully disputed that the Allied Companies have proceeded diligently and in the utmost good faith under the approval of their right of way and have a valuable plant in active and beneficial operation under the approval heretofore given to the Deseret Company, which plant has cost thousands of dollars for its installment and maintenance, and upon its continuation and enlargement a large number of persons are dependent for water for domestic and irrigation uses. It is satisfactorily shown that an enlargement of the plant is necessary; whether or not it was contemplated in the first instance is not material. Such enlargement is surely now necessary to enable the Allied Companies to extend their scheme of irrigation so as to utilize all of the water appropriated by them, and make it available upon land in the vicinity and thus serve the very beneficent purpose contemplated by the statute under which its existing right of way was granted, and is being held and used. On the other hand, the Dover Company has expended very little money, and it would seem, therefore, inequitable to allow it, under the circumstances of this case, to stand in the way of the enlargement of the plant already constructed.

It is thought, further, that there is an additional circumstance connected with this litigation which, for the purposes of administra-



tion, should be given consideration. On June 25, 1910, which was after both applications in question had been filed, a contract was entered into between certain of the Allied Companies of the one part and the Sevier Land and Water Company of the other part, which was intended to adjust the conflicting interests of the parties. Without going into the details of this contract, and without expressing any opinion as to its legal effect, it is certainly true that so far as the Sevier Land and Water Company is concerned it was to operate as an agreement to abandon its application. There is some suggestion of an attempted repudiation of this contract by the Allied Companies upon the ground that it was not legally executed, and some complaint on the part of the Dover Company that the Allied Companies have refused to enter into a working agreement thereunder, but it is said on behalf of the Dover Company that this contract is still in force and that all questions as to its legality and the rights of the Dover Company thereunder will at the proper time be litigated in the courts of Utah. Under these circumstances the Department will leave this controversy to the courts. These compromise proceedings were, however, directed to one purpose, namely, the enlargement of the existing dam owned by the Allied Companies. That being so the Dover Company would seem to be in no position to question action which will admit of carrying out the proposed compromise.

The decision appealed from is reversed and the case is remanded with direction to reject the application of the Dover Company and to consider and report in regular course to the Department as to the application of the Allied Companies, upon its merits.

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#### L. W. LOWELL ET AL.

Motion for rehearing of departmental decision of November 29, 1911, 40 L. D., 303, denied by Assistant Secretary Thompson, February 10, 1912.

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#### LITCH v. SCOTT.

*Decided February 12, 1912.*

#### HOMESTEAD—RIGHT OF ENTRYMAN TO REMOVE SAND AND GRAVEL.

A homestead entryman does not have the right to remove sand and gravel from the land embraced in his unperfected entry for the purpose of sale; but the fact that he may have trespassed in that respect does not of itself necessarily invalidate the entry.

THOMPSON, *Assistant Secretary:*

This is an appeal by Harry L. Scott from the decision of the Commissioner of the General Land Office, December 20, 1910, reversing the recommendation of the register and receiver and holding for

cancellation his homestead entry No. 06337, filed March 16, 1909, at Sterling, Colorado, for the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 33, T. 8 N., R. 52 W., upon the contest of Abraham L. Litch.

The contest affidavit filed September 14, 1909, charged:

Harry L. Scott did not file on said land for the purpose of making said land a home; that the said land was filed on by said Scott for speculative purposes, that said land is not agricultural in character; that said land is chiefly valuable for mineral purposes in this to wit that said land is entirely in the bed of the South Platte River, and is valuable only for sand and gravel for building purposes; that the said Harry L. Scott falsely swore in his application that said land had no gravel on the same, when in truth and in fact said land is almost entirely sand and gravel, and said Scott is selling gravel continuously from said land.

Service of notice thereunder was had December 7, 1909, and a hearing held February 25, 1910. June 9, 1910, the register and receiver rendered their decision recommending that the contest be dismissed. They found that the entryman had built a house, put down a well, broke two acres of ground, had paid \$40 upon a contract for the breaking of the balance of the land and had purchased \$150 worth of fruit trees for planting and that the entryman had resided upon the land continuously from May, 1909, up to the time of hearing. From those facts, they concluded that the claimant had filed upon the land for the purpose of making it his home. They further found as follows:

There is no evidence that claimant filed upon the land for speculative purposes, unless it is sought to be shown that by the selling of sand and gravel from his land, is evidence that the land was taken by him for speculation. If an entryman in good faith, files upon a piece of land for a homestead, and the same is more valuable for agriculture than it is for other purposes, that should the same contain sand, gravel or stone, that the same could be used or sold by the claimant, provided he used the land for a home, and improved the same, and cultivated the land.

The entryman submitted commutation proof July 26, 1910, against which Litch filed a protest which was denied by the register and receiver, August 31, 1910, upon the ground that it simply amounted to a request for a new trial without setting forth any new evidence and that it raised the same questions as had been involved in the contest. Litch appealed from this action to the Commissioner. The proof was also protested by the Chief of Field Division and upon November 4, 1910, a special agent made an adverse report, charging:

1. That the entryman has failed to reside on the land claimed by him as required by law.
2. That the entryman has failed to cultivate and improve the land.
3. That the entryman did not make the entry in good faith for the purpose of acquiring a home but because of the commercial value of the sand within its boundaries.

No action has been taken by the Commissioner upon Litch's protest against the commutation proof or the special agent's report.

In his decision of December 20, 1910, the Commissioner, after finding that the question as to the mineral character of the land was foreclosed by the decision of the Department in *Zimmerman v. Brunson* (39 L. D., 310), based his judgment of cancellation on the following ground:

This office believes that entryman did not file upon the land in good faith for the purpose of making a home thereon, but rather for the purpose of utilizing the deposits of sand and gravel, and the fact that he has sold large quantities of the same fortifies the belief, especially in the absence of any actual cultivation, and the fact that the land appears never to have been considered valuable or desirable for its agricultural properties, but has for years been a favorite resort of the builders doing business in Sterling for its gravel which was easily accessible and of a size peculiarly adapted for cement work.

The Department must express its dissent to the opinion apparently held by the register and receiver as to the right of the entryman to remove sand and gravel from the land embraced in his entry for the purpose of sale. The situation is somewhat analogous to that of an unperfected homestead entry containing timber. As to this, the Supreme Court of the United States in *Shiver v. United States* (159 U. S., 491) held:

Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which entry is in all respects regular, he may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and perhaps may exchange such timber for lumber to be devoted to the same purposes; but he can not sell the timber for money, except so far as it may have been cut for the purpose of cultivation.

In the present case, it does not appear that the removal of the sand or gravel had any connection with the cultivation of the land and it was removed solely for the purpose of sale. Some attempt was made to show that the places where the sand and gravel were removed were later refilled by the action of the river; that is, that it was in reality a moving stream of sand. There is also some showing to the effect that the new sand and gravel so deposited is inferior in quality to that removed. The record fails to show how much sand and gravel had been removed or its value; or whether the removal materially damaged the land or not.

It is apparent that the sole question now before the Department is whether the material allegations of Litch's contest affidavit filed September 14, 1909, were sustained. As to this point, the Department concurs with the decision of the register and receiver. The land apparently lies partly in the channel of the South Platte River which contains several so-called islands embracing about 27 acres of the total 40 acres. Of the 27 acres, it seems that about 20, ac-

ording to the present record, are susceptible of cultivation. The entry was but eleven months old at the time of the hearing and the actions of the entryman up to the date of the hearing can not be held to be indicative of bad faith. It is true, that prior to his filing upon the land and subsequent thereto, sand and gravel were removed from the land and hauled to the town of Sterling and used in connection with building purposes and the laying of cement sidewalks, &c. The fact that the entryman may have trespassed in that respect does not necessarily invalidate his entry.

The decision of the Commissioner holding the entry and proof for cancellation is accordingly reversed without prejudice to his further proper action upon the appeal of Litch from the rejection of his protest against the commutation proof and upon the adverse report of the special agent.

### SAN CARLOS RESERVOIR SITE.

*Decided February 17, 1912.*

#### RIGHT OF WAY THROUGH CANYON—RAILROAD AND RESERVOIR SITE.

Application for railroad right of way through a narrow canyon in an Indian reservation, which is the most feasible site for a reservoir for irrigation of lands in the vicinity, rejected for the reasons that construction of the road as contemplated would prevent use of the canyon for reservoir purposes and that it is practicable to construct the railroad at a higher grade without interfering with the reservoir site.

#### APPLICATION FOR RESERVOIR SITE—SHOWING TO SUPPORT SAME.

An application for a reservoir site should be accompanied by a showing reasonably demonstrating the feasibility of the contemplated irrigation scheme and the capability of the applicant to carry the project to a successful conclusion.

#### ADAMS, *First Assistant Secretary:*

The so-called San Carlos Reservoir Site is located on the Gila River in the White Mountain, or San Carlos, Indian Reservation in Gila county, Arizona, near the junction of the San Carlos and Gila rivers. The Gila River at this point traverses spurs of the Pinal range of mountains and for a distance of about thirty miles below the proposed reservoir site flows in a narrow "box" canyon. Explorations on the Gila by hydrographers of the Geological Survey, in 1899, resulted in the location of what was believed to be a suitable site for a dam and reservoir for the purpose of storing the waters of the Gila River for irrigation of lands in its valley, including part of the lands occupied by Pima and other Indians some miles below.

In 1905 a Board of Engineers of the United States Reclamation Service examined the site with a view of determining whether or not it should be utilized for a reclamation project under the act of

June 17, 1902 (32 Stat., 388), and recommended that the project be not undertaken by the Reclamation Service.

April 13, 1906, the Arizona Eastern Railroad Company filed an application for right of way through the San Carlos Indian Reservation and through the reservoir site in question under the provisions of the act of March 2, 1899 (30 Stat., 990), which application was approved by this Department. No construction has been made under this approval and the period within which such construction should have been made has already expired. August 3, 1909, the company filed a new application for a right of way through said reservation and reservoir site which application is now up for consideration.

December 17, 1909, J. M. Jamison filed application for right of way for a reservoir site under the provisions of the act of March 3, 1891 (26 Stat., 1095), as amended by the act of May 11, 1898 (30 Stat., 404), which application covers the so-called San Carlos Reservoir Site, conflicts with the pending application for right of way of the Arizona Eastern Railroad Company, and also covers a part of the constructed line of the Arizona Eastern Railroad Company which leaves the main line of the Southern Pacific Railroad Company at Bowie and extends in a northwesterly direction through the reservoir site and terminates at Miami, a town located in the Globe mining district.

The Casa Grande Valley Water Users' Association, a corporation formed under the laws of the Territory of Arizona and composed of certain land owners whose lands would be subject to irrigation from the reservoir site, and the Gila River Water Company, an Arizona corporation, have also filed applications for rights of way for said reservoir site under the provisions of the acts of 1891 and 1898, *supra*.

Various resolutions adopted by the Boards of Trade of cities and towns in the vicinity, and by the inhabitants or land owners, of the Gila Valley have been filed in the Department all urging the rejection of the railroad right of way application and the preservation of the reservoir site for development and use in the irrigation of arid lands in the Gila Valley. The several applicants for the right to use the reservoir site for irrigation purposes appear to be at cross-purposes with one another but all unite in opposing the railroad application, urging that the construction of a railroad upon the level proposed in said application will forever defeat and prevent the use of this reservoir site for the reclamation of arid lands. The United States is especially interested because of its guardianship over the Pima and other tribes of Indians domiciled on lands which might be irrigated in part, lying below the proposed dam.

Because of the large and varied interests involved I made a personal inspection of the premises in company with Director F. H. Newell, Reclamation Service, Mr. W. H. Rosecrans, consulting en-

gineer in irrigation matters connected with the Indian Service, James D. Schuyler, consulting engineer, and other engineers and representatives of interested parties, and also accorded a public hearing on the several pending applications, at which all parties were represented and participated in oral argument, and upon the entire record thus supplemented the matter has received careful consideration.

It is contended on behalf of the railroad company that the refusal of its application will result in the abandonment of a proposed short transcontinental line of lower grade than any other existing line, the construction of which would afford the shippers lower rates and more expeditious handling of freight between the East and West, and, incidentally, through the construction of branch lines, supply the Salt River Valley, now irrigable under the Roosevelt Dam, the Globe mining district, and southwestern Colorado with cheap transportation facilities, cheap fuel, and easy outlet for crops, minerals, and other commodities.

It is contended by the reservoir applicants that a "high-line" location of the railroad so placed as to avoid any interference with the utilization of the reservoir site is entirely feasible and can be constructed and operated at a comparatively small increase in cost over a railroad upon the right of way applied for. Such a "high-line" has been surveyed by an engineer employed by reservoir applicants but the findings of this engineer are controverted by the engineers of the company who contend that the additional cost of construction and operating the so-called high-line will be prohibitive, and state that unless its application for right of way as applied for is approved, the railroad will be compelled to abandon its purpose to construct through Gila Canyon.

A number of examinations of the proposed reservoir and dam site have been made by engineers in the Government service and by engineers in the employ of private parties, and their reports as to the feasibility of the utilization of the site, the cost of construction, the available supply of water for storage therein, and the possibility of disposing of the accumulation of silt carried in the waters of the Gila, differ quite materially. The reports also differ widely as to the amount of land which could be reclaimed through the construction of the proposed dam, but there is no doubt that there is a sufficient supply of water in the Gila available for storage and a sufficient area of fertile arid lands susceptible of irrigation from the reservoir to justify the utilization of the site, if it be determined that a suitable foundation is present for the construction of a high dam which will create a reservoir of sufficient capacity to impound the flood waters of the Gila, and if a method of disposing of the silt carried in the water can be successfully worked out and the cost is not prohibitive. The project is, however, of such magnitude and

involves such problems as to require that any one undertaking the construction and utilization of the reservoir be assured of ample funds to carry the project to a successful conclusion. In the interest of the land owners, who must ultimately bear the burden of expense involved in the construction of any such project, the financial and engineering features of the project should be carefully worked out and assured before this Department will be warranted in granting the use of the site.

Reservoir sites, wherein it is feasible or may be practicable, to store the waters of the Gila for the irrigation of arid lands in its valley, are not numerous, and it seems to be the opinion of many engineers of high standing that the San Carlos site is the best adapted to the purpose. A railroad constructed through the reservoir site upon the grade applied for by the Arizona Eastern would practically destroy the future use of this site for irrigation, and the Department is by no means convinced that the additional cost of building and maintaining the railroad on a higher level so as to avoid interference with the reservoir site would make the construction of the railroad impracticable. Certainly, the railroad should not be permitted to destroy the possibilities incident to the irrigation of the arid lands in the valley, including Indian lands, and the resulting agricultural prosperity of that portion of Arizona, from which the railroad itself will ultimately derive a substantial benefit, especially where a change in the location of its line is reasonably possible.

Accordingly, and in view of the foregoing, the application for right of way filed by the Arizona Eastern Railroad Company, August 3, 1909, is hereby rejected because of its interference with the San Carlos Reservoir Site, but this rejection will not preclude the railroad company from presenting another application for right of way for its road along the Gila at such an elevation as will avoid interference with the reservoir site.

As hereinbefore indicated, there is no unanimity among the applicants for the right to use the reservoir site as the basis for an irrigation project. Jamison and the Gila River Water Company approach the proposition as promoters or as persons whose interest lies in the profit to be derived from the sale of water rights to the owners of land under the project. The Water Users' Associations mentioned, apparently composed wholly of land owners, desire to secure an adequate and permanent supply of water for the irrigation of their arid lands, do not expect to derive a profit from the sale of water rights but expect to reap a benefit from the water supply and the increased value of their lands when reclaimed from their arid condition. None of said applicants have, however, satisfactorily demonstrated to this Department that they have made such investigation as demonstrates the feasibility of their plans either from an engineer-

ing or financial standpoint, nor that they control sufficient funds to successfully construct and operate the project if the right of way were granted.

Upon the present record, therefore, the several applications for rights of way for the reservoir site are accordingly hereby rejected without prejudice to the right of said applicants, or any one of them, to hereafter submit a new application, supported by such showing as shall reasonably demonstrate the feasibility of the scheme and the capability of the applicants to carry the project to a successful conclusion.

### RECLAMATION—CARLSBAD PROJECT—CHARGES.

#### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

*Washington, February 17, 1912.*

Whereas, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), works for irrigation have been constructed or are in contemplation at a cost of approximately \$900,000 for the irrigation and reclamation of about 20,000 acres for the Carlsbad Project, New Mexico, and said cost must be repaid by the water users as required by said act in not exceeding ten annual instalments divided into a building charge for the building of the works and a charge for the operation and maintenance thereof, and

Whereas, public notice of the said charges, the time and manner of payment has been given, the said charges being fixed so as to recover the cost of building, operating and maintaining the project as then estimated, and

Whereas, most of the water-right applications for lands under the said project have been delinquent by reason of failure to make payment of two instalments of building charges as required by public notice heretofore issued, and

Whereas, the order issued March 13, 1911, under the provisions of the act of Congress approved February 13, 1911 (36 Stat., 902), provides for a stay of proceedings looking to cancellation of entries or water-right applications for failure to make payment of the building charge, such stay of proceedings to become effective upon payment on or before March 31, 1911, of the charges for operation and maintenance for the year 1910, provided all prior charges for operation and maintenance are paid, and subject also to compliance with the provisions of a public notice to be issued which shall provide for an increased building charge to be determined after further investigation, and

Whereas, the water users have failed to make the payments as required by the public notice for reasons which, in many cases, have been unavoidable on their part, and it has been accordingly decided



to offer such opportunity as may be reasonable and possible under the terms of the said act of February 13, 1911, for the water users to secure easier terms of payment, and at the same time to recover for the reclamation fund, as required by the terms of the Reclamation Act, the cost as now estimated of the building, operation and maintenance of the irrigation works, including betterments and construction of necessary works in addition to those at first estimated:

Therefore, the following public notice is issued under the terms of section 4 of the Reclamation Act and of the said act of February 13, 1911, for the lands shown on farm-unit plats of—

T. 21 S., R. 26 E.,	approved	Dec. 14, 1907
T. 22 S., R. 26 E.,	“	“ 13, 1911
T. 21 S., R. 27 E.,	“	Nov. 1, 1909
T. 22 S., R. 27 E.,	“	Dec. 13, 1911
T. 22 S., R. 28 E.,	“	“ 13, 1911
T. 23 S., R. 27 E.,	“	“ 13, 1911
T. 23 S., R. 28 E.,	“	“ 13, 1911
T. 23 S., R. 29 E.,	“	Nov. 1, 1909
T. 24 S., R. 28 E.,	“	Dec. 13, 1911
T. 24 S., R. 29 E.,	“	“ 13, 1911

1. All applications for water rights heretofore filed under the terms of the public notices and orders heretofore issued which have complied with the terms of previous public notices and orders may be continued thereunder.

2. For all entries and water-right applications for which the entrymen or owners availed themselves of the stay of proceedings provided for by order of March 13, 1911, or who have failed to comply by payment and otherwise with the public notices and orders under which their water-right applications were made, it is hereby ordered that water-right application at a building charge of \$45 per acre of irrigable land may be made as amendatory to water-right applications heretofore filed or original water-right application at the same charge shall be made where none has been heretofore filed. The applications under this paragraph shall be subject to the public notices and orders heretofore issued, except as otherwise provided herein, and the said building charge of \$45 per acre shall be due and payable in ten graduated annual instalments, such portions of the annual instalments to be as follows:

First building charge payment	\$3.60	due	Dec. 1, 1912
Second	“	“	“ 1, 1913
Third	“	“	“ 1, 1914
Fourth	“	“	“ 1, 1915
Fifth	“	“	“ 1, 1916
Sixth	“	“	“ 1, 1917
Seventh	“	“	“ 1, 1918
Eighth	“	“	“ 1, 1919
Ninth	“	“	“ 1, 1920
Tenth	“	“	“ 1, 1921

3. Where water-right application at the building charge of \$45 per acre, as fixed in paragraph 2, is filed, any payments heretofore made on account of the building charge thereon and also a portion of each operation and maintenance charge heretofore paid at the rate of \$1.35 per acre to the extent of 35 cents per acre shall be credited on the first and subsequent building charge payments on the same tract. A portion of the amount of such credit shall be applied on each successive instalment until it shall be entirely absorbed, on the following basis: \$3.10 per acre to be applied on the first instalment, and the remainder on the following instalments.

4. For lands for which amendatory water-right applications shall be filed, as provided in paragraph 2 hereof, the portion of the instalment for operation and maintenance due on December 1, 1911, and to become due on December 1 of each year thereafter, until further notice, shall be \$1.00 per acre of irrigable land.

For lands which remain subject to the \$31 rate established by public notices heretofore issued the portion of the instalment for operation and maintenance due on December 1, 1911, shall be \$1.35 per acre; the portion to become due on December 1, 1912, and on December 1, of each year thereafter until further notice, shall be \$1.75 per acre of irrigable land.

No water will be furnished in any year until the portions for operation and maintenance of all instalments then due shall have been paid. Accordingly no water will be furnished in the irrigation season of 1912 for any lands unless the portion for operation and maintenance of the instalment due December 1, 1911, and for previous years, has been paid and in like manner no water will be furnished in any subsequent irrigation season unless payment has been made of the portions of instalments for operation and maintenance then due and unpaid.

5. Failure to comply with the terms of this and previous public notices and orders shall render the existing water-right applications subject to cancellation with the forfeiture of all rights thereunder and of all monies paid thereon as provided by the Reclamation Act.

6. Except as to the amount of the operation and maintenance charge, this public notice shall not be construed as affecting water-right applications for which payments are not in arrears more than one instalment.

7. A private landowner against whose water-right application there is no pending charge of noncompliance with the laws or regulations, or whose application is not subject to cancellation, may make written assignment of credits for payments made, in favor of a subsequent applicant for the same tract, and his grantee shall have the right to continue payment at the same building charge. Except as specifically provided in this notice, no benefit of a smaller charge than

that fixed in the public notice in force at the time of filing water-right applications shall accrue for any land except when the landowner holds written assignment made under the conditions herein stated.

8. The stay of proceedings granted by order of March 13, 1911, shall terminate on March 15, 1912.

SAMUEL ADAMS,  
*First Assistant Secretary of the Interior.*

## SALE AND USE OF TIMBER UPON THE UNRESERVED PUBLIC LANDS IN THE DISTRICT OF ALASKA.

### REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
*Washington, February 24, 1912.*

*To residents and others doing business in Alaska, registers and receivers, and special agents of the General Land Office:*

Section 11 of the act of May 14, 1898 (30 Stat., 414), provides:

SEC. 11. That the Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the District of Alaska, and may from time to time sell so much thereof as he may deem proper for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the District of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the District from year to year, and payments for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said District of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes.

2. *Limitation upon sales.*—Timber upon the public lands in Alaska will be sold only in such quantities as are actually needed and will be used from year to year in the District of Alaska, and not for export therefrom, and only to persons who are residents of Alaska and others engaged in business therein.

3. *Applications for purchase—Place to file—Contents.*—Applicants to purchase must file with the receiver of the United States land office for the district wherein the lands to be cut over are situated, on the form prescribed by the Commissioner of the General Land Office (Form 4-023), an application, duly witnessed by two witnesses, setting forth (a) the name or names, post-office address, resi-

dence, and business occupation of the applicants who apply to purchase timber; (b) the amount, in board feet or cord unit of measurement, of timber it is desired to purchase; (c) the place in Alaska where such timber is to be used, and the proposed use; (d) the necessity for taking said timber, and that the use contemplated will consume the whole thereof within two years from the date of authorization to cut, and that the entire amount applied for will be cut and prepared for removal from the ground within one year from the date of the said authorization; (e) a description, by reference to survey, or by natural boundaries and courses and distances, of the vacant, unoccupied, nonreserved Alaska public lands from which it is proposed to cut, sufficient to properly identify such land; (f) a statement that the applicants will pay a reasonable stumpage for said timber, or for the appraisal thereof, and that there is to said application attached a draft or post-office money order, drawn on a post office or a bank of that place within which the local United States land office is situated, payable to the above receiver of the local land office, in the sum of \$50, or, when the full stumpage value, at the minimum rate, of the material applied for is less than \$50, for the full stumpage value thereof, as an evidence of good faith, to be applied to the purchase price of said timber, or its appraisal cost if purchase is not made; (g) that no trees will be cut under said application other than those of the size and class of material necessary to furnish the amount of timber applied for; that the stumps will be cut so as to cause the least possible waste; that each tree cut will be used to a diameter in the top sufficiently small to prevent waste; that all lops, tops, and necessarily cut underbrush made in taking said timber will be piled in small, compact piles, or otherwise disposed of as required by the person making the appraisal, in a manner to prevent danger of forest fires.

4. *Action upon application, by receiver.*—Upon the first business day following the filing of such application, the receiver of the local land office (retaining the remittance attached) will mail said application to the special agent of the General Land Office designated as chief of the field division, including said district of Alaska, with a request that the truth of the application be inquired into and an appraisal of the timber made. Where such chief of division has designated a special agent near the land to make appraisements, the receiver will forward the application to said agent direct, giving due notice thereof to the chief of field division.

5. *Action upon application, by special agents.*—The special agent designated shall at once investigate as to the truth of said application, and thereupon go upon the lands therein described and estimate

and appraise the material applied for. If the said agent finds true the facts in said application recited, he will proceed as follows:

(a) Examine, and if necessary change, and properly mark the boundaries of the land described in the application; (b) determine the kind, estimate the quantity, and appraise the stumpage price of timber to be sold under said application; (c) prepare, in triplicate, a report addressed to the Commissioner of the General Land Office (Form 4-023a), transmitting therewith the original application, referring to said application and setting forth the agent's description of the land to be cut over, if other than that described in the application; the kind, quantity, and stumpage value of the material; that applicants accept such description of land in lieu of the description in the application (if in anywise different), as well as the kind, estimate, and price as fixed by the agent; that applicants will cut and prepare for removal from the ground the material applied for within one year from the date of the authorization to cut; that applicants have delivered to the said special agent post-office money orders or bank drafts or certified checks for said appraised amount, less the amount of the original deposit therefor, made payable to the receiver of the proper local land office; that said money orders, drafts, or checks shall not be held payment for said timber until same are converted into cash by said receiver, and finally paid by the office or bank upon which drawn; that the Commissioner of the General Land Office reserves the right to reject said sale and prevent further cutting under said application and report. The special agent will deliver one copy of said report to the applicant; on the other two copies he will require the applicant's signature under proper date and indorsement: "Within amounts and conditions hereby accepted."

6. *When cutting and removal may begin.*—As soon as the special agent shall have made the field investigation and appraisal, as hereinbefore provided, and shall have accepted said money order, draft, or certified check, and shall have secured the applicant's signature and indorsement, as above required, the applicant may commence taking timber under said application to purchase. If the special agent for any reason is unable to make the investigation and appraisal, as required, within 30 days after the filing of the application, he will, if he knows of no objection, give the applicant written permission (Form 4-023b) to enter upon the lands described in the application and commence cutting therefrom. In case of the failure on the part of the special agent to make an investigation before the cutting has been completed, the applicant may, after the expiration of six months from the date of the filing of the application and after the completion of the cutting, remove and use the material or dispose of it for the purpose intended after first remitting to the receiver

of the local land office a post-office money order, bank draft, or certified check, made payable to said receiver, for the unpaid balance of the purchase price of all the material applied for, based upon the minimum stumpage values as hereinafter designated: *Provided, however,* That where the application covers an area not exceeding 40 acres the applicant may remove and use the material as aforesaid upon compliance with all the conditions above stated, except that he need not await the expiration of said six months' period. In no case may an applicant enter upon the land described in his application and commence cutting without first securing permission from the special agent or chief of field division.

7. *Limitation upon rights acquired under permission to cut timber.*—The permission to cut shall not give the applicant the exclusive right to cut timber from the lands embraced in his application as against any person entitled to the free use of timber under section 11 of the act of May 14, 1898 (30 Stat., 414), unless the area described in the application is limited to 40 acres and the boundaries thereof are blazed or otherwise marked sufficiently to identify them.

8. *Appraisal—minimum price.*—No special agent or other officer shall in any event appraise any timber suitable for saw timber or mine timbers at less than the following minimum rates: \$1 per 1,000 feet b. m. for Sitka spruce, hemlock, and red cedar; \$2.50 per 1,000 feet b. m. for yellow cedar; nor any piling 50 feet or less in length up to a top diameter of 7 inches at less than one-half cent per linear foot; nor any piling between 50 or 80 feet in length up to a top diameter of 8 inches at less than three-fourths cent per linear foot; nor any piling over 80 feet in length up to a top diameter of 8 inches at less than 1 cent per linear foot; nor any shingle bolts or cooperage stock at less than 50 cents per cord; nor any wood suitable only for fuel or mine lagging at less than 25 cents per cord. Subject to such minimum price the agent will, in the absence of a competitive market, determine the stumpage value by deducting from the manufactured article price for like material the cost of manufacture plus a fair profit upon the time and capital required to manufacture.

9. *Disposition of moneys—Receipts.*—When an application accompanied by the remittance mentioned in section F of paragraph 3 is received by the receiver of public moneys, he will immediately issue and forward to the applicant the new form of receipt (4-131) for the amount transmitted. The receipt must contain a full description of the money order, bank draft, or certified check, with the words "Subject to collection." Such money orders, drafts, and checks must be immediately deposited in the receiver's depository for collection, to be placed to his official credit as "unearned fees and other trust funds." When the appraised amount mentioned in paragraph 5 is received,

the receiver will immediately issue an additional receipt therefor, with a similar notation as to the form of remittance and the words "subject to collection." This remittance must also be immediately deposited for collection, to be placed to the receiver's official credit as "unearned fees and other trust funds." When the receiver is notified by the Commissioner of the General Land Office that the sale is approved, he will immediately deposit the full amount to the credit of the Treasurer of the United States as "sales of timber, act of May 14, 1898," and report such amounts as a special in the monthly and quarterly accounts current, rendering a separate abstract of collection (Form 4-105) therefor. Further receipts will not issue for the amounts when they are reported collected by the depository, but the applicant will be notified that the amount has been collected and he is credited therewith.

10. *Examinations after cutting.*—At convenient times during cutting, or after any sale, the special agent will examine the lands cut over, and submit report as to compliance with the terms of the sale; or if cutting is being conducted in violation of the terms of sale, will immediately stop the cutting and report the matter for action.

11. *Limited free use by settlers, etc.*—Persons designated in the last sentence of section 11, act of May 14, 1898, may take in amount not exceeding a total of 30,000 feet b. m., or 60 cords, in any one calendar year, in saw logs, piling, cordwood, or other timber, the aggregate of either of which amount may be taken either in whole in any one of the above classes of timber, or in part in one kind and in part in another kind or kinds, and where a cord is the unit of measure it shall be estimated, in relation with saw timber, in the ratio of 500 feet b. m. per cord, free of charge and without application or previous permit, for their own actual needs for firewood, fencing, buildings, mining, prospecting, or domestic purposes, but not for sale or use by others. Where such persons are unable to take such timber in person, they may employ a servant or agent to cut and deliver the timber so taken. No person, servant, or agent shall in any calendar year take hereunder, either for himself or as agent for another or others, or through his servants or agents, in all more than 30,000 feet b. m. of timber or 60 cords of wood, as specified above. Attention is directed to the fact that the law extends the foregoing free use of timber to settlers, residents, individual miners, and prospectors only, and not to associations and corporations.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved, February 24, 1912.

SAMUEL ADAMS,  
*First Assistant Secretary.*

## APPENDIX.

AN ACT Prohibiting timber depredations on public lands and providing a penalty for violation thereof.

Whoever shall cut or cause or procure to be cut, or shall wantonly destroy or cause to be wantonly destroyed, any timber growing on the public lands of the United States, or whoever shall remove or cause to be removed any timber from said public lands, with intent to export or to dispose of the same; or whoever, being the owner, master, or consignee of any vessel, or the owner, director, or agent of any railroad, shall knowingly transport any timber so cut or removed from said lands, or lumber manufactured therefrom, shall be fined not more than \$1,000 or imprisoned not more than one year, or both. Nothing in this section shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States. And nothing in this section shall interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.

Section 49 of the penal code, approved March 4, 1909 (35 Stat., 1088), chapter 321.

The above act is applicable to the public lands in the Territory of Alaska.

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**STATE OF WASHINGTON v. MACK.**

Petition for the exercise of the supervisory power of the Secretary to review and vacate departmental decision of December 9, 1910, 39 L. D., 390, motion for review of which was denied May 26, 1911, 40 L. D., 116, denied by First Assistant Secretary Adams February 28, 1912.

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**RECLAMATION—UMATILLA PROJECT—CHARGES AND PAYMENTS.****PUBLIC NOTICE.**

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C., March 2, 1912.*

Whereas, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), works for irrigation have been constructed or are in contemplation for the irrigation and reclamation of lands under the Umatilla project, Oregon, and the cost thereof must be paid by the water users, as required by said act, in not exceeding ten annual instalments, and

Whereas, it has been decided to offer such opportunity as may be reasonable and possible under the terms of the act of February 13, 1911 (36 Stat., 902), for the water users to secure easier terms of payment, and at the same time recover for the Reclamation Fund, as required by the terms of the Reclamation Act the cost of building, operation and maintenance of the irrigation works as now estimated;



Now, therefore, the following public notice is issued under the terms of section 4 of the Reclamation Act and of the said act of February 13, 1911:

1. All applications for water rights heretofore filed under the terms of the public notices heretofore issued may be continued under the terms thereof, if the said public notices be fully complied with by payment or otherwise within two months from the date hereof.

2. For the purpose of avoiding the cancelation of entries and water-right applications for which the entrymen or owners shall have failed within two months from the date hereof, to comply by payment or otherwise with the public notices and orders under which their water-right applications were made, it is hereby ordered that water-right applications at the increased rates herein named may be made within two months from the date hereof as amendatory to water-right applications heretofore filed, and original entries and water-right applications shall be made at the new rates when none have been heretofore filed. The new rates shall apply also in cases where prior entries are canceled and new entries made without written assignment of credits for payments theretofore made. The portion of the charge on account of building the irrigation system shall be \$70 per acre of irrigable land, and shall be due and payable in not more than ten annual payments, as follows:

Instalments due (except as to first instalments for certain farm units, payable at time of entry, as shown in schedule).	First unit.		Second unit.		Third unit.		Fourth unit.	
	Now subject to entry or entered under Reclamation Act.	Other lands.	Now subject to entry or entered under Reclamation Act.	Other lands.	Now subject to entry or entered under Reclamation Act.	Other lands.	Now subject to entry or entered under Reclamation Act.	Other lands.
December 1, 1908.....	\$6.00	\$6.00						
December 1, 1909.....	6.00	6.00	<sup>2</sup> \$6.00	\$6.00				
December 1, 1910.....	2.00	2.00	2.00	2.00	<sup>2</sup> \$18.00	\$2.00		
March 1, 1912.....	3.50	3.50	3.50	3.50	2.00	3.00	<sup>2</sup> \$12.00	\$2.00
March 1, 1913.....	5.00	5.00	4.50	4.50	2.00	4.00	2.00	3.00
March 1, 1914.....	7.50	7.50	6.00	6.00	2.00	5.50	2.00	4.00
March 1, 1915.....	10.00	10.00	8.00	8.00	3.00	7.00	3.00	5.50
March 1, 1916.....	10.00	10.00	10.00	10.00	6.00	8.50	4.00	7.00
March 1, 1917.....	10.00	10.00	10.00	10.00	8.00	10.00	7.00	8.50
March 1, 1918.....	10.00	10.00	10.00	10.00	9.00	10.00	10.00	10.00
March 1, 1919.....			10.00	10.00	10.00	10.00	10.00	10.00
March 1, 1920.....					10.00	10.00	10.00	10.00
March 1, 1921.....							10.00	10.00
Total.....	70.00	70.00	70.00	70.00	70.00	70.00	70.00	70.00

<sup>1</sup> Includes portions of farm units described in special public notice for T. 4 N., R. 28 E., W. M., dated Jan. 6, 1910.

<sup>2</sup> Payment required at time of entry.

Except as to the amount of the building charge, and graduation of the instalments thereof, as herein provided, applications under this paragraph shall be subject to the public notices and orders heretofore issued, and the instalments shall be due and payable at the times set forth therein.

3. Where water-right application is filed for which the increased building charge fixed in paragraph 2 is applicable, any payments heretofore made on account of the building charges thereon, shall be credited on the first and subsequent building charges for the same tract.

4. Failure to comply with the terms of this and previous public notices and orders shall render existing homestead entries and water-right applications for public lands, or water-right applications for lands in private ownership, subject to cancelation, with the forfeiture of all rights thereunder, and of all moneys paid thereon, as provided by the Reclamation Act.

5. An entryman against whose entry there is no pending charge of noncompliance with the law or regulations, or whose entry is not subject to cancelation under the Reclamation Act, may relinquish his entry to the United States and assign in writing to a prospective entryman any credits he may have for payments made on his water-right application, and such assignee shall have the right to continue payment at the same building charge. A private land owner against whose water-right application there is no pending charge of noncompliance with the law or regulations, or whose water-right application is not subject to cancelation may in like manner make written assignment of credits for payments made, and his grantee shall have the right to continue payment at the same building charge. Except as specifically provided in this notice, no benefit of a smaller charge than that fixed in the public notice in force at the time of filing water-right application shall accrue for any land, except when the entryman or private land owner holds written assignment made under the conditions herein stated.

SAMUEL ADAMS,

*Acting Secretary of the Interior.*

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**RICHARD P. IRELAND.**

*Decided March 6, 1912.*

**PRACTICE—REPORT OF DIRECTOR OF GEOLOGICAL SURVEY.**

A report by the Director of the Geological Survey, based upon an examination by a field agent, concerning an application for reservoir site, may serve as a basis for a charge and order against the applicant to show cause why his application should not be rejected, but is not evidence upon which final action adverse to applicant may be taken without notice to him and opportunity to be heard.

**THOMPSON, Assistant Secretary:**

Richard P. Ireland appealed from decision of the Commissioner of the General Land Office of June 22, 1910, rejecting his applications for No Name Reservoir sites, No. 1, in Sec. 34, T. 4 S., and

No. 2 in Sec. 35, T. 8 S., both R. 89 W., 6th P. M., on surveyed and unsurveyed land in White River and Holy Cross National forests, Glenwood Springs, Colorado.

July 5, 1910, Ireland applied for these reservoir sites, No. 1 covering 10.6 acres, with a capacity of 90.8 acre feet, and No. 2 covering 37.5 acres, with a capacity of 752.6 acre feet, both under acts of March 3, 1891 (26 Stat., 1095), and of May 11, 1898 (30 Stat., 404), specifying the intended use of the reservoirs to be "for irrigation, domestic use and fish culture purposes."

January 23, 1911, the Commissioner referred the matter to the Forester and the Directors of the Geological Survey and of the Reclamation Service for report. March 15, 1911, the Reclamation Service reported that "approval of the application will not interfere with any contemplated project of the reclamation act." June 6, 1911, the Director of the Geological Survey reported:

A field examination indicates that the applicant desires these reservoirs for summer resort purposes and for fish culture, and the application, therefore, should not have been filed under the acts of March 3, 1891, and May 11, 1898. The small streams that drain into the reservoir are dry during the greater part of the year, and flood-water only is available for storage. No valuable water-power sites are involved, and there would probably be no objection to the granting of this application if filed under the act of February 15, 1901.

The Commissioner made reference to such conclusion of the Director of the Geological Survey, and held that the acts of 1891 and 1898 "do not provide for the purposes for which this application is filed," and rejected it. Ireland alleges error of the Commissioner in rejecting the application on the mere *ex parte* report of a field agent that applicant desires these reservoirs for summer resort and fish culture purposes, without opportunity to applicant to be heard; also—

*Fifth.* Because summary rulings of this kind made without notice and hearing after an honest effort on the part of applicants to comply with every rule and regulation of the department and every provision of the law of which they are able to advise themselves is destructive of the confidence and respect which citizens ought to have for the administration of the Land Department and are the source and cause of bitter feelings of dissatisfaction and a sense of injustice and wrong done by the Government to citizens seeking in good faith to comply with its requirements.

The Commissioner erred in crediting and taking final action on the report of the Director of the Geological Survey. Such report made to the Commissioner as to the intent and conduct of an applicant has no more force and effect than the report of a special agent of the General Land Office. It may be credited by the Commissioner as basis for a charge and order to show cause, but is not evidence upon which he can take final action. George T. Burns, 4 L. D., 62, 65; The Le Cocq Cases, 2 L. D., 784; John C. Miller, 28 L. D.,

45, 46. No one making a legal application, specifying a lawful purpose named in the law, should be denied, except on notice and opportunity to be heard.

The decision is reversed, and the Commissioner may rule applicant to show what particular lands are proposed to be irrigated from these reservoirs and what arrangements or contracts have been or are proposed to be made for use of the reservoir waters for irrigation purposes. On incoming of such showing the Commissioner will take such further proceeding, with or without a hearing, as the return may warrant.

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**SAMUEL B. BEATTY ET AL.**

*Decided March 6, 1912.*

**MINING CLAIM—PATENT EXPENDITURES—VALUE OF IMPROVEMENTS.**

In determining whether the requisite expenditure of \$500 in labor or improvements has been made upon a mining claim for which patent is asked, the proper test is whether the reasonable value of the work performed or improvements relied upon amounts to that sum. Proof of the actual amount paid or of the actual number of days spent in prosecution of such work is not conclusive.

*ADAMS, First Assistant Secretary:*

This is a motion for rehearing filed by Samuel B. Beatty, Joseph B. Fagan, and Kathryn Cannon, in the matter of their mineral applications for patent, Nos. 5169 and 5187, filed at Helena, Montana, for the Mamouth and Gold Nugget placers, embracing lands in T. 5 N., R. 13 W., T. 6 N., R. 13 W., surveys Nos. 8093 and 8094, in which the Department, by its decision of December 5, 1911, affirmed a rejection thereof by the Commissioner of the General Land Office.

The sole question raised by the motion for rehearing is the Department's finding that \$500 worth of labor or improvements had not been performed upon each of the claims. The Department based its decision upon the amount of excavation required for the cuts and shafts claimed, and found that the reasonable value thereof was below the necessary \$500. The motion for rehearing contends that the value thereof should be fixed more by the number of days consumed in making these excavations at the usual price for that character of labor rather than the amount of excavation estimated from measurements made thereof.

In *Mattingly v. Lewisohn* (35 Pac., 111) the Supreme Court of Montana approved the following instruction to a jury:

In determining the amount of work done upon a claim, or improvements put thereon for the purpose of representation, the test is as to the reasonable value of the said work or improvements, not what was paid for it, or what the contract price was, but it depends entirely upon whether or not the said work or improvements were reasonably worth the said sum of one hundred dollars.

This holding was affirmed in *Penn v. Oldhauber* (61 Pac., 649), in which the court said:

when the contention is as to whether or not a mining claim has been represented for a given year, the test is, not as to the number of days' work done upon it, but what is the worth or reasonable value of the labor performed or improvements made thereon. The value of work done or improvements made is to be measured, not in days, but in dollars. Such work or improvements may add nothing to the value of the claim, but if, when completed, said work or improvements are reasonably worth the sum of one hundred dollars, then this requirement of the statute has been fulfilled.

So in *Whalen Consolidated Copper Mining Co. v. Whalen et al.* (127 Fed., 611) the Circuit Court for the District of Nevada held that evidence of the amount of money paid for assessment work upon a mining claim, though not conclusive, is admissible as bearing upon the claimant's good faith, but the court adopted the rule that the work or improvements must reasonably be worth the amount required by the statute. The Department also in *Floyd et al v. Montgomery et al.* (26 L. D., 122, at 132) states:

the amount paid for the labor performed, or expended for the improvements made, is not material, except as these facts are valuable in ascertaining the worth of the labor and improvements, for the purpose contemplated by the statute.

From the above authorities, it is apparent that the true test is the reasonable value of the work performed or improvements made. The amount actually paid or the number of days actually spent in the prosecution of such labor and improvements are elements to be considered in arriving at the reasonable value, but they are not conclusive.

After a careful review of the entire record, the Department is satisfied that its former holding that the reasonable value of the cuts and shafts on each of the claims was less than \$500 is correct.

The motion for rehearing is accordingly denied.

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### NORMAN T. HALLANGER.

*Decided March 6, 1912.*

#### ENLARGED HOMESTEAD—CHANGE OF ENTRY.

An entry, under sections 1 to 5 of the enlarged homestead act, of lands designated as subject to entry under said sections, may, upon the lands being subsequently designated as subject to entry under section 6 of that act, be changed to stand as an entry under that section.

ADAMS, *First Assistant Secretary*:

Norman T. Hallanger has appealed from decision of November 25, 1911, by the Commissioner of the General Land Office, denying his application to have his entry changed so as to stand under section 6

of the enlarged homestead act of February 19, 1909 (35 Stat., 639). Said entry was made February 14, 1911, for the SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 29, S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 30, T. 17 S., R. 2 W., S. L. M., Salt Lake City, Utah, land district, under sections 1 to 5 of the said act.

At the time the above entry was made the land involved was designated as being subject to entry under sections 1 to 5 of the said enlarged homestead act, but on May 2, 1911, after the entry was made, the character of the designation was changed so as to make the provisions of section 6 of the act applicable thereto. An entryman making entry under said act other than section 6 is not only required to reside upon the land but also to cultivate at least one-eighth of the area to agricultural crops other than native grasses beginning with the second year of the entry, and at least one-fourth beginning with the third year of the entry, and to so continuously cultivate the same to the end of the five-year period. Section 6 of the act excuses residence under the conditions stated therein but requires cultivation of an additional area during the fourth and fifth years after the date of an entry made thereunder. Said section reads as follows:

That whenever the Secretary of the Interior shall find that any tracts of land, in the State of Utah, subject to entry under this act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate two million acres, and thereafter they shall be subject to entry under this act without the necessity of residence: *Provided*, That in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section.

Hallanger states that at the time he made the said entry he was led to believe that water could be obtained for culinary purposes by the digging of a well to a reasonable depth; that a well has been sunk by a neighbor upon adjoining land to the depth of ninety feet and then abandoned because no water or indication of water had been reached; that he has placed considerable improvements upon the land and still intends to spend the greater portion of his time thereon in connection with the cultivation and improvement of same, but that he does not deem it feasible to maintain such residence thereon as is required by the law under which his present entry stands; that he sunk a well to a depth of about fifteen feet, but in view of the one dug upon adjoining land without results he

is convinced that it would be a waste of time and money for him to continue the well to a greater depth.

Inasmuch as the Department has designated these tracts as being of the character of lands to which the provisions of section 6 are applicable, and as the claimant has also made a showing to that effect, no reason is seen why the entryman should not be excused from residence. The entry will therefore be noted as changed so as to stand under section 6 of the act.

The decision appealed from is accordingly reversed.

### HEIRS OF MAY LYON.

*Decided March 6, 1912.*

#### DECEASED HOMESTEADER—HEIRS—SUCCESSION.

Upon the death intestate of a homestead entrywoman, leaving surviving a husband and a minor child, the latter does not have the sole right of succession to the entry, under section 2292, Revised Statutes, where under the statutes of the State the husband is an heir of his wife, but, in such case, the right of succession is to the heirs generally, under section 2291, Revised Statutes, and upon completion of the entry patent will so issue, leaving it to the local courts to determine who such heirs are and what their interests may be.

#### ADAMS, *First Assistant Secretary:*

October 28, 1903, May Harris made homestead entry for the NW.  $\frac{1}{4}$ , Sec. 15, T. 9 S., R. 23 W., G. & S. R. M., Phoenix, Arizona, land district, subject to the act of June 17, 1902 (32 Stat., 388).

March 22, 1910, William H. Lyon, the surviving husband of May Harris, deceased, made final proof on said entry in behalf of himself and Emma Harris, a minor daughter of May Harris by a former marriage.

May Harris was a widow at the time she made entry and afterwards was married to William H. Lyon.

By decision of June 27, 1911, the Commissioner held the proof for rejection and the entry for cancelation, calling for certain additional evidence upon penalty of cancelation of the entry in case of failure to furnish the additional proof. William H. Lyon has filed appeal from that action.

It appears from the final proof that May Harris, the entrywoman, died July 17, 1907, leaving her minor child and surviving husband as above stated. The Commissioner in his decision stated that in his opinion William H. Lyon did not succeed to any right in connection with said entry under the homestead law, but that the said minor was entitled to the entry under section 2292, R. S. U. S. The Depart-

ment can not accept this view. Where a homestead entryman dies prior to submission of final proof the order of succession to his interest in the entry is provided in sections 2291 and 2292, R. S. U. S. These sections were very carefully considered and construed by the Supreme Court in the case of *Bernier v. Bernier* (147 U. S., 242). It was there held that section 2292 has no application where there are heirs other than infant children of the deceased entryman; that the succession is to the heirs generally under section 2291 if there be both adult and minor heirs.

Section 2117 of the Revised Statutes of Arizona (1901) provides:

Where any person having title to any estate of inheritance, real, personal, or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows:

If the deceased have a child or children, or their descendants, the surviving husband or wife shall take one-third of the separate personal estate of deceased, and the balance of such separate personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants.

Therefore the surviving husband, being an heir under the above law, is entitled to share in the distribution of the estate of his deceased wife, the entrywoman, and is entitled to recognition under section 2291, R. S., in the matter of making final proof and claim to patent under this entry. In such cases, if the proof be satisfactory, the patent will issue to the heirs generally, leaving to the courts of the respective localities the duty of ascertaining who the particular heirs are and what their particular interests are under the law of the State in which the land is situated. See *Instructions of July 16, 1891* (13 L. D., 49); *Agnew v. Morton* (13 L. D., 228); *Instructions May 22, 1893* (16 L. D., 463); *Tracy v. Schoenau* (22 L. D., 403); section 22, Circular April 20, 1911 (40 L. D., 41).

The additional evidence called for by the Commissioner is as follows:

Affidavit, corroborated by two witnesses, showing the death of May Harris; that Emma Harris is the heir of May Harris; that she is a minor and that there are no other minor heirs.

In view of the law applicable to this case as above shown, none of the evidence called for by the Commissioner is necessary. The fact of the death of the entrywoman is clearly shown in the final proof. It is also satisfactorily shown that Emma Harris is a minor and that she is not the sole heir. In fact, it is not important to know whether she is a minor or not, as there is shown to be an adult heir, and she would not therefore be the sole successor under section 2292. A report from a chief of field division also shows the death



of the entrywoman and that she left a surviving minor child, a girl about twelve years old.

It is deemed proper to further suggest that the entry should not be canceled at this time, even if compliance with law for the required period of five years has not been performed, provided the condition with reference to irrigation under the project is similar to that involved in the case of John H. Haynes (40 L. D., 291).

The decision appealed from is accordingly reversed and the case remanded for further consideration upon its merits concerning compliance with law as to residence, cultivation and improvements.

### APPLICATIONS FOR EXCHANGE OF LANDS WITHIN INDIAN RESERVATIONS FOR PUBLIC LANDS.

#### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

*Washington, March 6, 1912.*

The COMMISSIONER OF THE GENERAL LAND OFFICE,  
The COMMISSIONER OF INDIAN AFFAIRS,

GENTLEMEN: Circular of March 3, 1909 (37 L. D., 537), governing exchanges of lands within Indian reservations for public lands, act of April 21, 1904 (33 Stat., 211), requires proposed exchanges, with report of the Commissioner of the General Land Office thereon, to be submitted to this Department, and states that—

It will then be referred by the Secretary to the Commissioner of Indian Affairs for report as to whether the described lands are needed for the use of the Indians, and such recommendations as the Commissioner may deem proper.

In order to expedite action in such cases, and in order that the Department may have before it all available information with reference thereto, at time of original presentation for consideration, it is hereby directed that the applications for exchanges and accompanying papers be submitted by the Commissioner of the General Land Office to the Commissioner of Indian Affairs for report as to whether the lands are needed for the use of the Indians and for such other recommendations as the Commissioner of Indian Affairs may deem proper, and that thereafter the applications, with all papers, including the reports and recommendations of the Commissioner of Indian Affairs and of the General Land Office, be submitted to this Department for consideration and action.

Very respectfully,

SAMUEL ADAMS, *Acting Secretary.*

**RECLAMATION—YUMA PROJECT—PAYMENT.**

## PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

*Washington, March 8, 1912.*

Whereas, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), works for irrigation have been constructed or are in contemplation for the irrigation and reclamation of lands under the Yuma project, California, and the charges for building, operation and maintenance must be paid by the water users, as required by said act, in not exceeding ten annual instalments; and

Whereas, public notice of the said charges, the time and manner of payment, has been given for a portion of the project, the said charges being fixed so as to cover the estimated cost of building, operating and maintaining the project as to the lands in question; and

Whereas, under the provisions of the Reclamation Act a large number of the homestead entrymen and water-right applicants for lands in the said project have found it impracticable to make the payment of the building charge; and

Whereas, the water users have not made the payments as required by the said public notice, for reasons which in many cases have been unavoidable on their part, it has accordingly been decided to offer such opportunity as may be reasonable and possible under the terms of the act of February 13, 1911 (36 Stat., 902), for the water users to secure easier terms of payment, and at the same time recover for the Reclamation Fund, as required by the terms of the Reclamation Act the cost of building, operation and maintenance of the irrigation works as now estimated;

Now, therefore, the following public notice is issued under the terms of section 4 of the Reclamation Act and of the said act of February 13, 1911:

1. All applications for water rights heretofore filed under the terms of the public notices heretofore issued may be continued under the terms thereof, if the said public notices be fully complied with by payment or otherwise on or before one month from the date of this notice.

2. For the purpose of avoiding the cancelation of entries and water-right applications for which the entrymen or owners shall have failed, on or before one month from the date of this notice, to comply by payment or otherwise with the public notice under which their water-right applications were made, it is hereby ordered that water-right applications at the increased rates herein named may be made as amendatory to water-right applications heretofore filed, and original entries and water-right applications shall be made at the new rates when none has been heretofore filed. The new rates shall

apply also in case where prior entries are canceled and new entries made without written assignment of credits for payments theretofore made. The portion of the charge on account of building the irrigation system shall be \$66 per acre of irrigable land, and shall be due and payable in not more than ten annual payments, as follows:

First installment	-----	\$5. 50 per acre	Sixth installment	-----	\$7. 00 per acre
Second	“	1. 00 “ “	Seventh	“	9. 00 “ “
Third	“	2. 00 “ “	Eighth	“	10. 00 “ “
Fourth	“	3. 50 “ “	Ninth	“	11. 00 “ “
Fifth	“	5. 00 “ “	Tenth	“	12. 00 “ “

Except as to the amount of the building charge, and graduation of the installment thereof, as herein provided, applications under this paragraph shall be subject to the public notices heretofore issued, and the installments shall be due and payable at the times set forth therein.

3. Where water-right application is filed for which the increased building charge fixed in paragraph 2 is applicable, any payments heretofore made on account of the building charges thereon, shall be credited on the first and subsequent building charges for the same tract.

4. Failure to comply with the terms of this and previous public notices and orders shall render existing homestead entries and water-right applications for public lands, or water-right applications for lands in private ownership, subject to cancellation, with the forfeiture of all rights thereunder, and of all moneys paid thereon, as provided by the Reclamation Act.

5. An entryman against whose entry there is no pending charge of noncompliance with the law or regulations, or whose entry is not subject to cancellation under the Reclamation Act, may relinquish his entry to the United States and assign in writing to a prospective entryman any credits he may have for payments made on his water-right application, and such assignee shall have the right to continue payment at the same building charge. A private land owner against whose water-right application there is no pending charge of non-compliance with the law or regulations, or whose water-right application is not subject to cancellation may in like manner make written assignment of credits for payments made, and his grantee shall have the right to continue payment at the same building charge. Except as specifically provided in this notice, no benefit of a smaller charge than that fixed in the public notice in force at the time of filing water-right application shall accrue for any land, except when the entryman or private land owner holds written assignment made under the conditions herein stated.

SAMUEL ADAMS,  
*First Assistant Secretary of the Interior.*

**DUNCAN McNEE.**

*Decided March 9, 1912.*

**ISOLATED TRACT—AFFIDAVIT AS TO NONMINERAL CHARACTER.**

The evidence as to nonmineral character required to be furnished by a purchaser of an isolated tract offered at public sale may be supplied in the form of an affidavit by any credible person having the necessary personal knowledge upon which to base an oath as to the character of the land, and need not necessarily be by affidavit of the purchaser himself based upon his own personal knowledge gained by actual examination of the land.

**THOMPSON, Assistant Secretary:**

July 19, 1910, the Commissioner of the General Land Office authorized the local officers at the Oakland, California, land office to offer at public sale as an isolated tract the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 32, T. 19 N., R. 13 W., M. D. M., upon the application of Charles E. Carner.

The usual notice was accordingly published and the land offered at public sale on August 30, 1910. Duncan McNee was the highest bidder and he was declared the purchaser. He tendered the required amount of money and furnished evidence of citizenship, but the local officers objected to the nonmineral affidavit submitted, and on September 3, 1910, rejected application of McNee to purchase. Upon appeal the Commissioner of the General Land Office, by decision of April 24, 1911, affirmed the action of the local officers. Appeal from the action of the Commissioner has brought the case before the Department for consideration.

McNee furnished his own affidavit as to the nonmineral character of the land, but struck out of the regular printed form prepared for such affidavit that part which states that he is well acquainted with the character of the land from personal knowledge gained by actual examination. He also furnished an affidavit executed by M. F. Reilly, dated August 30, 1910, on the regular printed affidavit form, wherein Reilly states that he is agent for Duncan McNee; that he is well acquainted with the character of the land and with each and every subdivision thereof, having frequently passed over the same; that his personal knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any mineral deposits, etc., using the ordinary printed form 4-062 in its entirety.

The Commissioner held that the purchaser must furnish his own nonmineral affidavit and which must be based upon personal examination of the land, and he accordingly rejected the application to make purchase.

Section 2 of instructions of June 6, 1910 (39 L. D., 10), issued under the act of June 27, 1906 (34 Stat., 517), amending section 2455

of the Revised Statutes, requires, among other things, that applicants to have isolated tracts ordered into the market must show by their affidavits, corroborated by at least two witnesses, that the land contains no salines, coal or other minerals. This requirement is made so that the land office may have information upon which to base its action and to enable it to determine whether or not the land should be offered at public sale. If the showing in behalf of such application be found satisfactory the Commissioner in his discretion directs that the land be offered after proper publication of notice. When the land is offered for sale in accordance with the notice, the highest bidder is declared the purchaser. Section 10 of the aforesaid circular of instructions requires such highest bidder to immediately deposit the amount bid with the receiver, and within ten days thereafter he must furnish evidence of citizenship, or declaration of intention to become a citizen, and the nonmineral affidavit.

It is observed that while the regulations require the purchaser to furnish a nonmineral affidavit they do not specifically require such affidavit to be made in person by such purchaser. In this case the purchaser has made such affidavit, based upon information and belief, not upon personal examination of the land, and has also furnished an affidavit made by his agent, based upon personal and actual examination of the land, showing its nonmineral and nonsaline character. The applicant for the offering furnished his own affidavit, presumably based upon personal knowledge of the land, as it adjoins other lands owned by him, and also a joint corroboratory affidavit by two witnesses who aver personal knowledge of the tract, all of whom state that said tract is nonmineral and nonsaline in character.

It has been held in case of soldiers' additional entry that proof as to the character of the land may be made by any credible person having the requisite personal knowledge of the premises, not necessarily by the applicant in person. *William E. Moses* (31 L. D., 320). The same rule obtains in the matter of application to select lieu lands under the act of June 4, 1897 (30 Stat., 11, 36). See instructions of March 6, 1900 (29 L. D., 580). The general rule pertaining to scrip and like claims, which may be located by agent and do not require personal inspection of the land by the applicant, is that the evidence to show the character of the land may be supplied in the form of an affidavit by any credible person having the necessary personal knowledge thereof upon which to base such oath.

The reason for application of the above rule to a purchaser of an isolated tract offered at public sale is even stronger than in the class of cases just mentioned, because the Government, prior to offering the land at such sale, requires evidence of its nonmineral character.

Accordingly the decision appealed from is reversed.

**ARMSTRONG v. MATTHEWS.***Decided March 11, 1912.***PRACTICE—CONTEST—ANSWER—DEFAULT.**

The filing of an answer to the merits by the contestee in a contest proceeding constitutes a waiver of the right to take advantage of the default of the contestant in failing to file proof of service of notice within the time fixed by the Rules of Practice.

**PRACTICE—NOTICE OF CONTEST—PROOF.**

Where service of notice of a contest is made in time under Rule 8 of Practice the contest will not abate, merely because of failure to file proof of such service, until the time for closing the issues shall have expired.

**PRACTICE—CONTEST—DEFAULT.**

A contestant in order to claim default of the contestee for want of answer within the time provided by Rule 13 of Practice should file proof of service of notice of the contest in apt time and should, after the expiration of the time for answer fixed in said rule and before the answer is filed, move for a default; and in case of failure to do so he loses the right to claim such default.

**RULES 8 AND 14 AMENDED.**

Rules 8 and 14 of Practice amended to accord with the views herein expressed.

*ADAMS, First Assistant Secretary:*

Appeal is filed by T. M. Armstrong from decision of July 24, 1911, of the Commissioner of the General Land Office reversing the action of the local officers and dismissing said Armstrong's contest against the desert land entry made March 4, 1908, by Oma Matthews for the SW.  $\frac{1}{4}$ , Sec. 3, T. 27 N., R. 53 E., Glasgow, Montana, land district.

Contest affidavit herein was filed February 18, 1911. Notice issued thereon April 3, 1911, and was served personally April 15, 1911; but proof of service was not filed until May 10, 1911.

Answer on behalf of contestee, made by her attorneys and verified by one of them because of her absence from the county, was filed June 1, 1911, was served on that date, proof of service being filed June 15, 1911, and hearing was ordered on such answer. Answer, specifically denying the charges, was also filed by the contestee herself June 12, 1911.

Armstrong on June 16, 1911, filed motion to strike the answer from the files, because same was not filed within thirty days from service of the contest notice, which the local officers denied, and on appeal the Commissioner, in the decision now appealed from, held that the contest had abated, under Rule 8 of the Rules of Practice in force (39 L. D., 395), by the failure of Armstrong to file proof of service of the contest notice within thirty days after the issuance of such notice.

Both Armstrong and Matthews are in default herein, the former under said Rule 8, in not filing proof of service of the contest notice within 30 days after issuance of said notice, and the latter under Rule 13 of said Rules of Practice, in not filing answer within 30 days after service upon her of said notice.

Neither, however, is in position to take advantage of the other's default. Matthews has not sought to do so and by filing answer to the merits has waived any right she might have had to claim Armstrong's default. The ordering by the local officers of a hearing upon such answer was not reversible error. Service being made within time a contest should not abate by the mere failure to file proof of such service until the time for closing issues shall have expired. By said Rule 13 a defendant in a contest has 30 days from personal service of the contest notice or 20 days after fourth publication notice within which to serve and file answer. A contestant, in order to claim default of the contestee for want of such answer, should file proof of such service or publication in apt time and should after the expiration of the time for answer as fixed in said rule and before the answer is filed move for a default. If he does not do so, he loses the right to claim such default.

The decision appealed from is therefore reversed and the case is remanded for hearing.

In accordance with the foregoing views, said Rule 8 is hereby amended so as to read as follows:

Unless notice of contest is personally served within 30 days after issuance of such notice and proof thereof made not later than 30 days after such service, or if service by publication is ordered, unless publication is commenced within 10 days after such order and proof of publication is made not later than 20 days after the fourth publication, as specified in Rule 10, the contest shall abate; provided, that if the defendant makes answer without questioning the service or the proof of service of said notice, the contest will proceed without further requirement in those particulars.

Rule 14 of said Rules of Practice is also hereby amended to read as follows:

Upon the failure to serve and file answer as herein provided, the allegations of the contest affidavit will on motion of contestant made before any answer is filed be taken as confessed, due personal service or due publication appearing as provided in rule 8, and the register and receiver will forthwith forward the case, with recommendation thereon, to the General Land Office, and notify the parties by registered mail of the action taken.

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## RECLAMATION—HUNTLEY PROJECT—OPERATION AND MAINTENANCE.

### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

*Washington, March 13, 1912.*

In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

For all irrigable lands shown on approved farm unit plats of lands under the Huntley project, Montana, the portion of the instal-

ment for operation and maintenance to become due on December 1, 1912, and on the same date of each year thereafter until further notice shall be \$1.00 per acre of irrigable land.

SAMUEL ADAMS,  
*First Assistant Secretary of the Interior.*

C. K. McCORNICK ET AL.

*Decided March 14, 1912.*

LODE MINING CLAIM—EXPENDITURES—DRILL HOLES.

Expenditures for drill holes upon a lode mining claim for the purpose of prospecting it and in order to secure data upon which the further development of the claim may be based are available toward meeting the statutory provision requiring an expenditure of \$500 as a basis for patent.

EXPENDITURES AS A BASIS FOR PATENT—MADE BY ONE HAVING NO INTEREST.

Expenditures upon a mining claim made by one who at the time has no interest in the claim and is not in privity with the owner thereof can not be accepted toward meeting the statutory requirements respecting expenditures as a basis for patent.

ADAMS, *First Assistant Secretary:*

February 17, 1909, C. K. McCornick and E. W. Bird by A. H. S. Bird, attorney in fact, filed mineral application for patent No. 02444, at Helena, Montana, for the Quay, Lorain, Lake, England, Moreton, Warwick, Salt Lake, Mountain, Richmond, Ridge No. 2, Headlight, Eureka, New York, Ridge No. 4, Mountain View, Ole Bull and Richmond No. 2, lode claims, survey number 8920. This application was rejected by the register and receiver December 17, 1909, on the following grounds:

the necessary \$500 expenditure for labor and improvements is not shown upon or for the benefit of the Quay and Lake lodes, it being made to appear from the field notes of survey, certified to by the deputy mineral surveyor making the survey, that outside of alleged diamond drill holes returned as part of the improvements tending to benefit said claims, sufficient expenditure is not shown, and said diamond drill holes cannot be accepted as improvements within the meaning of the law, because they are not tunnels, drifts, or crosscuts for the development of the claims, and do not in any way facilitate the extraction of mineral therefrom, but were simply run for prospecting purposes "to demonstrate veins in adjoining claims," and not with a view of their utilization for operating purposes. The extent or direction of said holes cannot be determined by the deputy mineral surveyor on the ground, and his certificate as to such extent, value and application, is without proper foundation.

December 27, 1909, an amended application to purchase, excluding the Quay and Lake lodes, was filed, entry being allowed for the remaining claims the same day. Later the claimants filed an appeal from the action of the register and receiver as to the above two lode



claims, which was affirmed by the Commissioner in his decision of February 13, 1911. The Commissioner cited two unreported decisions of the Department which held that drill tests made by a locator of a placer claim for the purpose of ascertaining the extent and value of the mineral deposits thereon in order to determine the feasibility of mining by the dredger process, when considered in connection with the locator's later action, in consequence of the results of such tests, in installing a dredger mining plant for the development of the claim and adjacent land, were available toward meeting the requirements of the statute. The Commissioner, however, remarked, concerning the above holding:

In the case at bar, the drill holes sought to be applied as improvements to meet the statutory requirements, were made upon lode claims, and this office cannot see wherein such improvements are applicable and can be accredited as improvements when they do not facilitate the extraction of ores from the locations.

The claimants have appealed to the Department.

The improvements upon the Lake lode consisted of certain tunnels and shafts of the value of \$450, and also "diamond drill hole No. 2, 500 feet long," \$1500; upon the Quay lode, cuts and shafts of the value of \$100, and also "one-half of the value of the diamond drill holes Nos. 6 and 7 on Lorain lode, 354 and 260 feet long, respectively," \$900; on the Lorain lode \$550, exclusive of one-half interest in the two drill holes. These three claims are the northernmost of the group applied for, the course of the veins being depicted upon the plat as from the southwest to the northeast, the Lorain adjoining the Quay on the southeast side and the Lake adjoining the Lorain. The abstract of title discloses that they were located July 10, 1903, by J. H. McCabe and B. T. King, conveyed December 23, 1903, to E. J. Matthews, who reconveyed to the locators March 4, 1905. They retained full title until March 13, 1905, after which the status of the title, without stating in detail all the conveyances, was as follows: March 13, 1905, to March 24, 1905, B. T. King, 3/6, J. H. McCabe, 1/6, A. H. S. Bird, 2/6; March 24, 1905, to April 24, 1905, A. H. S. Bird, 4/6, B. T. King, 2/6; April 24, 1905, to March 16, 1906, A. H. S. Bird, 3/6, C. K. McCornick, 1/6, B. T. King, 2/6; March 16, 1906, to November 22, 1907, A. H. S. Bird, 1/2, C. K. McCornick, 1/2; November 22, 1907, to April 27, 1908, E. W. Bird, 2/6, A. H. S. Bird, 1/6, C. K. McCornick, 3/6; April 27, 1908, E. W. Bird, 1/2 and C. K. McCornick, 1/2.

The appeal is signed by A. H. S. Bird, the attorney in fact, and in it he states:

Under the circumstances the method of prospecting adopted here was not only a good method; but was probably the *best* method.

As a miner of long experience in several mining fields, acting in good faith, with the sole desire of developing the ground, expending my own money for that purpose, it seemed to me that the method adopted was the best and cheapest.

*Secondly:* A proper inquiry is, what results were actually obtained from the diamond drilling; and was subsequent development work based on the results thereof.

When I first acquired interest in the Quay Lorain, and Lake claims, with others, large veins showed on the surface, made up of oxidized and altered veinous granite, different from the decomposed country granite, and easily distinguishable by one who knows Butte vein conditions, with sheets and bunches of quartz throughout this altered mass. I worked on several similar veins in all my claims, but could not get down below the zone of oxidation on account of the water.

These veins are of the same type and identical with the principal copper veins of Butte.

Similar veins, all parallel, showed on the three claims mentioned. Those on the Lorain were on a ridge; and in the gulch, covered by the Lake claim, large quantities of metallic copper could be, and were, and can be at the present time, dug out. Apparently this proceeded from the veins mentioned, which were at this point intersected by a dike which appeared to drain them, now shown to be the case. Owning a small Sullivan diamond drill I drilled the Lorain veins across twice, in each case getting in the vein, in places, cores of vein quartz and altered vein granite, and in places considerable iron with copper glance, the veins, at such points, being soft, and not yielding "cores."

The following is copied from my second hole record made at the time.

Then follows a statement of the result of the second drill hole, which was commenced February 9, 1905, and completed February 27, 1905, to the depth of 370 feet. It appears that at various depths vein material of different character was disclosed by the drill.

I tried this vein a third time at greater depth, with a nearly flat hole, setting up my drill on the Lake. I did not reach the Lorain vein, but I cut a "blind" vein in the Lake at a shallow depth. The cost of this hole was about \$1,500. It was 469 feet deep, and cost, as did the others, approximately \$3 per foot.

Then follows a statement of the results of that drill hole, which was commenced April 28, 1905, and had reached a depth of 262 feet by May 14. At a depth of 210 feet altered granite vein material was struck, at 225 some copper, and at 236 country granite.

The vein mass and the points of passage from it into the granite walls were unmistakable. I drilled several other veins on other immediately adjacent claims, with similar satisfactory results. The copper invariably being in the form of chalcocite or copper glance.

This proved that the oxidized altered granite and quartz croppings were the croppings of copper veins, and I was enabled to make a second comparison at a greater depth with the Butte copper veins, but not at a depth sufficient to get pay ore. To this extent the "drill tests" very materially "enabled me to determine" the character of the veins, and they were of "substantial benefit" (to me and my associates) "in that I based my future mining action upon the results of the drill tests upon this claim."

The mineral surveyor also reported:

The mineralized solutions flowing from the veins of this group have formed an iron gossan which overlies the outcrops at the surface so that in order to determine the position and strike of these veins extensive diamond drilling was found to be necessary on the Eureka, Lorain and Lake lodes in order to demonstrate the veins in the adjoining claims, benefitting these claims as listed in foregoing field notes.

The Department will first consider the matter as to the Lake lode. The drill hole there was put in after A. H. S. Bird had acquired an interest in the claim and is located in its southeasterly part extending in a westerly direction across the course of the vein and probably into the Lorain claim. It is apparent that the solution of the question presented depends upon the construction of section 2324 and 2325, R. S., the former requiring that on mining claims "not less than one hundred dollars worth of labor shall be performed and improvements made during each year;" the latter that the applicant "shall file with the register a certificate of the United States surveyor-general that five hundred dollars worth of labor has been expended or improvements made upon the claim by himself or grantors."

In *Zephyr and Other Mining Claims* (30 L. D., 510, at 513), the Department said:

As, obviously, whatever may be credited as labor or improvements toward meeting the requirement relative to annual expenditure may also be credited toward the expenditure required to be shown by section 2325 as a condition precedent to the entry and patenting of a mining claim, it follows that the provisions of the law relating to annual expenditure, and the decisions of the courts construing or interpreting such provisions, may properly be resorted to to determine what expenditure in labor and improvements may be credited to such a claim or claims under that section.

In *Chambers & Others v. Harrington & Another* (111 U. S., 350), the Supreme Court stated the purpose of the requirement of an annual expenditure on page 353, as follows:

Clearly the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger.

The purpose was thus described by the Circuit Court for the District of Nevada, *McCulloch v. Murphy et al.* (125 Fed. Rep., 147 at 149):

The object of the law in requiring annual assessment work to the extent of \$100 on the claim is that the owner shall give substantial evidence of his good faith. A liberal construction must be given to the requirements of the law. The labor and improvements, within the meaning of the statute, should be deemed to be done when the labor is performed or improvements made, for the

purpose of working, *prospecting* or developing the mining ground embraced in the location, or for the purpose of facilitating the extraction or removal of the ore therefrom.

In *Power et al. v. Sla et al.* (61 Pac. Rep., 468), the Supreme Court of Montana construed the words "labor and improvements," at page 471, as follows:

the terms "work" and "labor" are not synonymous with the term "improvements." The former have reference to *prospecting* and excavating for the purpose of development; while the latter, though comprehensive enough to include everything signified by the former, has reference also to tangible, material additions to the claim in the way of machinery, buildings, and other structures put in place or erected for the purpose of developing the property and extracting minerals contained in it.

In *United States v. Iron Silver Mining Company* (24 Fed. Rep., 568), it was held that—

work done for the purpose of discovering mineral, whatever the particular form or character of the deposit which is the object of search, is within the spirit of the statute.

In *Book et al. v. Justice Mining Company* (58 Fed. Rep., 106), the 8th paragraph of the syllabus reads, in part:

Labor and improvements, within the meaning of the statute, are deemed to be done upon the location when the labor is performed or improvements made for the express purpose of working, *prospecting*, or developing the ground embraced in the location.

In *Mann v. Budlong et al.* (62 Pac. Rep., 120), the Supreme Court of California said:

The court found that the work thus performed upon the Jeanette mine did not and could not tend to develop or benefit the claim known as the "Ontario Mine." But if against this finding it be conceded or shown that the work was actually done upon the Ontario claim in good faith, for the purpose of developing the Ontario mine, a strict compliance with the requisites of the statute is established, and a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of that of the owner.

The Supreme Court of Wyoming expressed similar views in *Sherlock v. Leighton* (63 Pac. Rep., 580, at 583):

But the law does not require that the annual expenditure to protect a claim shall be applied in the way of the best possible development of the claim. As to that matter miners of equal experience and judgment might honestly differ.

The Department is in harmony with the views as so expressed by the courts. In *Kirk et al. v. Clark et al.* (17 L. D., 190), the Department considered certain shafts upon a placer claim, which apparently were not sunk for the purpose of using them in the actual extraction of the mineral, but in order to secure data upon which to base later permanent development work, which in that case consisted of a long

tunnel which finally reached the pay gravel. The Department stated the facts at page 193:

There are three shafts sunk on the "Justice" within section 26. Engineer Browne, who is an old experienced miner, as well as mine engineer, said:

"Before making a final selection of a point at which to begin permanent work for the working and development of the 'ancient channel,' it is not only customary, but proper, to sink shallow shafts, and drive short tunnels at or near the points on the claim, or contiguous claims, where the bed rock may be exposed on the surface. By this means, the pitch or incline of the bed rock into the channel can, with reasonable certainty, be ascertained, and data furnished upon which to base an intelligent estimate of the proper depth at which to begin, and the point from where, and the course for a permanent working tunnel into the ground intended to be worked."

From all the evidence, fairly considered, it appears that these claimants had expended over \$500 in doing what expert miners say was the proper and reasonable thing to do, and they so fully prospected the claim, that the "Mayflower" Company, a wealthy corporation, were willing to take hold of the work and push it to completion.

Again in *Hughes et al. v. Ochsner et al.* (26 L. D., 540, at 543), the Department said:

Civil engineers and persons experienced in mining operations may honestly differ as to the probable results to be had from a plan of development, and these may be involved, as is often the case in such operations, in considerable uncertainty, but if money or labor is expended in good faith, in furtherance of the plan, the Department will not look beyond the fact of such expenditure.

From the above authorities it may be fairly adduced that the statutory requirements are required as an earnest of good faith, and to prevent a prolonged occupation of mining ground without any development work being done; that, if the locator in good faith expends the required amount in prospecting or developing his claim, or extracting mineral therefrom, neither the courts nor the Department will refuse credit for the expenditures on the ground that some better method for the above purposes could have been pursued.

Tested by the foregoing principles and in view of the statements contained in the appeal, it cannot be doubted that the drill hole placed upon the Lake claim was for the purpose of prospecting it in order to secure data upon which the further development work could be based. This expenditure together with the other improvements to which the Commissioner made no objection, is more than sufficient. As to the Lake lode, the decision of the Commissioner is reversed and entry will be allowed if no further objection appear.

As to the Quay claim, the appeal discloses that the drill holes, one-half of whose cost is sought to be accredited, were dug prior to February 27, 1905, at the sole expense of A. H. S. Bird. The abstract of title discloses that A. H. S. Bird had no interest in that claim at the time of expenditure, his first interest having been acquired March 24, 1905, and no privity between him and the prior

owners of the claim at the time of the expenditure is shown. In the absence of a further showing, such expenditures made by one who, as far as the record discloses, had at that time no interest in the claim, cannot be accepted. As to the Quay claim, the Commissioner's decision is accordingly affirmed, without passing upon the question whether the drill holes claimed could be accepted as an improvement common to the two claims or not.

## RECLAMATION—NORTH PLATTE PROJECT—WATER SERVICE.

### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

*Washington, March 14, 1912.*

1. In pursuance of section 4 of Reclamation Act of June 17, 1902 (32 Stat., 388), public notices have heretofore been issued opening to irrigation lands in the first and second lateral districts, North Platte project, Nebraska-Wyoming.

2. Pending the issue of public notice announcing the limitations, charges, terms and conditions under which water will be furnished to lands in the Third Lateral District, it was ordered on April 21, 1911, that water be furnished to lands in said district, shown on plats approved March 10, 1911, for the irrigation seasons of 1911 and 1912, without charge for operation and maintenance, in pursuance of the plan theretofore adopted in view of the provisions of contract with the North Platte Valley Water Users' Association, dated June 23, 1909. Such lands, with additional lands not heretofore irrigated, are hereby opened to irrigation in 1912, under the provisions hereinafter recited.

3. Notice is hereby given that water will be furnished from the North Platte project under the provisions of the Reclamation Act, in the irrigation season of 1912 and thereafter for the irrigable lands in the Third Lateral District shown upon farm unit plats of—

#### *Sixth Principal Meridian*

T. 22 N., R. 53 W., approved March 4, 1912  
 T. 22 N., R. 54 W., approved March 10, 1911  
 T. 23 N., R. 52 W., approved March 4, 1912  
 T. 23 N., R. 54 W., approved March 4, 1912  
 T. 23 N., R. 53 W., approved March 4, 1912

on file at the local land office at Alliance, Nebraska.

4. Homestead entries accompanied by applications for water rights and, as hereinafter provided, by the appropriate instalment or instalments of the charges for building, operation and maintenance, may be made under the provisions of the said act for the farm units shown on said plats. Water-right applications may also be made for lands heretofore entered, and for lands in private ownership,

and the time when payments will be due therefor is hereinafter stated.

5. The limit of area per entry representing the acreage which in the opinion of the Secretary of the Interior may be reasonably required for the support of a family on the lands entered, subject to the provisions of the Reclamation Act, is fixed at the amounts shown on the plats for the several farm units. The limit of area for which water-right applications may be made for lands in private ownership shall be 160 acres of irrigable land for each land owner.

6. The plats show by distinctive symbols (*a*) the lands opened to irrigation in 1911; and (*b*) those opened to irrigation in 1912.

7. The charges which shall be made per acre of land shown on the plats as opened to irrigation in 1911, whether public land farm units or lands heretofore entered or in private ownership, including the cost of drainage works for the control of seepage waters, so far as the location and cost of the same can now be anticipated, are divided into two parts as follows:

*First.* For building, and including in the first two years of new entries, and the first two irrigation seasons in other cases, the cost of operation and maintenance, \$55 per acre of irrigable land, payable in not more than ten annual instalments, graduated as follows:

*Per acre of irrigable land.*

First instalment	-----	\$1. 00
Second	-----	2. 00
Third	-----	3. 00
Fourth	-----	4. 00
Fifth	-----	5. 00
Sixth	-----	6. 00
Seventh	-----	7. 00
Eighth	-----	8. 00
Ninth	-----	9. 00
Tenth	-----	10. 00

Full payment may be made at any time of any balance of the building charge remaining due, subject to the regulations of the General Land Office.

*Second.* The portion of instalment for operation and maintenance for the irrigation season of 1913 and annually thereafter until further notice shall be \$1.25 per acre of irrigable land, whether water is used thereon or not, and shall be due annually on December 1 of the preceding year. No water will be furnished in any year until the portions for operation and maintenance of all instalments then due shall have been paid. Accordingly no water will be furnished for the irrigation season of 1913 unless the portion for operation and maintenance of the instalment due December 1, 1912, has been paid, and no water will be furnished in any subsequent year

unless payment has been made of the portions of instalments for operation and maintenance then due and unpaid. As soon as the data are available the operation and maintenance charges will be fixed in proportion to the amount of water used, with a minimum charge per acre of irrigable land, whether water is used thereon or not.

8. All entries of lands not heretofore entered, and all entries of lands which have heretofore been entered and relinquished to the United States, but which are not accompanied by written assignment of credit, shall be accompanied by the amount of the first two instalments, which will include the charges for building, operation and maintenance, \$3 per acre of irrigable land. The third instalment of the building charge, \$3 per acre, plus the charge for operation and maintenance then in effect, shall be due on December 1 of the year succeeding the date of entry, and subsequent instalments of charges for building, operation and maintenance shall become due on December 1 of each year thereafter.

9. For lands heretofore entered and for lands in private ownership opened to irrigation in 1911, the first instalment of \$1 per acre of irrigable land, plus the charges for operation and maintenance, shall be due on December 1, 1912, the second and all subsequent instalments of the building charge, plus the appropriate charge for operation and maintenance then in effect, shall become due on December 1 of each year thereafter.

10. For lands shown on said plats as opened to irrigation in 1912, the same charges, limitations and graduations of payment shall apply as for lands opened to irrigation in 1911, except that for lands in private ownership and lands heretofore entered the several instalments of the charges for building, operation and maintenance shall become due one year later. In all other respects the provisions of this notice shall apply alike to lands opened to irrigation in 1911 and those opened in 1912.

11. Failure to pay any two instalments of the charges when due, whether on entries made subject to the Reclamation Act, or on water-right applications for other lands, shall render such entries and the corresponding water-right applications, or the water-right applications for other lands, subject to cancelation, with the forfeiture of all rights under the Reclamation Act, as well as of any moneys already paid.

12. All charges must be paid at the local land office at Alliance, Nebraska. These charges may, for the convenience of applicants, be paid to the special fiscal agent of the United States Reclamation Service, assigned to the North Platte project, for transmission to the register and receiver of the local land office on or before the date specified for payment at the local land office; but in case this privilege



is availed of, the necessary charges for the transportation of the cash, as determined by the special fiscal agent, must accompany the payment of the water-right charges.

SAMUEL ADAMS,  
*First Assistant Secretary of the Interior.*

**RECLAMATION—NORTH PLATTE PROJECT—PAYMENT.**

**ORDER.**

DEPARTMENT OF THE INTERIOR,  
*Washington, March 13, 1912.*

Whereas, it has been represented to me by the President of the North Platte Valley Water Users' Association that many of the water users under the North Platte Reclamation project will be seriously crippled financially if required to pay in advance the operation and maintenance charges for the season of 1912, amounting to \$1.25 per acre of irrigable land, and that the postponement of the liability for such charges until December 1, 1912, with an increase in the amount of such charges by the sum of 15 cents per acre of irrigable land will save such water users from the necessity of selling necessary work animals, seed and farm equipment to meet such payment in advance, and will thereby enable them to make a crop during the season of 1912,

Now therefore, by virtue of the authority given me by the act of Congress approved June 17, 1902 (32 Stat., 388), commonly called the Reclamation Act, and by acts supplementary thereto and amendatory thereof, it is hereby ordered:

1. That any water user in said project whose water-right application is subject to the public notice of December 30, 1911, for said project, may receive water for irrigation in the season of 1912 without prior payment of the portion of the instalment for operation and maintenance for 1912, amounting to \$1.25 per acre of irrigable land, subject to the following conditions:

2. Every such water user shall fully pay the unpaid balance, if any, of operation and maintenance charges for 1911 and prior years before any water is furnished to him for 1912.

3. Every water user desiring such extension shall, on or before April 30, 1912, make application therefor to the project engineer, who may, in his discretion extend the time of payment for the operation and maintenance charges for 1912 until December 1, 1912. For all persons to whom such extension is granted, the charge for operation and maintenance per acre of irrigable land for the season of 1912 shall be \$1.40 instead of \$1.25.

SAMUEL ADAMS,  
*Acting Secretary of the Interior.*

**RECLAMATION—NORTH PLATTE PROJECT—PAYMENT.****PUBLIC NOTICE.**

DEPARTMENT OF THE INTERIOR,

*Washington, March 19, 1912.*

In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and of the act of February 13, 1911 (36 Stat., 902), notice is hereby issued for the North Platte project, Nebraska-Wyoming, as supplemental to the public notice of December 30, 1911 (40 L. D., 336), for the said project, viz:

1. All entries of lands not heretofore entered, and all entries of lands heretofore entered and relinquished to the United States, which are not accompanied by written assignments of credit for payments theretofore made, shall be subject to the charges announced in the public notice of December 30, 1911, and shall be accompanied by the amount of the first two instalments of the building charge, amounting to \$3.00 per acre as stated in paragraph 2 of the public notice of December 30, 1911. The third instalment of the building charge shall become due on December 1 of the following year, and subsequent instalments of charges for building shall become due on December 1 of each year thereafter until the charges are paid in full.

2. The portion of the first instalment for operation and maintenance, \$1.25 per acre, or such other amount as may then be in effect, shall become due on December 1 of the year of entry, and the portions of subsequent instalments shall be due on December 1 of each year thereafter.

SAMUEL ADAMS,

*First Assistant Secretary of the Interior.***DESERT ENTRIES IN WELD AND LARIMER COUNTIES, COLORADO—EXTENSION OF TIME.****INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, March 19, 1912.*

REGISTER AND RECEIVER,

*Sterling, Denver, and Glenwood Springs, Colorado.*

SIRS: Annexed is a copy of the act of Congress approved January 26, 1912 (Public—No. 62), entitled "An act authorizing the Secretary of the Interior to grant further extension of time within which to make proof on desert land entries in the counties of Weld and Larimer, Colorado."

1. All applications for the benefit of this act must be supported by the affidavits of the applicants and at least two corroborating witnesses made before an officer legally authorized to administer oaths

in connection with the entry in question and set forth the facts on account of which the further extension of time is desired.

2. Such applications and affidavits must be filed in the local land office of the district wherein the lands are situated for transmission, with the recommendation of the register and receiver, to the Commissioner of the General Land Office.

3. You are directed to suspend any application that may be considered defective in form or substance, and allow the applicant an opportunity to remedy the defects or to file exceptions to the requirements made, advising him that upon his failure to take any action within a specified time, appropriate recommendations will be made. Should exceptions be filed, they will be duly considered with the entire record. In transmitting applications for the benefit of this act, you will report specifically whether or not there is any contest pending against the entry involved, and if a contest is pending, you will transmit the application to the Commissioner of the General Land Office by special letter without action thereon, making due reference to this paragraph.

Very respectfully,

S. V. PROUDFIT,  
*Assistant Commissioner.*

Approved:

SAMUEL ADAMS,  
*First Assistant Secretary.*

[PUBLIC—No. 62.]

AN ACT Authorizing the Secretary of the Interior to grant further extension of time within which to make proof on desert-land entries in the counties of Weld and Larimer, Colorado.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior may, in his discretion, grant to any entryman who has heretofore made entry under the desert-land laws in the counties of Weld and Larimer, in the State of Colorado, a further extension of the time within which he is required to make final proof: *Provided,* That such entryman shall, by his corroborated affidavit filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor; but such extension shall not be granted for a period of more than three years, and this act shall not affect contests initiated for a valid existing reason.

Approved, January 26, 1912.

**MAURICE E. GOLDBERG.**

*Decided March 20, 1912.*

**HOMESTEAD COMMUTATION—EXTENSION OF TIME FOR PAYMENT.**

The land department is without power to extend the time for payment of the purchase price upon the commutation of a homestead entry beyond the limit of ten days after notice provided by the act of March 2, 1907; but

where an entryman within the purview of the act of August 19, 1911, relieving certain homesteaders from the necessity of residence and cultivation from the date of said act until April 15, 1912, failed to make payment of the commutation purchase price within ten days after the notice provided for in the earlier act, he may subsequently be permitted to make such payment, without additional proof, where the entire intervening period between the submission of his commutation proof and the time he actually makes payment is covered by the period of exemption granted by the said act of August 19, 1911.

THOMPSON, *Assistant Secretary*:

Maurice E. Goldberg has appealed from decision of December 13, 1911, by the Commissioner of the General Land Office, affirming the action of the local officers rejecting the commutation proof submitted August 23, 1911, upon homestead entry made by Goldberg March 25, 1910, for lots 3 and 4, S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 3, T. 22 N., R. 4 E., B. H. M., Lemmon, South Dakota, land district.

The proof was found to be satisfactory so far as concerns residence, cultivation and improvements, but the entryman failed to pay the purchase price of the land (\$200.13).

The entryman asked extension of time within which to make the payment because of crop failure and consequent financial inconvenience. There was no authority, however, for extension of time within which to make the payment except as provided by the act of March 2, 1907 (34 Stat., 1245), which provides that in case of commutation proof the purchase price must be paid within ten days after notice that the proof is acceptable. The action taken was therefore correct.

The entryman now asks the privilege of making payment at this time if extension can not be granted, instead of being required to make new proof.

By act of August 19, 1911 (37 Stat., 23), Congress granted leave of absence to homestead entrymen in several different land districts including that of Lemmon, South Dakota. By said act such entrymen are relieved from the necessity of residence and cultivation upon their lands from the date of approval of said act to April 15, 1912. See instructions of September 8, 1911 (40 L. D., 263).

Under the provisions of the above act Goldberg is excused from residence until April 15, 1912, and the entire period of time since he submitted proof is covered by said provisions. Therefore, he is not in default in the matter of residence or cultivation and even if the present proof should be rejected, no additional compliance with law except in the matter of payment would be necessary. In view of this situation no reason is seen why acceptance of the money in connection with the present proof should not be directed. It is accordingly ordered that the entryman be allowed to make the required payment within ten days from notice hereof.

The decision appealed from is modified accordingly and the case is remanded for appropriate action.

## RECLAMATION—MINIDOKA PROJECT—CHARGES.

## PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

*Washington, March 21, 1912.*

Whereas, In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), an order was issued on May 4, 1911, for the Minidoka project, Idaho, stating that additional works for the irrigation of certain areas irrigable from the C-2 canal had been constructed and that water was available therefor in 1911, and announcing that a public notice would be thereafter issued announcing the charges, terms and conditions under which water-right applications may be made for such lands; and

Whereas, The public notice issued on December 30, 1911 (40 L. D., 330), provides that the charges for such high lands for which water may be available shall begin on the date to be announced by the Secretary of the Interior;

Therefore, the following public notice is issued under the terms of Section 4 of the Reclamation Act:

1. For the high land areas herein listed and shown on approved farm unit plats on file at the local land office at Hailey, Idaho, entries for which lands may be in effect on December 1, 1912, the first instalment of the charges for building, operation and maintenance shall become due on that date. Entries made subsequent to that date without written assignment of credits shall be subject to all of the charges, terms and conditions of the public notice of December 30, 1911. Subsequent instalments shall be due on December 1 of each year thereafter.

Farm unit.	Section.	Township South.	Range East.	High land area irrigable by C-2 raise.
A	12	9	22	2.0
J	{12	9	22}	30.0
C	13	9	22	7.0
G	13	9	22	10.0
A	{14	9	22}	52.0
A	23	9	22	
A	7	9	23	29.0
C	7	9	23	47.0
E	{7	9	23}	55.0
A	8	9	23	18.0
B	8	9	23	17.0
C	8	9	23	37.0
D	8	9	23	34.0
E	8	9	23	72.0
F	8	9	23	72.0
G	8	9	23	34.0
C	9	9	23	6.0
J	{4	9	23}	26.0
A	9	9	23	
A	17	9	23	4.0
B	17	9	23	54.0
C	17	9	23	2.0
A	18	9	23	45.0
B	18	9	23	4.0
C	18	9	23	5.0
D	18	9	23	7.0

2. For public land farm units for which acceptances of the terms of the public notice of December 30, 1911, shall at any time be filed, the rate of building charge shall be \$30 per acre, payable as therein set forth. This rate will apply not only to the gravity lands, but also to the high lands listed in paragraph 1. In the event of failure to file such acceptance, the building charges for such high lands shall be \$35 per acre, payable in ten equal annual instalments.

3. The annual charge for operation and maintenance other than the drainage charge for these high lands shall be at the same rate as for the other lands within the respective farm units.

4. The regulations regarding the payment of drainage charges as set forth in public notices of January 23, 1911 (39 L. D., 528), and December 30, 1911, shall apply to the lands hereinabove described.

5. No farm unit for which the temporary water application provided for in the order of May 4, 1911, was filed, shall hereafter be entitled to water until all charges due thereon under said order shall have been paid.

SAMUEL ADAMS,

*First Assistant Secretary of the Interior.*

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**SARAH NANNA.**

*Decided March 23, 1912.*

**PRINCIPLES GOVERNING ENLARGEMENTS OF DESERT LAND ENTRIES.**

The right to enlarge desert land entries is governed by the same general principles as govern the enlargement of homestead entries.

**ENLARGEMENT OF DESERT ENTRY.**

A desert land entryman who made entry for less than the area he was entitled to take under the law, because of the fact that all the vacant contiguous public land was at that time nonirrigable from any known source of water supply, may, upon such land subsequently becoming susceptible of irrigation, be permitted to enlarge his entry to the full amount authorized by law.

**THOMPSON, Assistant Secretary:**

Sarah Nanna appealed from decision of the Commissioner of the General Land Office of July 28, 1911, rejecting her application to enlarge her desert-land entry to include lot 2, Sec. 15, and lots 1 and 2, Sec. 5 (Ute), T. 34 N., R. 8 W., N. M. M., Durango, Colorado.

May 3, 1909, Nanna made desert-land entry for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 15. December 7, 1911, the local office forwarded her application to amend to include the land above described, 45.17 acres, if the amendment be allowed. The Commissioner found that at time of her original entry the land was vacant, and might have been embraced therein. On supposed authority of instructions of July 26,

1907 (36 L. D., 44), the Commissioner rejected her application as she gave no notice at time of her original entry that she did not intend to exhaust her right.

The instructions referred to provide:

As to desert-land entries for less than the maximum amount allowed to be entered by one person, the Department is of opinion that good and sufficient reason exists for restricting their enlargement to cases where the entryman could not at the date of the entry as originally made, because of the existence of entries or filings covering adjacent lands, embrace in his entry the full quantity allowed by law, but immediately took appropriate steps to clear the record as to a particular tract of such adjacent land, with the view to subsequently including such tract in his own entry, and clearly indicated in his application to make the original entry that that was his intention. Your office is therefore instructed to allow the enlargement of desert-land entries under no other circumstances.

In her application for entry Mrs. Nanna shows that at the time of her original entry, the land now sought to be included was above any projected irrigation ditch, and was supposed to be entirely nonirrigable; that she inquired respecting this land at the time, prior to making her entry, and was informed it could not be reclaimed or cultivated; that since that time the Pioneer Ditch has been so extended as to irrigate, reclaim, and cultivate the NE.  $\frac{1}{4}$ , Sec. 8 (Ute), and is constructed through the land she applies to enter, so that it can now be irrigated, cultivated, and reclaimed.

The right to enlargement of a desert-land entry is the same, governed by the same principles, as that to enlarge a homestead entry. In case of a homestead entry (Loring R. Reynolds, 39 L. D., 36, 38), the Department held that "no hard and fast rule can well be laid down to govern in all respects the application of this equitable and supervisory power. Its application must necessarily depend upon the facts and circumstances appertaining to each particular case."

In Ella Pollard, 33 L. D., 110, 111, it was held that a desert-land entryman who failed to enter the full area allowed by law, for the reason that no vacant land adjoining that entered was susceptible of irrigation and reclamation, might, if the irrigable land thereafter became vacant, enlarge the entry. In the reasoning of that case the Department held:

Inasmuch as the law gives the desert land applicant the right to enter 320 acres of land and its policy is to encourage the reclamation and improvement of lands which are desert in character, and there being no adverse claim to the land applied for, no reason is seen why, under the wise and liberal administration of the law, the said applicant should not be allowed to enlarge her original entry so as to include therein the land applied for.

In the present case no irrigable land has become vacant since the entry, but vacant land has become irrigable contrary to the facts as

they appeared at the time of the entry. The difference between the two cases is the mere transposition of the two elements—"vacant" and "irrigable."

The purpose of the act, no doubt, was to assure improvement of the country and the reclamation of irrigable lands. It could not be foreseen when Nanna entered that this land was irrigable. Extension of the ditch required expenditure of which there was then no present prospect. Land, not irrigable, was in a sense not subject to desert-land entry. To take it and make initial payment was a mere waste of money to get a barren right inevitably subject to cancellation and loss.

Remembering the similarity of rights to enlarge a homestead and to enlarge a desert-land entry, Charles Carson, 32 L. D., 176, 177, becomes authority, holding:

The application does not seek to change the entry so as to abandon land entered and held from other appropriation, but merely to fill the right which the entryman had and failed to exercise because of erroneous information as to the condition of the land he now seeks to appropriate. No one has been or could have been prejudiced by the alleged mistake, except the entryman himself. The policy of the homestead law is to allow a qualified entryman to take one hundred and sixty acres, or one quarter section, of the public domain. Where one deliberately takes less than his right he is regarded to have waived so much of it as was not then exercised, especially where the first entry has been consummated and closed upon the record. Michael Dermody (10 L. D., 419-420).

The case is not unlike that of Marmaduke W. Mathews, 38 L. D., 406, wherein Mathews was defeated in his original homestead entry by extreme wetness. Here, Nanna was defeated of desire to enter this land by its extreme dryness and supposed impossibility of irrigation. The case is within the principle of Mathews, *supra*, and within established authority of the land department expressed in the general circular of January 25, 1904, page 19, "that where obstacles which could not have been foreseen, and which render it impracticable to cultivate the land, are discovered subsequent to entry \* \* \* the entry may in the discretion of the Commissioner be canceled and a second entry allowed." This was approved in the case of Mathews. The conditions of extreme aridity and extreme wetness being transposed, the cases are alike, except that Nanna does not wish to cancel her original entry. Both the conditions produce the same result—utter futility of cultivation. The same general principles govern both decisions. The instructions of July 26, 1907 (36 L. D., 44), are not applicable to such cases. One can not be supposed deliberately to forego a right, unless the right is known at the time to exist. In the present case, it is true Nanna knew the land was vacant, but it is also true that she supposed it was hopelessly nonirrigable and of no utility



in her entry. The changed conditions and circumstances which have since transpired entitle her under the law to enlargement of her entry, in the absence of any adverse right.

The decision is reversed and case remanded to the General Land Office for further proceedings appropriate thereto.

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## RECLAMATION—SHOSHONE PROJECT—WATER SERVICE.

### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,  
*Washington, March 23, 1912.*

Pursuant to the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

1. Water will be furnished from the Shoshone project, Wyoming, under the provisions of the Reclamation Act in the irrigation season of 1912 for the irrigable lands in the Fourth Unit shown on farm unit plats of township 55 north, ranges 99 and 100 west and township 56 north, ranges 98 and 99 west, sixth principal meridian, approved March 11, 1912, by the Secretary of the Interior and on file in the local land office at Lander, Wyoming.

2. Homestead entries, accompanied by applications for water-rights and the first instalment of the charges for building, operation and maintenance, may be made on and after April 22, 1912, beginning at 9 o'clock a. m., under the provisions of said act for the farm units shown on said plats. Water-right applications may also be made for lands heretofore entered and for lands in private ownership, and the time when payments will be due therefor is hereinafter stated.

3. Warning is hereby expressly given that no person will be permitted to gain or exercise any right whatever under any settlement or occupation begun prior to May 15, 1912, on any lands shown on said plats; provided, however, that this shall not interfere with any valid existing rights obtained by settlement or entry while the land was subject thereto.

4. The limit of area per entry, representing the acreage which in the opinion of the Secretary of the Interior may be reasonably required for the support of a family on the lands entered subject to the provisions of the Reclamation Act, is fixed at the amounts shown on the plats for the several farm units. The limit of area for which water right application may be made for lands in private ownership shall be 160 acres of irrigable land for each landowner.

5. The charges which shall be made for each acre of irrigable land in the said entries and for lands heretofore entered or in private ownership are in two parts as follows:

(a) The portion of the charge on account of building the irrigation system shall be \$52 per acre of irrigable land, payable in not more than ten annual instalments, as follows:

1st instalment	-----	\$4.70
2nd	“ -----	1.00
3rd	“ -----	1.00
4th	“ -----	4.30
5th	“ -----	6.00
6th	“ -----	6.00
7th	“ -----	6.00
8th	“ -----	6.00
9th	“ -----	6.00
10th	“ -----	11.00

(b) The portion of the charge on account of the operation and maintenance of the irrigation system for the irrigation season of 1912 and annually thereafter until further notice shall be \$1.00 per acre of irrigable land, whether water is used thereon or not. As soon as the data are available the operation and maintenance charges will be fixed in proportion to the amount of water used, with a minimum charge per acre of irrigable land whether water is used thereon or not.

6. All entries made hereafter for any of the lands described, whether for lands not heretofore entered or for lands covered by prior entries which have been canceled by relinquishment or otherwise, shall be accompanied by applications for water rights in due form, and by the first instalment of the charges for building, operation and maintenance, not less than \$5.70 per acre of irrigable land, except where payments have been duly made by the prior applicants and credits therefor duly assigned in writing. The second instalment shall become due on December 1 of the following year. Subsequent instalments shall become due on December 1 of each year thereafter until fully paid. For lands in private ownership and for lands heretofore entered the first instalment of the said charges shall become due on December 1, 1912. The second instalment shall be due on December 1, 1913. Subsequent instalments shall be due on December 1 of each year thereafter until fully paid.

7. On some of the farm units in township 55 north, range 100 west, additional areas (shown on the plat enclosed in a square) will be irrigated at a later date by the construction of the highline canal, at which time water-right applications will be required therefor.

8. The regulation is hereby established that no water will be furnished in any year until the portions for operation and maintenance of all instalments then due shall have been paid. Accordingly, no water will be furnished for the irrigation season of 1913 for any lands unless the portion of the instalment for operation and maintenance due on December 1, 1912, has been paid, and in like manner

no water will be furnished in any subsequent irrigation season until payment has been made of the portions of the instalments for operation and maintenance for the current and prior years.

9. Failure to pay any two instalments of the charges when due, whether on entries made subject to the Reclamation Act or on water-right applications for other lands, shall render such entries and the corresponding water-right applications, if any, or the water-right applications for other lands, subject to cancelation with the forfeiture of all rights under the Reclamation Act, as well as of any moneys already paid.

10. All charges must be paid at the local land office at Lander, Wyoming. The charges may, however, for the convenience of applicants, be paid to the special fiscal agent of the United States Reclamation Service assigned to the Shoshone project, for transmission to the register and receiver of the local land office on or before the date specified for payment at the local land office, but in case this privilege is availed of, the necessary charges for the transportation of the cash, as determined by the special fiscal agent, must accompany the payment of the water-right charges.

SAMUEL ADAMS,

*First Assistant Secretary of the Interior.*

#### OPENING OF ROSEBUD AND PINE RIDGE INDIAN LANDS.

##### EXECUTIVE ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, February 26, 1912.*

SIR: For the purpose of enabling applicants to designate the lands selected by them under the proclamation of June 29, 1911 [40 L. D., 164], opening portions of the Rosebud and Pine Ridge Indian Reservations, at a point near the lands so selected, it is recommended that the town of White River, South Dakota, be designated as a place at which such applicants may appear before an officer designated for that purpose and there specify the lands they desire to enter, and the officer so designated shall issue certificates which will authorize the persons named therein to enter the lands designated by them at any time within fifteen days after the dates of such certificates.

And for the purpose of assuring better climatic conditions during the time when such selections are being made, it is recommended that such selections be made on and after April 15, 1912, on such dates as may be assigned to the applicants for that purpose.

Very respectfully,

SAMUEL ADAMS, *Acting Secretary.*

THE PRESIDENT, WHITE HOUSE.

Approved February 26, 1912:

WM. H. TAFT.

## OPENING OF ROSEBUD AND PINE RIDGE INDIAN LANDS.

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

*Washington, March 28, 1912.*

REGISTER AND RECEIVER,

*Chamberlain, South Dakota.*

SIRS: Paragraph 18 of the regulations of June 29, 1911 (40 L. D., 167, 171), relative to the opening of the Pine Ridge and Rosebud Indian Reservations, is hereby amended to read as follows:

Applications filed prior to October 1, 1912, to contest entries allowed for these lands will be immediately forwarded by you to the General Land Office where they will be at once carefully examined and forwarded to the Secretary of the Interior with proper recommendations, when the matter will be promptly decided, and this regulation will supersede, during the period between April 15, and October 1, 1912, all existing rules of practice or regulations relative to contests in so far as they affect entries for said lands.

The procedure relative to the presentation, amendment, allowance and rejection of applications to file soldiers' declaratory statements and applications to enter said lands will be controlled by existing regulations and rules of practice and not by the provisions of this paragraph as they heretofore existed.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved, April 2, 1912:

SAMUEL ADAMS,

*First Assistant Secretary.*

## JOHN W. HENDERSON.

## TIMBER TRESPASS—MEASURE OF DAMAGES.

In all cases of innocent trespass, where timber has been cut from lands of the United States, whether the timber so cut has been converted by the trespasser or the innocent vendee of such trespasser, or whether it has been allowed to remain on the land where cut, the measure of damages should be the value of the timber after it has been severed from the soil and not its stumpage or standing value.

*Instructions by Commissioner Dennett, approved by First Assistant Secretary Adams, to Mr. Antoine Paul, Chief of Field Division, Gainesville, Florida, April 1, 1912.*

This office is in receipt of a timber trespass report made by Timber Cruiser William L. Hill dated March 8, 1911, transmitted approved

by you July 31, 1911, in which it is charged that one John W. Henderson, of Tallahassee, Florida, cut in trespass during the year 1906, 165 small pine trees, manufactured into 16,500 feet, board measure, of slats and boards, from vacant unreserved public lands at date of trespass described as the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 22, T. 1 S., R. 1 E., T. M., Gainesville, Florida, land district, and now embraced in homestead entry 06165, entered by W. C. Cauley December 4, 1909, still intact.

It is stated in the report that the aforesaid timber was cut by one D. M. Lutz, whose address is now unknown, an employe of said Henderson; that the said slats and boards were removed from the land and used in the building of shades and sheds on said Henderson's tobacco farm nearby; that none of said timber was sold; that the trespass was evidently unintentional, owing to the fact that the late John A. Henderson, father of the trespasser, died leaving a large estate consisting of lands which surrounded the above referred to forty acre tract; that the said tract had formerly been assessed to private individuals, afterwards to the father of the trespasser, and at the latter's death to the trespasser himself; that the county records show that such assessments had been paid thereupon by the aforementioned parties; that it was generally acknowledged to be private property; and that when the aforesaid timber was cut the trespasser had no knowledge that the land belonged to the United States. The values per thousand feet are given as follows: stumpage \$2.50, on ground where felled \$3, manufactured \$6.

Accompanying the report was a proposition of settlement submitted by said John W. Henderson in the sum of \$49.50, secured by certified check for said amount, being the severed value of 16,500 feet at \$3 per thousand feet, intended to cover his full civil liability in the premises on the ground of an unintentional trespass.

Timber Cruiser Hill states that he investigated the county records and ascertained that the allegations made by the trespasser to the effect that the lands had been assessed to him were true and he recommended that said offer be accepted as made, in view of the decision rendered by the Supreme Court of the State of Florida January 30, 1906, in the case of *Peacock et al. v. Feaster* (40 So., 74), and you concurred in said recommendation.

The case at hand would be merely an ordinary case of unintentional trespass and would require no discussion were it not for the fact that the proposition of settlement was submitted on the basis of the severed value of the timber. In order to hold that this is the proper measure of damages to collect in this case, it will be necessary to announce a new doctrine and therefore an interpretation of the rule governing the measure of damages in cases where the tres-

pass is an innocent one is necessary. Owing to the importance of the question the subject will be discussed somewhat at length.

At the October, 1882, term the United States Supreme Court handed down, in the case of *Woodenware Company v. United States* (106 U. S., 432), a rule governing the measure of damages in the case of a willful trespass. The opinion of the court was delivered by Mr. Justice Miller, who also in the form of dictum stated a rule to govern the measure of damage where the trespass was unintentional or by mistake. The rule was given in the following language:

But the weight of authority in this country, as well as in England, favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition.

The above quoted rule is the one which has been followed by this office in the settlement of trespass cases where the trespass was innocent. The clause, "the value of the property when first taken must govern" has been interpreted by this office to mean "the stumpage or standing value of the timber."

On March 1, 1883 (1 L. D., 695), instructions were sent out to the special timber agents of the General Land Office by the Commissioner, with the approval of the Secretary, setting forth in full the three rules (including the rule pertaining to unintentional trespass) laid down in the case of *Woodenware Company v. United States*, *supra*, and directing:

In cases where settlement with an innocent purchaser of timber cut unintentionally through inadvertence or mistake is contemplated, you are instructed to report as nearly as possible the damage to the Government as measured by the value of the timber before cutting.

It will be observed from the above quotation that the second rule laid down in the *Woodenware Company* case was interpreted to mean that the value of the timber while standing would be the measure of damages in cases of unintentional trespass.

In 1904 the case of *United States v. St. Anthony Railroad Company* (192 U. S., 524) was decided by the United States Supreme Court. The case was based upon an action in trover brought by the United States to recover for the cutting down and conversion of certain timber from government land. The court held the trespass to be an unintentional one and fixed the measure of damages in the following language:—"We think the measure of damages should be the value of the timber after it was cut, at the place where it was cut."

The court further stated that the case did not come within the purview of *Woodenware Company v. United States*, *supra*, or of *Pine River Logging Company v. United States* (186 U. S., 279) for the reason that the trespass in each of these cases was held to be a willful one.

The question that here arises, therefore, is whether the court in the case of *United States v. St. Anthony Railroad Company* modified the rule which was laid down in the form of dictum in the *Woodenware Company* case or intended to lay down a new rule. The rules enunciated in the *Woodenware Company* case were quoted in full in the *Pine River Logging Company* case and seem to have met with the approval of the court. The form of action in all three of these cases was the same, namely, an action in trover, and therefore if the degree of the trespass had been the same in each, the same rule pertaining to the measure of damages would have been applicable. The language of the court relative to the measure of damages in cases of innocent trespass as stated in the *Woodenware Company* case is not entirely clear. A number of English cases were referred to where coal was mined in trespass and in which it was held that the value of the coal in place before the same had been mined would constitute the measure of damages, but the court, after laying down the rule governing the measure of damages in an innocent trespass, referred approvingly to several cases, one of which was *Winchester v. Craig* (33 Mich., 205). In this case it was held that the measure of damages which could be rightfully recovered in the case of an innocent timber trespass would be the value of the timber after it had been severed from the realty. The earlier case of *Greeley v. Stilson* (27 Mich., 152) was referred to. This rule, however, was not held to be the uniform rule in all such cases and extracts were quoted by the court in the case of *Winchester v. Craig*, *supra*, from a number of cases in some of which it was held that the value of the property in place before severance would be the proper measure of damages.

The following cases, however, held that the value of the property after severance would be the proper measure of damages:

*Forsyth v. Wells* (41 Penn. State, 291);

*Moody v. Whitney* (38 Maine, 124).

It is obvious, therefore, that the court when it handed down its decision in the *Woodenware Company* case had in mind the holdings in the above mentioned decisions and when it stated that the measure of damages would be in the case of an innocent trespass, "the value of the property when first taken," it may have intended that the value of the property after the same had been severed from the soil would be the proper measure of damages. To further substantiate

this fact it will be noticed that in stating the facts in the case the court said:

The timber on the ground after it was felled was worth twenty-five cents per cord, . . . where defendant bought and received it three dollars and fifty cents per cord. . . . The question on which the judges divided was whether the liability of the defendant should be measured by the first or the last of these valuations.

While the court was considering the above mentioned values on the basis of a willful trespass, yet it tends to show that the standing value of the timber was never at any time taken into consideration. The same may be said also in the Pine River Logging Company case, *supra*.

It does not appear from the foregoing that the court in the St. Anthony Railroad Company case intended to change any principle of law laid down in the two cases referred to above but that it considered that in an action of trover the proper measure of damages would be the value of the timber after its severance from the soil. It is true that the value after severance in that case was the minimum value as agreed to by the parties in the stipulations. Nevertheless, that fact alone ought not to influence the finding of the court with reference to the measure of damages. An action in trover is an action to recover for the value of personal property converted to the use of the trespasser. Since personal property forms the gist of the action it must have been severed from the soil before such an action could be brought. Otherwise it would not be personal property. It is probably upon that principle that the court fixed the measure of damages in the case of an innocent trespass.

In the case of Trustees of Dartmouth College *v.* International Paper Company (132 Fed., 92), the measure of damages for the cutting and conversion of timber was fully discussed in the light of the various decisions pertaining to the subject. It is shown in that decision that where standing timber has been wrongfully cut the injured party may have the choice of one of five different remedies, namely:

1. Trespass *quare clausum*.
2. Trespass *de bonis asportatis*.
3. Trover.
4. Replevin.
5. Recaption.

Of the above mentioned remedies the two with which this office is most interested are those of trespass *quare clausum* and trover. The former is the one most applicable where the trespasser has allowed the timber to remain on the ground where cut. The latter is applicable



where the trespasser has removed the timber. The action of trespass *de bonis asportatis* is sometimes resorted to instead of trover. In discussing the measure of damages recoverable in the case of an innocent trespass in an action of trover, the court states:

Unfortunately the precise measure of the allowance to the defendant for his improvement has been stated by different courts—or by the same court—in many ways.

The following rules are then set forth:

1. The stumpage value.
2. The value after severance, less expense of severance.
3. The stumpage plus profit.
4. The value at severance less what it would have cost the plaintiff to sever.
5. The value at time of action brought or at some other time after severance, less expense of improvement.
6. Value immediately after severance.
7. Value when removed from the plaintiff's land.
8. Defendant's profit received.
9. Value at time the action is brought less value added by defendant.

To support the sixth rule of those enumerated above the following cases are cited:

- United States *v.* Van Winkle (113 Fed., 903);  
White *v.* Yawkey (108 Ala., 270);  
Ivy Co. *v.* Alabama Co. (135 Ala., 579);  
Franklin Coal Co. *v.* McMillan (49 Md., 549);  
Blaen Co. *v.* McCullough (59 Md., 403);  
Morgan *v.* Powell (3 Q. B., 278);  
Martin *v.* Porter (5 M. and W., 351);  
Beede *v.* Lamprey (64 N. H., 510).

The case of United States *v.* St. Anthony Railroad Company, *supra*, appears to be the only United States Supreme Court case pertaining to either of the above mentioned nine rules, and that case substantiates the sixth rule mentioned above. The court in the case of Trustees of Dartmouth College *v.* International Paper Company, *supra*, held, however, that the stumpage value of the timber only should constitute the measure of damages, notwithstanding the holding of the United States Supreme Court in the St. Anthony Railroad Company case, cited therein.

A review of the case of Peacock *et al.* *v.* Feaster, *supra*, shows that relative to the rule pertaining to the measure of damages in an innocent timber trespass case, the court followed the rule laid down

in an earlier case, namely, that of *Wright v. Skinner* (34 Florida, 453; 16 So., 335); which was in the language of the court as follows:

If the parties who committed the trespass did so unintentionally through mistake in the land lines, what is the legal measure of damage to the owner who sues in trover for compensation for the loss of property that he has sustained, and in such case, if the defendant is an innocent vendee from an innocent trespasser what, in his case, is the measure of damage? . . . (Here the court discusses the rules laid down in the case of the *Woodenware Company v. United States* and concurs in the holdings contained in rules 1 and 3 of that case, but states that it believes the second rule should be modified and gives a rule as a substitute therefor in the language which immediately follows.) Where the trespass is an unintentional or mistaken one the damages should be the value of the chattels at the time and place of their conversion. Where the property converted consists of logs taken from another's land, the conversion does not become complete until they are actually removed from the land of the owner, because they are considered in law to continue to be in the possession of the owner of the land until actually removed therefrom; therefore where the trespasser is an unintentional or innocently mistaken one, there should not be any deduction in his favor from the value of the property at the time and place of conversion for the cost of any labor bestowed thereon anterior to the time that he completely consummates the conversion by actual removal from the owner's land.

The syllabus by the court in the case of *Peacock et al. v. Feaster*, *supra*, contains the substance of the above rule.

Chief of Field Division L. L. Sharp, of Portland, Oregon, has also recommended that in cases of innocent trespass arising in his field division the rule laid down by the court in the *St. Anthony Railroad Company* case be followed. He has reported that the rule enunciated in the last mentioned case has been followed by the United States District Court for the district of Idaho in the case of *United States v. Bunker Hill and Sullivan Mining Company*, decided at Moscow, Idaho, in 1909. He has also stated that the United States Attorney for the district of Oregon has concurred in the recommendation; that he has been advised by the Assistant to the Solicitor of the Forest Service that the rule laid down in the *St. Anthony Railroad Company* case is now being followed in all cases within the jurisdiction of the Forest Service involving an innocent or mistaken trespass; and that he has also been advised that recently instructions to the United States Attorney J. W. Freeman at Helena, Montana, by the Attorney-General directing institution of suit in the case of *United States v. Gorus*, to recover the stumpage value of timber cut in an innocent trespass, were withdrawn and that new instructions were issued directing that the rule in the *St. Anthony Railroad Company* case be applied.

In the case of *Woodenware Company v. The United States*, *supra*, the court was considering the liability of the trespasser on the basis of a willful trespass and when it enunciated a rule for the liability

of the trespasser in the case of an innocent trespass it did so merely as dictum. The action was one in trover and when the court stated in its opinion that in the case of an innocent trespass—

the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant he should be credited with this addition—

it surely must have had reference to personal property and not to standing timber. This office is of the opinion that the court in that case never at any time took into consideration the stumpage value of the timber involved; that when it said that the defendant should be credited with value afterwards added it intended to convey the meaning that such value to be credited to the trespasser should be for any labor or improvement added to the property after it had been converted and not for labor in accomplishing the conversion.

This office, therefore, in view of the rule laid down in the St. Anthony Railroad Company case by the United States Supreme Court, which is the highest authority, concludes that in all cases of innocent trespass where the timber has been converted by the trespasser or innocent vendee from such trespasser, the measure of damages should be the value of the timber after same has been severed from the soil, instead of the stumpage or standing value of the timber as has been the rule in previous cases.

As will be noticed the above rule is applicable in all cases where the United States would be entitled to bring an action in trover. If the conversion has not been consummated by the trespasser, as would be the case where the timber has been allowed to remain on the ground where cut, it might seem necessary to apply another rule, since in such cases the Government in order to recover would be compelled to bring an action in trespass *quare clausum fregit* and the amount recoverable in that case would be limited to the damage done to the real estate. In formulating a rule, however, to be followed by special agents of the General Land Office covering the measure of damages in innocent trespass cases, this office in view of the practice prevalent, is of the opinion that no distinction should be made between a case where the trespasser has removed the timber from the land where cut, thus consummating the conversion, and a case where he has permitted the timber to remain on the land where cut, for the reason that the office has allowed an innocent purchaser who submits a proposition of settlement for the timber cut by him to afterwards convert the timber for which he has settled to any use which he sees fit. Accordingly, you will in all future cases of innocent trespass be guided by the rule laid down in the St. Anthony Railroad Company case, and similar instructions will be given to the other chiefs of field divisions.

## INSTRUCTIONS.

## ENLARGED HOMESTEAD—QUALIFICATIONS.

In order to entitle one to make an entry for 320 acres under the enlarged homestead act he must be possessed of the right to make homestead entry for 160 acres elsewhere; and one entitled under section 6 of the act of March 2, 1889, to make an additional entry for an amount less than 160 acres, is not, by virtue of that fact, qualified to make an entry for 320 acres under the enlarged homestead act.

## REGISTERS AND RECEIVERS,

*United States Land Offices,*

*Arizona, Colorado, Idaho, Montana, Nevada,*

*New Mexico, Oregon, Utah, Washington, and Wyoming.*

GENTLEMEN: Under date of March 22, 1912, the following instructions were issued by the Department to this office:

## THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I have your informal memorandum dated March 2, 1912, submitted in connection with a letter prepared in your office for my signature (P. R. S. 1071), addressed to Hon. Charles N. Pray, House of Representatives, the memorandum being in full as follows:

"It is now held by the General Land Office that in cases such as are discussed in the accompanying letter an entry under the enlarged homestead act for the full area of 320 acres may be allowed when the deficit in area of the former perfected entry under section 2289, R. S., was such as would entitle the entryman, under the rule of approximation, to make an additional entry under section 6 of the act of March 2, 1889 (25 Stat., 854), of a legal subdivision of forty acres."

Differently stated, reference being had to the aforesaid draft of letter, this is the equivalent of saying that it is now held as a rule of administration in the General Land Office that in cases where a homestead entry has been allowed and perfected under section 2289 of the Revised Statutes, for a quantity of land less than 160 acres, the entryman of the perfected homestead may make further or additional entry for 320 acres of land under the enlarged homestead act of February 19, 1909 (35 Stat., 637), in all cases where such deficiency would entitle him to make an additional entry under section 6 of the act of March 2, 1889, for forty acres of land.

That this is an erroneous view of the law seems clear. The enlarged homestead act permits the entry of 320 acres or less of land by any person "who is a qualified entryman under the homestead laws of the United States." Section 6 of said act of March 2, 1889, qualified a person who has entered "a quantity of land less than 160 acres" and who is otherwise within its provisions, to enter under the homestead laws "so much additional land as added to the quantity previously so entered by him shall not exceed 160 acres." This does not restore such person to the full qualifications of a homestead entryman but confers a special and limited privilege—limited to the right to make an additional entry for lands of area to be measured by the difference in acreage between 160 acres, the full homestead right given by section 2289 of the Revised Statutes, and the number of acres actually entered thereunder.

In other words, the right granted by the act of March 2, 1889, is the right to enter additional land in amount limited to meet the deficiency existing between that originally entered under the homestead laws and 160 acres. The rule of approximation for administrative convenience may in actual practice either enlarge or reduce this right, but this does not affect the construction of the statute.

So the right of additional entry given by the act of March 2, 1889, is necessarily confined by its terms to an acreage wholly inconsistent with the theory that 320 acres may be entered under the enlarged homestead act. Nothing in the enlarged homestead act precludes the exercise of such right of additional entry within the area designated for entry under that act, but the grant of additional right is not thereby enlarged as to such cases. It is such right only as might be exercised elsewhere upon the public domain of the United States subject to homestead entry.

This question was presented in a somewhat different form in the case of *Ex parte Saavi Storaasli*, decided by this Department July 18, 1911 (40 L. D., 193). That case involved the right of Storaasli to make an entry of 320 acres or to retain an entry of 160 acres of land he had been allowed to make under the enlarged homestead act. It appeared that he had theretofore made and perfected an entry under section 2289 of the Revised Statutes, for 157.33 acres, and he maintained his claim of right to make the enlarged homestead upon the ground that he was in that behalf a qualified entryman by reason of the deficiency of 2.67 acres of his original homestead, and consequent additional entry privilege accorded by the act of March 2, 1889. That claim was denied upon the ground that—

“The fact that the land thus patented lacked a little more than two acres of making 160 acres, did not give him the status of a qualified homestead entryman or the right to enter under the enlarged homestead act an additional 320 acres of land.”

It was not intended by this to say, even inferentially, that the case would have been different if the deficiency in the original entry had been large enough under the act of March 2, 1889, as administered, to entitle him to an additional homestead entry for forty acres of land. That case was decided upon its own facts. The discussion was confined to such facts, and nothing found therein justifies the rule which you say now obtains in your office with reference to this question.

I have to direct that in the further administration of the enlarged homestead act your office conform to the views herein expressed.

Very respectfully,

SAMUEL ADAMS,

*First Assistant Secretary.*

The foregoing instructions supersede any former practice or instructions and you will be governed accordingly.

Very respectfully,

FRED DENNETT,

*Commissioner.*

Approved, April 2, 1912.

SAMUEL ADAMS,

*First Assistant Secretary.*

## JACKSON OIL CO. v. SOUTHERN PACIFIC RY. CO.

Decided October 6, 1911.

## RAILROAD SELECTION—RESURVEY—PATENT.

Where a railroad company applied to select a certain described quarter-section of land, but prior to approval of the selection the township was resurveyed, and the latter survey approved and plat thereof filed in the local office, the subsequent approval of the selection and issuance of patent thereon carries title to the designated quarter-section as fixed by the survey in force at the time the patent was issued.

## CONFLICTING DECISION OVERRULED.

McKittrick Oil Co. v. Southern Pacific R. R. Co., 37 L. D., 243, overruled in so far as in conflict.

ADAMS, *First Assistant Secretary*:

The Southern Pacific Railway Company has appealed from the decision of the Commissioner of the General Land Office, dated March 17, 1911, wherein, as the result of a contest proceeding instituted by the Jackson Oil Company, it was found that lots 1, 4 and 9, being a part of the NE.  $\frac{1}{4}$ , Sec. 11, T. 30 S., R. 21 E., M. D. M., Visalia land district, California, are oil lands; that said tracts were not embraced in any previous patent issued to said company; and that its selection therefor, which was held to be still pending, was rejected because of said mineral finding.

The mineral character of the tracts in question seems to be conceded, but the railroad company earnestly contends that the tracts involved are not public lands, having been included in the patent issued to said company January 25, 1896.

This township was originally surveyed by one Reed, whose survey was approved April 27, 1869. The township was later surveyed by one H. P. Carpenter, whose survey was approved November 18, 1893, and the plat thereof filed in the local land office at Visalia April 6, 1894.

December 26, 1891, the Southern Pacific Railroad Company applied to select, among other tracts, the NE.  $\frac{1}{4}$  of section 11 of this township. The selection was not acted upon until 1896, when patent was made to it of the NE.  $\frac{1}{4}$  of section 11 of said township. The question involved is as to whether such NE.  $\frac{1}{4}$  is to be understood according to the survey in effect when the company applied to select this land, or the survey in force at the time the patent was issued. It is well settled that no selection is complete until acted upon by the Department. At the time the Department acted on this application the Carpenter survey was in force and there was no authority in law for issuing patents to the railroad in other than odd-numbered sections. It necessarily follows that the patent issued in 1896 to the railroad company must be interpreted according to the Carpenter survey. If a mistake was made in issuing the patent—which is not

decided—it is too late to correct that mistake. It necessarily follows that lots 1, 4 and 9 did pass to the railroad under the patent of 1896, while no land now in section 2 under the Carpenter survey passed to the railroad.

This holding is in consonance with the decision of the Department of January 23, 1903. Consequently, the patent of 1896, issued to the railroad company, as held in said decision of January 23, 1903, conveyed the title to these lots to said company; and since then this Department has been without jurisdiction over the lands. Any expression to the contrary in the case of McKittrick Oil Company *v.* Southern Pacific Railroad Company (37 L. D., 243), must be regarded as overruled.

The decision appealed from is reversed and the case is dismissed.

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### JACKSON OIL CO. *v.* SOUTHERN PACIFIC RY. CO.

Motion for rehearing of departmental decision of October 6, 1911, 40 L. D., 528, denied by First Assistant Secretary Adams April 18, 1912.

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### STATE OF CALIFORNIA.

*Decided December 26, 1911.*

#### SWAMP LAND GRANT—CHARACTER OF LAND.

Lands which at a hearing, upon application of the State under the act of July 23, 1866, are shown to have been, on September 28, 1850, the date of the swamp land grant to the State, not of a permanently swampy character, but subject merely to periodical overflow and susceptible of cultivation on recession of the waters, were not swamp within the meaning of the swamp land grant and did not pass to the State thereunder.

#### ADAMS, *First Assistant Secretary:*

This is an appeal from the decision of the Commissioner of the General Land Office of May 21, 1911, affirming the finding of the United States surveyor-general for California, that approximately 99,840 acres of land in townships 7, 8, 9, 10, and 11 south, ranges 21 and 22 east, and township 12 south, range 22 east, are not swamp lands within the meaning of the act of September 28, 1850 (9 Stat., 519).

The case arose upon the application of the State for a hearing under the provisions of the act of July 23, 1866 (14 Stat., 218), which provides that if the authorities of the State claim as swamp and overflowed lands not so represented upon the plat or returned by the official surveys, the character of such land at the date of the

grant, September 28, 1850, and the right to the same, shall be determined by testimony taken at a hearing before the United States surveyor-general, who shall decide the same, subject to the approval of the Commissioner of the General Land Office.

Upon application by the State of California, and after notice in the form prescribed by the rules, hearing in this matter was held before the United States surveyor-general August 22 to 26, 1910, and upon consideration of the testimony there submitted the surveyor-general held that as to a portion of the lands involved the doctrine of *res judicata* applies, because the same was the subject of proceedings initiated by the State and disposed of by dismissal of the State's claim in decision of the Commissioner of the General Land Office of April 3, 1894. He further held that the State of California had failed to establish that any of the land involved was swamp and overflowed land on September 28, 1850. On appeal prosecuted by the State, the Commissioner of the General Land Office affirmed the finding of the surveyor-general as to the failure of the State to establish the swamp and overflowed character of the land at date of the swamp land grant, holding, in substance, that while portions of the area involved are subject to overflow during the majority of years, the overflow is of short duration and is beneficial to the production of crops thereupon.

From said decision the State of California has appealed, alleging that the evidence shows that the land involved was, on September 28, 1850, and has been since that time, subject to periodical overflows, which prevent the cultivation thereof except at irregular intervals, and that if it were not for such overflow, agricultural crops could be regularly grown upon the land through irrigation. Error of law is alleged in holding that the swamp land grant does not apply to or cover lands of the character involved.

The lands involved in this proceeding are situate in what is locally known as Palo Verde Valley, in Riverside and Imperial Counties, California, comprising, in part at least, bottom lands on the west side of the Colorado River. The official surveys of township 7 south, ranges 21 and 22 east, and of township 8 south, range 21 east, were approved October 6, 1856; of townships 9, 10, and 11 south, range 21 east, were approved March 21, 1857, and of townships 8, 9, 10, 11, and 12, range 22 east, were approved May 22, 1879. None of the lands were returned by said surveys as swamp land.

The survey of township 8 south, range 22 east, describes a number of sections in the eastern portion of the township as subject to overflow by an ordinary rise of the river, and states that unusual floods overflow nearly the entire township, which latter condition is also shown by the survey to apply to township 9 south, range 22



east. Both surveys return the land, however, as first and second rate, very fertile, and well adapted to the production, when irrigated, of grain, cotton, rice, sugar-cane, and fruits. Generally, it may be stated that the returns of the surveys show the land in the river bottom and involved in this proceeding to be fertile and covered with a growth of mesquite, cottonwood, willow, and arrowweed, while the higher lands are shown to have a sandy or clayey soil, supporting a growth of greasewood and scattering bunch grass.

The act of the legislature of California approved May 13, 1861, required the county surveyors of the several counties in the State to segregate and map the swamp and overflowed lands within their respective counties. There was introduced in evidence a certified copy of an official map of San Diego County prepared in 1889, in which county the lands here involved were then situate, which map does not designate any lands in this proceeding as swamp lands.

At the hearing before the surveyor-general a number of persons claiming portions of the land under homestead and desert land entries, or applications to make such entries, intervened and upon stipulation all lands included in valid subsisting entries and applications were excluded. The testimony of twelve witnesses, five of whom appeared at the instance of the State, was taken. None of the witnesses had any knowledge as to the condition or the character of the lands in 1850. One of the witnesses has known the land in a general way since 1859, another since 1864, while the acquaintance of the other witnesses covers various periods between 1879 and the date of hearing.

The evidence shows that the Colorado River has been building up its bed for many years, and that while overflows carry considerable silt upon the valley lands adjacent to the river, the latter have filled up but little. What are designated as the spring overflows of the Colorado River are occasioned by the melting snows upon the mountain slopes which drain toward the Colorado and its tributaries, and the height of the overflow is consequently dependent upon the depth of the snowfall or the rapidity with which the snow melts. These overflows occur between May and July, and last from two to six weeks, usually for the shorter period. Overflows at other seasons, occasioned by cloud-bursts or heavy rains, are unusual, and last as a rule but a few days. Four unusual floods are referred to in the evidence, 1862, 1867, 1882, and 1909, the latter, which was probably the highest of all, having overflowed a considerable portion of the lands here involved. Other overflows within the memory of the witnesses have not been of such magnitude.

The evidence shows that Indians resident in the valley in the early days, and the white settlers of a later period, raised crops of

Indian corn, sorghum, beans, melons, and pumpkins upon lands subject to overflow, the method of production being to seed the same immediately after the subsidence of the floods, depending upon the moisture retained by the soil to support their growth to maturity. Lands not overflowed or not planted promptly after the recession of the waters will not produce crops because of the aridity of the soil, which becomes baked and dry under the rays of the sun. The cultivation of the lands has been limited. That of the Indians was primitive, consisting of sticking the seeds of corn, melons, etc., in the ground, leaving them to grow and mature unaided. The cultivation by the white settlers was limited to small tracts, where they raised forage for stock, or corn, melons, and vegetables for their own use. The remoteness of the lands from centers of population and the absence of transportation facilities have tended to retard agricultural development. Alfalfa can not be grown upon lands subject to overflow, as a flood drowns and kills the growth. The overflows or the danger of overflows has retarded the irrigation of the lands, because floods destroy or injure the ditches and canals. It is clear, however, from all the evidence submitted that the overflows, where they occur, are but temporary in character, and that after the water has receded the land, except in the low level areas, where moisture is retained for a time, becomes dry and arid, and of the character usually denominated desert lands. None of the lands involved are shown to be, by reason of the overflows or otherwise, wet or swampy in character throughout the year or any considerable portion thereof.

On the whole, the evidence shows the result of the overflows upon the river bottom lands to be beneficial to agricultural production rather than detrimental, and so far as shown none of the lands are permanently overflowed or wet.

The act of September 28, 1850, *supra*, was designed to effect, through the agency of the several States, the reclamation of lands unfit, by reason of water thereon, for cultivation unless reclaimed. It grants to the States mentioned "the whole of those swamp and overflowed lands, made unfit thereby for cultivation," and in section 3 it is provided that in listing such lands "all legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats."

The act does not purport, nor was it the intent, to grant to the States lands temporarily overflowed and not permanently removed from agricultural use and production, or lands which, in their usual and natural condition during the crop season, are too arid to grow crops.

As stated by the United States Supreme Court, in its opinion in the case of *Heath v. Wallace* (138 U. S., 573, 587), the term "over-

flowed" as thus used "has reference to a permanent condition of the lands to which it is applied. It refers to those lands which *are* overflowed and will remain so without reclamation or drainage; while 'subject to periodical overflow' has reference to a condition which may or may not exist, and which, when it does exist, is of a temporary character. It was never intended that all the public lands which, perchance, may be temporarily overflowed at the time of freshets and high waters, and which, for the greater portion of the year, were dry lands, should be granted to the several States as 'swamp or overflowed' lands. At any rate, whether or not lands returned as 'subject to periodical overflow' are within the descriptive terms of those granted by the swamp land act—that is, whether they are 'swamp and overflowed'—is a question of fact properly determinable by the land department."

This Department, construing the swamp land act, has ruled that lands subject to periodical overflow, but susceptible of cultivation on the recession of the waters, are not swamp and overflowed land within the meaning of the act. *California v. United States* (3 L. D., 521); *Oregon et al. v. Mothershead* (19 L. D., 63); *DeWitt v. Oregon et al.* (21 L. D., 256).

As held by the decision of the Commissioner, the lands involved, not having been returned as swamp by the public surveys, the burden of proof rested upon the State in connection with its application, under the act of 1866, *supra*, to establish by clear and convincing proof the swamp and overflowed character and condition of the land at date of the grant, September 28, 1850.

The Department is clearly of the opinion that the evidence submitted fails to establish that the lands involved, or any of them, were swamp and overflowed lands at date of the grant, or are of that character at the present time.

The decision of the Commissioner of the General Land Office, rejecting the claim of the State, is accordingly hereby affirmed.

This determination renders unnecessary consideration of the question of *res judicata* presented in connection with a part of the lands here involved, further than to call attention to the fact that the proceeding had in 1894 was dismissed because of failure of the State to prosecute the case, and no evidence was submitted or decision rendered upon the merits, or determinative of the character of the land.

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#### STATE OF CALIFORNIA.

Motion for review of departmental decision of December 26, 1911, 40 L. D., 529, denied by First Assistant Secretary Adams April 25, 1912.

## LOW ET AL. v. KATALLA COMPANY.

*Decided January 15, 1912.*

**JURISDICTION OF LAND DEPARTMENT OVER PUBLIC DOMAIN.**

The jurisdiction of the land department in all matters involving the disposition of the public domain is plenary and exclusive except where specific legislation has made the adjudication of local tribunals auxiliary to the proceedings before the land department connected with the acquisition of title.

**ALASKAN LANDS—ADVERSE CLAIM—JURISDICTION OF LAND DEPARTMENT.**

Neither section 10 of the act of May 14, 1898, nor any other provision of law respecting proceedings in the courts concerning adverse claims to public lands in the District of Alaska, has the effect to divest the land department of its general and exclusive jurisdiction to investigate and determine the mineral or nonmineral character of public lands in that district.

**ALASKAN LANDS—ADVERSE PROCEEDINGS—SECTION 10, ACT OF MAY 14, 1898.**

The adverse proceedings provided for by section 10 of the act of May 14, 1898, are limited to cases of conflict arising between nonmineral claimants only, and have no application to cases of conflict between mining locators on the one hand and agricultural or nonmineral claimants on the other.

**ADAMS, First Assistant Secretary:**

Albert Low *et al.*, lode mining claimants, on January 18, 1911, filed an appeal from the decision of the Commissioner of the General Land Office, dated December 9, 1910, wherein they were granted sixty days in which to apply for an order for a hearing on their "adverse claim," treating it as a protest, against the application of the Katalla Company, for a tract of 39.98 acres, included in non-mineral survey, No. 829, Juneau land district, Alaska, or to appeal, on pain of the dismissal of their protest.

In order that the scope of this appeal may appear a brief history of the case is set forth. The Katalla Company's tract was surveyed in the field on March 22 and 23, 1906, which survey was approved by the Surveyor-General for the District of Alaska on July 8, 1908. The land is situated at Three Tree Point, on Orca Inlet, near Cordova (Eyack), Alaska, and within the general outboundaries of the Chugach National Forest, as established by the presidential proclamation of July 23, 1907 (34 Stat., 2149), and subsequent proclamations, these latter not being material here.

September 3, 1908, the Katalla Company, as assignée, in the exercise of a soldiers' additional homestead right, filed application for patent, No. 070, Juneau, for the tract surveyed, and publication of notice thereof began October 10, 1908. On April 22, 1906, the Comet lode mining claim was located, which is largely in conflict with the company's tract. On July 14, following, the Juneau Fraction lode claim was located, which is not in conflict with nonmineral survey No. 829, but is in conflict with nonmineral survey No. 831

to the east, and apparently also claimed by the Katalla Company. Still another mining claim, the Bear claim, immediately adjoining Comet on the north, was located on March 16, 1907, and is in conflict with the company's tract. These three claims now appear to be owned by Albert Low *et al.* The Comet and Juneau Fraction locations were officially surveyed August 19 to 25, 1908, and are embraced in mineral survey, No. 878, which was approved September 23, 1908. Official mineral survey, No. 902, of the Bear lode, was executed December 18 to 22, 1908, and was approved March 4, 1910.

October 7, 1908, Low *et al.*, claiming the Comet and Juneau Fraction locations, began suit against the Katalla Company to quiet their title to said claims and on October 15, 1908, these claimants filed their application for patent, No. 0105, for said locations. November 9, 1908, they filed in the land office their so-called "adverse claim" and therein set forth their ownership of the Comet location and averred that said nonmineral survey, No. 829, in great part embraced mineral land containing gold and copper and that the same was not subject to the company's soldiers' additional right. A protest was also filed on behalf of their Juneau Fraction claim. In December, 1908, the mineral claimants filed in court a supplemental complaint in their action against the company, setting up the filing of their adverse claim in the land office, and attached to said complaint a copy of the adverse claim as an exhibit.

April 4, 1910, Albert Low *et al.* filed in the land office application for patent, No. 01356, for the Bear location. July 15, 1910, the Katalla Company filed its so-called "adverse claim" against said application and thereafter instituted suit to quiet its title. The two actions above mentioned were consolidated and in a supplemental answer by the company, the Commissioner's decision of December 9, 1910, herein, and the pendency of the present appeal were set forth, followed by a prayer that the proceedings in court be stayed until a final determination of the questions raised before the Interior Department be had. However, the District Court of Alaska, Division No. 3, proceeded with the consolidated case, heard the evidence, and on May 29, 1911, handed down its findings of fact, conclusions of law, and decree in favor of the mining claimants, adjudicating that they were the owners and entitled to the possession of the three lode mining claims, subject to the paramount title of the United States, and that the Katalla Company had no right, title, or interest in or to said premises. The record before the Department indicates that active steps are being taken to bring the case before the Circuit Court of Appeals for the Ninth Circuit and that the decree of the Alaska District Court is not a final and conclusive determination of the

action. Certified copies of that decree, however, in connection with the judgment roll, together with applications to purchase, have been filed in both application proceedings of the mining claimants, but action thereon by the Commissioner is apparently suspended, awaiting final disposition of the pending appeal.

In the meantime, before the local officers, on June 28, 1909, the Katalla Company moved to strike from the files the so-called adverse claim of Low *et al.* This motion was denied by the register and receiver on the ground that they were without authority to proceed in the face of the adverse claim and the pending suit thereon. The company then petitioned on July 9, 1909, that the adverse claim be considered as a protest and be set down for a hearing as involving the character of the land. Said petition was denied July 13, 1909. The company thereupon appealed to the Commissioner and on January 24, 1910, also filed a motion to dismiss the so-called adverse claim, as a protest, because it was not corroborated and because the allegations were too vague and indefinite to justify a hearing as to the character of the land. In the decision of December 9, 1910, the Commissioner held in part as follows:

Regardless of all other questions which might possibly be raised as to the relative jurisdiction of this Department and of the courts under the statutes cited above, it can not be said that it was intended to confer upon the courts the exclusive power to adjudicate the mineral or nonmineral character of the lands and thus determine the particular laws under which they shall be patented. That power has always been conferred upon and exercised by the land department. It is fundamentally essential that the Department charged with the execution of the public lands laws, and the duty of issuing patents, should be authorized to determine the character of the lands; and there is no provision in any of the statutes relating to the disposition of Alaskan lands which justifies the assumption that Congress intended to transfer that power and vest it exclusively in the courts.

If the lands now in dispute in this case contain valuable mineral deposits, they can not be patented under the homestead application, and, since the question as to the existence of such deposits has been raised by the protest of Low *et al.*, it becomes the duty of this office to ascertain the facts before further steps are taken in this case. In doing this, it is not necessary that the validity of the adverse claim of Low *et al.* be inquired into or determined, or that the existence of that claim be recognized, because a protest against an application under a nonmineral law which is based on an allegation that the lands applied for are mineral in character, may be made by any person, regardless of whether he asserts or does not assert an adverse claim to the land.

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Your decision is, therefore, reversed, and said Low *et al.* will be allowed 60 days from notice hereof, to apply to you for, and serve upon the Katalla Company, an order for a hearing to determine the character of the land in controversy, to be held in accordance with the Rules of Practice, on a day set before you, or before some officer designated by you under Rule 35 of Practice. In default thereof, or of appeal herefrom, said protest will be finally dismissed.

The mining claimants, in their appeal, attack said decision on two grounds and contend (1) that the pendency of the adverse claim and suit thereunder by force of the statute operates to suspend all proceedings before the land department until the suit is finally determined, and (2) that, whether the lands are mineral or nonmineral the Katalla Company can have no claim or right to the tract sought, because, before the approval of its survey and the filing of its application, the land was withdrawn and included in the national forest.

The first contention, if well founded, is decisive. The question raised is important, involving, as it does, an apparent conflict of jurisdiction between the District Court of Alaska and the land department. It is a matter of first impression here.

The mining statutes with their adverse claim provisions contained in sections 2325 and 2326, Revised Statutes, were extended to the District of Alaska by section 8 of the act of May 17, 1884 (23 Stat., 24), and by section 26 of the act of June 6, 1900 (31 Stat., 321). The act of May 14, 1898 (30 Stat., 409), extended the homestead laws to Alaska, including the right to enter surveyed or unsurveyed lands under the provisions relating to the acquisition of title through soldiers' additional homestead rights with certain prescribed limitations. Section 10 of that act provides how all affidavits, testimony, proofs and other papers required under the act, or by regulations pursuant thereto, shall be taken and how notice of claimants' applications shall be given, for a period of at least 60 days, and concludes as follows:

and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court.

Section one of the last-mentioned act was amended by the act of March 3, 1903 (32 Stat., 1028). The existing regulations, under these acts, so far as soldiers' additional claims are involved, are those of January 13, 1904 (32 L. D., 424), which prescribe (page 441) that in the event of an adverse claim and suit being seasonably filed, no further action will be taken in the local office upon the application to purchase until the final adjudication of the rights of the parties in the court. Essentially similar provisions are found in section three of the Alaska coal land act of April 28, 1904 (33 Stat., 525), and para-

graph 21 of the regulations thereunder of April 12, 1907 (35 L. D., 678).

In passing, it may be observed that the express provisions of the mining statute contained in section 2326, Revised Statutes, to the effect that "all proceedings, except the publication of notice and making and filing of the affidavits thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived," were not in terms carried forward into the other Alaska adverse claim statutes.

Congress, by the legislation above set forth, has evinced a general design to have issues between proper adverse claimants adjudicated in the local courts. The serious question is presented whether by these statutes the jurisdiction and authority of the Department to ascertain and determine the character of lands (mineral or nonmineral) applied for in Alaska is taken away or suspended and vested in the courts.

The adverse claim provisions of the general mining laws have been repeatedly held to apply only to conflicting mining claims covering the same mineral ground and not to conflicts arising between claims of different or other classes and the courts have jurisdiction of adverse actions thereunder only between contending mining claimants. A tunnel site claim under the mining laws was held not to be a proper claim for adverse proceedings by the Supreme Court of the United States in the case of *Creede Company v. Uinta Company* (196 U. S., 337, 357, 360), the court saying:

Reading these two sections together it is apparent that they provide for a judicial determination of a controversy between two parties contesting for the possession of "land claimed and located for valuable deposits;" in other words, the decision of a conflict between two mining claims, a decision which will enable the Land Department without further investigation to issue a patent for the land. A tunnel is not a mining claim, although it has sometimes been inaccurately called one. . . . Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant.

See also the cases of *Iron Silver Mining Company v. Campbell* (135 U. S., 286), and *Richmond Mining Co. v. Rose* (114 U. S., 576). In the later case of *Clipper Company v. Eli Company* (194 U. S., 220, 234), involving a successful placer adverse suit against lode applicants, the Court in affirming the judgment below in favor of the placer claimants said:

The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.

Under the mining laws townsite claimants, occupants, or patentees have no standing as adverse claimants. *Wright et al. v. Town of Hartville* (81 Pac., 649); *Le Fevre et al. v. Amonson et al.* (81 Pac.,



71); *Ryan v. Granite Hill Company* (29 L. D., 522). A mill-site claimant need not adverse. *Snyder v. Waller* (25 L. D., 7); *Helena Company v. Dailey* (36 L. D., 144). A railroad company as to its right of way and station grounds which conflict with lode claims will not be allowed to adverse. *Grand Canyon Railway Company v. Cameron* (35 L. D., 495). In the case of *Powell v. Ferguson* (23 L. D., 173, 174), wherein it was contended that because the homestead entryman had failed to file his adverse claim he was forever barred from questioning the character of the land, the Department said:

The statute referred to only contemplates adverse suits as between rival mineral claimants to the land, and does not have in view a settlement of the character of the land as between agricultural and mineral claimants. The Department having jurisdiction over all public lands until patent issues, may at any time, either on its own motion or on an application made by others, order a hearing for the purpose of determining its character, and there is no other tribunal provided by law for that purpose, whose judgment would necessarily be binding on the Department. (*Alice Placer Mine*, 4 L. D., 314.)

The Interior Department is specifically authorized and empowered to enforce and execute the public land laws of the United States. Sections 441, 453, 2478, Revised Statutes. The land department is a quasi-judicial tribunal and has exclusive jurisdiction over the disposition of lands of the public domain in the absence of specific legislation to the contrary. *Bishop of Nesqually v. Gibbon* (158 U. S., 155); *Knight v. United States Land Association* (142 U. S., 161); *McDaid v. Oklahoma* (150 U. S., 209). Pending final action of the Department with respect to title to public lands, generally the State or Federal courts will not interfere, nor entertain actions relating thereto. *Cosmos Company v. Gray Eagle Oil Company* (190 U. S., 301); *Marquez v. Frisbee* (101 U. S., 473); *U. S. v. Schurz* (102 U. S., 378); *Tiernan v. Miller* (96 N. W., 661); *Warnekros v. Cowan* (108 Pac., 238).

In the case last-above cited, one in which an action was brought against lode applicants, but in which the plaintiff did not allege the filing of the requisite adverse claim in the land office, the Supreme Court of Arizona commented as follows:

Upon the filing of an application for patent to public mineral land, the jurisdiction of the Land Office becomes exclusive as to all questions affecting the title to the lands therein applied for, and so remains until the final determination of the application. The exercise of its jurisdiction may be stayed only by the filing of an adverse claim as provided by section 2326 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1430). Without the filing of such adverse claim, neither the state nor federal courts will exercise jurisdiction in actions affecting the title to lands included within the application. It is by virtue of the provisions therein contained that courts assume jurisdiction of a question as to the right of possession to the ground in controversy after an application for patent is filed.

From the foregoing it clearly appears that the jurisdiction of the Department, in all matters involving the disposition of the public domain is plenary and exclusive, except where specific legislation has made the adjudications of local tribunals auxiliary to the proceedings before the land department connected with acquisition of title. In the Alaska acts Congress has not by any express legislation undertaken to divest the Department of its general and exclusive authority to investigate and determine the mineral or nonmineral character of lands in that district. Indeed, counsel for the mining claimants concede that such power resides with the Department. They contend that its exercise is postponed until the courts have concluded, and that if the courts determine the issue as to the character of the land, the Department ought not to burden the parties with further litigation of that question, but should accept the conclusions of the judicial tribunal.

With these views the Department does not agree.

In the case of *Snyder v. Waller* (25 L. D., 7, 8) the Department said:

Where the character of the land is involved to the extent that the determination of that question fixes the right to purchase the same, it can only be decided by the executive branch of the government which is clothed with the power to determine the question. It follows, I think, that there is nothing for the court to determine under the adverse that would aid the Department in deciding to whom the patent should issue.

In the case of *Ryan v. Granite Hill Company* (29 L. D., 522, 524), the following language was used:

No authority of law exists for transferring the proceedings from the land department to the courts for a decision of that question, and hence the decision of the court thereon can not bind or conclude the land department nor relieve it from the duty of making its own decision in the premises.

The Department is of the opinion that the adverse claim statutes applicable to Alaska have full scope for proper operation without infringing upon or interfering with the general and exclusive jurisdiction of the land department to investigate and adjudicate the character of the land. Since adverse proceedings under the mining laws are confined to conflicting mining claims, as shown by the authorities above cited, the adverse feature of the act of May 14, 1898, *supra*, should, for like reasons, be limited to cases of conflicts arising between *nonmineral claims only*, and should not be invoked or held applicable to cases of conflicts arising between mining locators on the one hand and agricultural, or nonmineral claimants on the other.

That substantially this view has been entertained by one of the courts of Alaska is evidenced by the opinion of District Judge Lyons,

dated January 16, 1911, handed down in the case of Heckman *et al. v. Mumford* on demurrer. That opinion is in part as follows:

Either the courts must have exclusive jurisdiction to determine the character of the land, or the Land Department must have such jurisdiction. There is nothing in the act which indicates an intention on the part of Congress to deprive the Land Department of the jurisdiction it has ever exercised since the date of its organization; that is, the determination of the character of the land in patent proceedings. When one applies for patent under a nonmineral application, the Land Department must determine the land to be nonmineral before a patent can issue; and when an applicant applies for patent for mineral land, the Land Department must determine that such land is mineral before patent can issue to such applicant.

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And it is intended by section 10 of the act of May 14, 1898, to give the Court jurisdiction merely to determine the question as to who has the better title to the property in controversy, the applicant for patent or the adverse claimant, or whether or not either of them has such title as warrants the issuing of patent to either as against the United States, without any reference to the character of the land, for that question must be determined by the Land Department; and although the court may quiet the title in favor either of the applicant or the adverse claimant, its judgment in that behalf is only binding upon the Land Department so far as the jurisdiction of the court extends, and such jurisdiction extends only to the determination of the right of either to obtain a United States patent, providing the character of the land is such as the applicant has claimed it to be in his application for patent; in other words, the courts are not authorized to aid the Land Department in any manner in determining the character of the land.

\* \* \* \* \*

It is contended, however, that the court being a court of general jurisdiction and having under the local laws jurisdiction in all actions of ejectment and actions to quiet title, should proceed to hear, try and determine an action when one is instituted regardless of any proceeding in the Land Department. Section 910, R. S. U. S., provides "that no possessory action between persons, in any court of the United States, for the recovery of any mining title or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mine lies is in the United States, but each case shall be adjudged by the law of possession." Under said section it is unquestionably true that this court has jurisdiction over possessory actions to mining claims in the district of Alaska and may entertain actions of ejectment or actions to quiet the title of any body in possession of an unpatented mining claim, and it may be that in the determination of such an action it might become necessary for the court to pass upon the character of the land and no doubt the court would have jurisdiction in such an action to determine for itself such question, but the court then acts independently and does not determine the question of the character of the land, or any other question in the action, for the purpose of aiding any proceeding to obtain patent. Under such circumstances the court has unlimited jurisdiction, but in patent proceedings it has only such jurisdiction as the acts of Congress expressly confer upon it. It is merely an auxiliary forum to determine certain questions which Congress has seen fit to endow it with jurisdiction to determine for the purpose of aiding the main forum in the determination of the question as to whether or not any party to the controversy is entitled to United States patent for the land in question.

And since the complaint in this action shows that the only question involved is the question of the character of the land and since the law provides that in all patent proceedings that question must be determined by the Land Department, and since this court is without jurisdiction in this proceeding to determine the question involved, it follows that the demurrer herein should be sustained, and it is so ordered.

It follows that the so-called adverse claim of the mining applicants can not be given the effect of an adverse claim under the statutes, but may be treated as a protest, as was done in the case of *Grand Canyon Railway Company v. Cameron* (35 L. D., 495). The conclusions reached by the Commissioner in that regard are therefore correct. Inasmuch as the ordering of a hearing is discretionary with the Commissioner of the General Land Office and as no abuse of discretion is made to appear in the case at bar the order will not be overturned.

The record indicates that there is an issue between these parties as to whether the Katalla Company's nonmineral claim is actually within the national forest, or whether it falls within the elimination therefrom made for the town of Eyack. The order for the hearing will accordingly be enlarged so as to include this issue.

So far as appears no examination or finding has been made by the Commissioner of the General Land Office as to the validity of the soldiers' additional right tendered by the Katalla Company or as to the sufficiency of the company's *ex parte* proceedings and proofs. If there be any fatal defect in these matters, further litigation before the land department at this juncture would be uncalled for and useless. The hearing ordered will be held in abeyance until the *prima facie* validity of the company's application and *ex parte* proofs has been investigated and ascertained, and if all be found regular and sufficient in that behalf, then due opportunity will be afforded the mining claimants to apply for a hearing as to the character of the land and the situation of the company's claim with respect to the national forest; but in default of such application, after due notice, their protest herein will be dismissed and their mineral applications, so far as in conflict with the company's survey No. 829, will be rejected. The Commissioner's decision is hereby modified to the extent above indicated.

The record in the case is accordingly remanded for further consideration and action in accordance with the views above set forth.

L. L. SQUIRES ET AL.

Decided January 25, 1912.

PATENT PROCEEDINGS—DILIGENCE—EFFECT OF DELAY.

An applicant for patent to a mining claim must proceed with diligence to complete his patent proceedings; and where not prosecuted to entry until

more than three years after completion of the publication of notice, and no satisfactory reason is given for the delay, the entry should be canceled.

**MINERAL ENTRY—AFTER-ACQUIRED TITLE.**

While a mineral entry allowed on insufficient showing of title in the applicant may be permitted to stand where the applicant subsequently acquires the complete title, he will not be allowed additional time in which to secure outstanding interests where there has already been an unexplained delay of more than three years between publication of notice of the application for patent and completion of the entry.

*THOMPSON, Assistant Secretary:*

February 6, 1905, L. L. Squires filed application for patent at Leadville, Colorado, for the Sundown placer, survey No. 17188, publication of notice being had from February 11, 1905, to April 15, 1905, and entry No. 5246 being allowed by the register and receiver January 8, 1906. This entry was held for cancellation by the Commissioner July 11, 1906, and September 17, 1906, for the reason that the boundaries of the claim were irregular and not in conformity with the system of public land surveys, and canceled April 2, 1907.

February 26, 1907, L. L. Squires and L. J. Squires filed application for patent No. 5853 for the same claim, described as lots 3, 7, 26, 37 and 39, Sec. 29, T. 6 S., R. 77 W., 6th P. M., containing 33.03 acres. Publication of notice was had from March 2, 1907, to May 4, 1907, and entry No. 0530 allowed by the register and receiver June 1, 1910. This entry was held for cancellation by the Commissioner January 7, 1911, and March 18, 1911, on account of certain defects in the applicants' title and for failure to furnish proof corroborated by two witnesses, as required by paragraphs 25 and 60 of the Mining Regulations, as to the improvements claimed.

The claim was located February 6, 1886, by George W. Crow, Michael Curtin, L. L. Squires, S. W. Jones and H. Riddell. Without stating all the conveyances in detail, the status of the title upon September 3, 1892, was as follows: George W. Crow,  $\frac{2}{3}$  interest, Martha Curtin  $\frac{1}{3}$  interest, and C. D. Crow  $\frac{1}{3}$  interest. George W. Crow's  $\frac{2}{3}$  interest was conveyed April 29, 1904, to John S. Crow. The abstract of title discloses that upon December 29, 1905, L. L. Squires recorded notice of forfeiture proceedings instituted by him under section 2324, R. S., against George W. Crow, deceased, Charles S. Crow and Martha Curtin. The notice claimed a failure on their part to contribute to the annual expenditure alleged to have been made by Squires for the year ending December 31, 1902, and was published March 21, 1903, to June 20, 1903. An affidavit by Squires that no contribution had been made by John S. Crow, George W. Crow and Martha Curtin was also recorded. The  $\frac{2}{3}$  interest of John S. Crow and C. D. Crow passed under several mesne conveyances to L. L. Squires and L. J. Squires, December 22, 1906, but the  $\frac{1}{3}$  in-

terest of Martha Curtin is still outstanding, unless the above forfeiture proceedings operated to vest it in L. L. Squires. The Commissioner held that they did not, since they were conducted while he had no interest in the claim.

April 26, 1911, the claimants filed an appeal stating that—

The relief prayed for at this time by these appellants, is that they be granted a sufficient time for these proceedings to be gone over again in order to perfect their title—

and they alleged that the corroborated proof of improvements could easily be furnished.

In the case of John C. Teller (26 L. D., 484) the Department held that where a mineral entry allowed on insufficient showing of title in the applicant was properly held for cancellation by the General Land Office but the applicant, after such decision, obtained by appropriate conveyances a complete chain of title and made a showing thereof before the Department which was satisfactory as between him and the Government, the entry might be allowed to stand and patent issue. So in the case of E. J. Ritter *et al.* (37 L. D., 715), in which some of the co-owners had made mineral entry and later secured outstanding undivided interests, the entry was allowed to stand.

In the present case, entry was not made until three years after the period of publication, and no reason for the delay appears in the present record. The land was covered by the prior entry from January 8, 1906, to April 2, 1907, and a comparison between the improvements claimed for it and the present entry discloses that they are identical, except a timbered shaft 4 x 6 x 45 feet deep of a value of \$450. To permit the applicant to institute forfeiture proceedings now would compel a further delay of six months or more.

Forfeiture proceedings are regulated by section 2324, R. S., which provides:

Upon failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section his interest in the claim shall become the property of his co-owners who have made the required expenditures.

The above provisions of forfeiture were strictly construed by the Supreme Court in *Turner v. Sawyer* (150 U. S., 578), which held that where a co-owner bringing the proceedings was not a co-owner at the time the expenditures, for which contribution was demanded, were made, such proceedings failed to secure the interest sought to

be acquired, the court saying that the right to give the notice of a claim for contribution is limited to a co-owner who has performed labor. In *The Golden and Cord Lode Mining Claims* (31 L. D., 178), the Department held that the above section—

authorizes proceedings to be had against a delinquent co-owner of a mining claim, only by "the co-owners who have performed the labor or made the improvements" required. A co-owner who has not made the required expenditures is not within the terms of the statute and is not in a position to take advantage of its forfeiture provisions.

The reverse of the present case was considered by the Department in *Surprise Fraction and Other Lode Claims* (32 L. D., 93) wherein it was held (syllabus):

The interest of a co-owner in a mining claim, which may be acquired under the forfeiture provisions of section 2324, Revised Statutes, is the share or interest of such co-owner in the purely possessory rights under the mining location, and not in any rights arising under an application for patent.

A co-owner who has been omitted from an application for patent to a mining claim can not, by subsequent recourse to forfeiture proceedings against the applicant co-owner, acquire any right in himself to make entry under the application.

It is not clear from the claimants' appeal whether they intended claiming a failure to contribute, by Martha Curtin, to the annual expenditures prior or subsequent to the present application for patent. If prior thereto, the present claimants having obtained their title December 22, 1906, it is apparent that they must stand upon their rights as grantees of the prior co-owners.

As to this, Costigan, in his work on Mining Laws, says at page 297:

Whether a co-owner who performs labor and acquires a right to forfeit the delinquent co-owner's interest loses that right by conveying away his own undivided interest in the mining claim, and whether his grantee gets the right to forfeit, are undecided questions, though it has been decided that where both join in the notice there is a forfeiture. The case of *Turner v. Sawyer* is opposed in reasoning to allowing the grantee to have the right, as he was not co-owner at the time the labor was performed, and that would seem to be sound. Whether the grantor, after he ceases to be co-owner, could forfeit, depends upon the nature of the right. Treating it as analagous to a right of entry for condition broken retained by the grantor of a fee, there would seem to be no reason why the one who was co-owner when he performed the labor should not forfeit, despite the conveyance of his undivided interest.

See also Snyder on Mines, section 528, as follows:

The plain reading of the statute leaves little or nothing to be said, and little room for discussion or construction as to who may claim the benefits, and who may be rendered liable for the performance of annual assessment work upon a mining claim. The statute says, "the co-owner who has performed the labor may give such delinquent co-owner notice," etc. It will thus be seen that the remedy is peculiar and statutory, and the right to exercise it is conferred solely upon the co-owner who did the work; he alone may exercise

it. This means not only a co-owner when the work was done, but likewise when the remedy is invoked.

It is also apparent that the remedy, being personal to the co-owner who did the work, is not assignable and may be exercised only by such person. The statute seems to require, in positive terms, that the notice must be given by the person who performed the labor to the person liable therefor at the time it was done; and while, as we have observed, the person performing the labor may not assign the claim even by the transfer of interest so as to authorize the assignee to give the notice of forfeiture and exercise the rights thereunder, the same rule does not apply to the person against whom the notice runs.

In *Badger Gold Mining & Milling Co. v. Stockton Gold & Copper Mining Co.* (139 Fed. Rep., 838) in which the notice of expenditure and failure to contribute was given by both the grantor, who had performed the labor, and his grantee, the court held that the interest of the non-contributing co-owner was thereby forfeited, paragraph 4 of the syllabus reading:

The fact that after the owners of a part interest in a mining claim had done the assessment work thereon for a particular year they conveyed the claim to a corporation, taking in payment substantially all of its capital stock, which they retained, did not preclude the forfeiture of the interest of their co-owner for failure to contribute to the work by a notice given in accordance with Rev. St. Sec. 2324 (U. S. Comp. St. 1901, p. 1426), and signed both by them and by the corporation, and the vesting of such interest in the corporation by virtue of their deed, which purported to convey the entire claim.

The court, however, indicated that in its opinion the right to enforce forfeiture is assignable, saying at page 842:

The right given by the statute is a substantial one. No reason is perceivable why it is not assignable.

From the above authorities, it is apparent that if the claimants intend basing their forfeiture proceedings upon a failure by Martha Curtin, or her legal representatives, to contribute to the annual expenditures prior to the present application for patent, it is exceedingly doubtful whether such proceedings would operate to vest her 1/5 interest in them. If the failure to so contribute is as to annual expenditures made after the present application for patent, it would seem that they would be in a measure taking advantage of their delay of three years in making entry.

In *Copper Bullion and Morning Star Lode Mining Claims* (35 L. D., 27), the Department held that an applicant for patent must proceed with diligence to complete his patent proceedings, and that where there was no obstacle or barrier to prevent the completion of the patent proceedings within the calendar year in which the publication of notice was completed, the entry should be canceled. This was modified in the case of *Woodman v. McGilvary* (39 L. D., 574) as to *ex parte* cases, to the effect that:

While an applicant for patent for a mining claim must diligently prosecute the patent proceedings to completion, yet where the local officers, upon a show-



ing deemed by them sufficient, have in fact allowed entry, although not within the calendar year in which the publication of notice of the application was completed, and there is no intervening adverse claim, the entry should not be canceled upon the protest of one alleging relocation of the land subsequent to allowance of the entry.

The reasons for the delay in that case appear to have been an error in the published notice, the absence of the applicant's attorney and also, to some extent, the death of the applicant during the patent proceedings. In the present case, no reason for the delay appears. The entry should not have been allowed by the local officers and must be canceled.

The decision of the Commissioner accordingly is affirmed.

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**BERNARD H. BARNES**

*Decided February 1, 1912.*

**PREMATURE CONTEST—RESIDENCE—ACT OF FEBRUARY 13, 1911.**

The act of February 13, 1911, granting certain homestead entrymen "until" May 15, 1911, within which to establish residence, gives such entrymen the whole of said day in which to begin residence; and a contest filed on that day, charging abandonment, is premature.

**ADAMS, *First Assistant Secretary:***

July 5, 1910, Frank Gilmore made homestead entry 04489 for the SW.  $\frac{1}{4}$  Sec. 10, T. 14 N., R. 5 W., Helena, Montana, land district.

May 15, 1911, at nine o'clock A. M., Bernard H. Barnes filed application to contest said entry, alleging that:

Said Frank Gilmore has never placed any improvements on said land and has never established a residence upon said land; that said Frank Gilmore has wholly failed to comply with the laws relating to U. S. homesteads and has wholly abandoned his said land, and has abandoned said land embraced in his said homestead entry.

May 17, 1911, this contest affidavit was rejected by the local officers for the reason that the entry was protected by the act of February 13, 1911 (36 Stat., 903), by which this entryman, with others in certain States including Montana, was granted until May 15, 1911, to establish residence upon the lands described in his entry.

From this action, Barnes appealed to the General Land Office and, by the Commissioner's decision of June 29, 1911, the action of the local officers was sustained, the Commissioner saying:

The entry is protected by the first section of said act, which allows homestead entrymen in the States named who were required to establish residence after December 1, 1910, until May 15, 1911, to commence such residence, and the entryman herein had all of that day, and a contest commenced at nine o'clock on that day is premature.

Barnes has appealed to the Department.

It is shown upon this appeal that another contest was filed against said entry May 16, 1911, by one William George Jackson, alleging abandonment of the tract by Gilmore.

July 14, 1911, Barnes filed what he termed a supplemental contest affidavit against the entry of Gilmore and, by the Commissioner's decision of July 28, 1911, this supplemental application was denied by the Commissioner as follows:

The original application to contest filed in the case, of which the one under consideration is attempted to be filed as supplemental, was rejected by this office because prematurely filed, and said rejection has been affirmed by Commissioner's letter "H" of June 29, 1911, and an appeal from said latter decision, to the Secretary of the Interior, has been filed, and is now pending.

If said rejection of said application is finally affirmed by the Secretary, it will have the effect of effectually and finally disposing of said contest, and no further proceedings could be had therein, especially the injection of an entirely new and subsequently accruing cause of action. Contestant's remedy would be the filing of an entirely new application to contest, and not by supplemental proceedings in the old contest.

An appeal from this decision is found in the files of the case, although not mentioned in the Commissioner's letter of transmittal.

Both appeals are presented in the argument filed in behalf of appellant Barnes, and the entire question is before the Department. Appellant attempts also to present a contention between himself and the second contestant, Jackson, but no such question is properly before the Department.

The sole question presented is whether the act of February 13, 1911, *supra*, granting to this and other entrymen "'until' May fifteen, nineteen hundred and eleven, within which to make . . . residence upon the lands," gives such entryman the whole of said May 15 upon which to establish his residence or only until the end of May 14.

The authorities upon this question are numerous and conflicting. The conclusion of the whole matter seems to be found in the proposition that—

"Until" may either, in a contract or a law, have an inclusive or exclusive meaning looking to the subject to which it is applied or nature of the transaction which it specifies and the connection in which it is used.

It is clear that the statute under consideration is of a remedial nature and should be construed liberally in favor of the parties to whom remedy or relief is granted and, in view of the subject under consideration when such statute was enacted, the Department is of the opinion that it should be construed as inclusive of the fifteenth of May and that the contest of Barnes was prematurely filed and properly rejected.

The decisions appealed from are affirmed.

## SHERAR v. VEAZIE.

Decided February 8, 1912.

## POWER SITE WITHDRAWALS—PENDING FOREST LIEU SELECTIONS.

A pending unapproved application to make forest lieu selection will not prevent withdrawal of the lands embraced therein for the purpose of reserving the power sites thereon for public uses.

ADAMS, *First Assistant Secretary*:

March 5, 1910, you forwarded for consideration forest lieu selections 05368, 05369, and 05370, presented by the Santa Fe Pacific Railroad Company, Joseph H. Sherar, attorney in fact, under the act of June 4, 1897 (30 Stat., 36), for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , lot 2 or the NW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 3, T. 4 S., R. 14 E., and the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 35, T. 3 S., R. 14 E., The Dalles, Oregon, land district. The lands in question were involved in a contest between the applicant above named and A. L. Veazie, but by decisions of June 15, September 16, and December 7, 1909, the case was finally decided in favor of the Santa Fe Pacific Railroad Company.

December 30, 1909, and March 18, 1910, the lands embraced in said selections were included within temporary power-site withdrawals Nos. 67 and 125. Said withdrawals were made in aid of proposed legislation affecting the disposal of water-power sites on the public domain, withdrew from entry, selection, disposal, and settlement all vacant lands, and temporarily suspended all existing claims, filings, and entries. These withdrawals were subsequently ratified, confirmed, and continued in full force and effect by Executive order of July 2, 1910, under and subject to the provisions, limitations, exceptions, and conditions contained in the act of Congress approved June 25, 1910 (36 Stat., 847). The withdrawals still remain in full force and effect, and under date of October 27, 1911, I am advised by the Director of the Geological Survey that the lands embraced in said forest lieu selections are of great value for power purposes. The purpose of the withdrawals was to reserve from final disposition lands the title to which had not passed from the United States and which are believed to be valuable for use in the development of hydroelectric power. Congress has the power to withdraw and devote to public purposes any public lands under which a vested right has not been secured. *Union Pacific Railway Company v. Harris* (215 U. S., 386); *United States v. Hanson* (167 Fed. Rep., 881); *Russian-American Packing Company v. United States* (199 U. S., 570); and *Frisbie v. Whitney* (9 Wall., 187).

In this case the applications to select under the act of June 4, 1897, have not been approved by the Department. It is well established by the decisions of the courts and of this Department that

until all questions of law and fact involved in an offered lieu selection have been determined and the approval given the selection, the equitable title to the land sought does not pass from the United States. *Cosmos Company v. Gray Eagle Company* (190 U. S., 301); *Clearwater Timber Company v. Shoshone County* (155 Fed. Rep., 612); *Miller v. Thompson* (36 L. D., 492); and *Thomas B. Walker* (36 L. D., 495).

In view of the withdrawals described, of the value of the lands in question for the development of hydroelectric power, and of their proposed devotion to public use, you are directed to refuse the offer of exchange submitted by the forest lieu selections 05368, 05369, and 05370.

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**ROBERT E. SLOAN.**

*Decided February 12, 1912.*

**SOUTHERN UTE INDIAN LANDS—SOLDIERS' ADDITIONAL RIGHT.**

Lands in the Southern Ute Indian reservation opened by proclamation of April 13, 1899, to occupancy and settlement and to entry under the desert, homestead, and townsite laws and the laws governing the disposal of coal, mineral, stone and timber lands, are not subject to appropriation by location of soldiers' additional right.

**THOMPSON, Assistant Secretary:**

Robert E. Sloan has appealed to the Department from the decision of the Commissioner of the General Land Office of August 12, 1911, holding for cancellation his soldiers' additional entry 02959 upon which final certificate issued March 8, 1911, for the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 35, T. 33 N., R. 3 W., N. M. P. M., Durango, Colorado, land district.

His application to enter said tract, under section 2306, Revised Statutes, was filed June 23, 1906.

The land involved was withdrawn July 26, 1906, from coal filing or entry; classified as coal land at \$25 per acre September 30, 1907, and reclassified as coal land at \$30 per acre September 10, 1909.

It appears that claimant was, at different times, notified that, upon proper election therefor, a limited patent could issue to him under the act of March 3, 1909 (35 Stat., 844), and again under the act of June 22, 1910 (36 Stat., 583), and, by the decision appealed from, his entry was held for cancellation because the land involved was a part of the Southern Ute Indian Reservation, opened by proclamation of April 13, 1899 (31 Stat., 1947), and instructions of April 15, 1899 (28 L. D., 271), under the desert, homestead, and townsite laws and the laws governing the disposal of coal, mineral and stone and timber lands, and therefore not subject to location by soldiers' additional

entry under the rules laid down in the case of Hiram M. Hamilton (32 L. D., 119), reference also being made to the case of Thomas A. Cummings (39 L. D., 93) and unreported departmental decision of March 27, 1911, in the case of McReynolds, assignee of Littlejohn, holding that a soldiers' additional entry is not in fact a homestead entry.

It is noticed that the land in question, under the statutes and departmental instructions heretofore cited, was open "to occupancy and settlement" and made "subject to entry under the desert, homestead, and townsite laws and the laws governing the disposal of coal, mineral, stone and timber lands," and providing payment for such lands at not less than \$1.25 per acre with cash payment of fifty cents per acre at the time filing should be made.

It is clear that Congress may withdraw any of the public lands from entry, under the general public land laws, and restore them to entry or disposition under specific laws and under such conditions and limitations as will be incompatible with the right acquired under section 2306, Revised Statutes, by the owner of such right. William M. Wooldridge (33 L. D., 525).

This has been done in connection with the lands in question by the provision that such lands shall be disposed of under the specified laws mentioned therein and that a stated price shall be paid for each acre of land so entered. The right given by section 2306, Revised Statutes, is in conflict with the conditions required by said act. The disposal of the lands under soldiers' additional right would be contrary to the declared purpose and intent of the act. See case of Frederick W. McReynolds, assignee of John Snipes, of date January 10, 1912.

It is contended upon this appeal that this entry should be permitted to go to patent because patent has heretofore issued on other claims for portions of the Southern Ute Indian Reservation, opened under the same proclamation and instructions as the land involved in this case.

In answer to this contention, it is only necessary to say that, if patent has heretofore erroneously and without authority of law issued to certain portions of this land, such fact constitutes no reason for the commission of a further error in connection therewith.

The decision of the Commissioner of the General Land Office is accordingly affirmed.

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ROBERT E. SLOAN.

Motion for rehearing of departmental decision of February 12, 1912, 40 L. D., 550, denied by Assistant Secretary Thompson May 1, 1912.

**OSMUNDSON v. HEIRS OF LILJEDAHL.**

*Decided February 26, 1912*

**CONTEST—SERVICE OF NOTICE—HEIRS OF DECEASED ENTRYMAN.**

In a contest against the entry of a deceased homesteader it is necessary to serve notice thereof only upon such of his heirs as are citizens of the United States.

**THOMPSON, Assistant Secretary:**

November 4, 1905, Nels Liljedahl, a naturalized citizen, made homestead entry number 36554 (serial 09195), for the S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  and lots 1 and 2 of Sec. 3, T. 159 N., R. 98 W., Williston, North Dakota, land district. April 26, 1909, Thilda Osmundson filed contest affidavit against said entry alleging that the entryman died on or about October 16, 1906, and that no person whatever had either resided upon or cultivated and improved the land since that date; that these defaults had existed for more than six months then last past; and that the land was in its natural condition with the exception of a small sod house which had been placed thereon.

Contest notice was issued June 28, 1909, returnable before the local officers August 27, 1909, and served upon Dina Nord and Anna Boreson, sisters of the deceased entryman, July 15, and 26, 1909.

August 6, 1909, a power of attorney from Dina Nord, "one of the heirs of Nels Liljedahl, deceased," authorizing an attorney "to appear for and represent me as my agent and attorney. . . . and prosecute said cause to a final determination" in the Interior Department was filed in the local land office.

The hearing was before the local officers in August, 1909, the contestant appearing in person with counsel and witnesses, and two of the heirs of the deceased entryman, Dina Nord and Anna Boreson, appearing in person with counsel and witnesses. By the decision of the Commissioner of the General Land Office of June 2, 1911, the previous action of the local officers was affirmed and entry held for cancellation, and Dina Nord presenting the case in behalf of the heirs has appealed to the Department.

From the testimony it appears that the entryman died at or about the time alleged in the contest affidavit, and that at the time of his death he had no heirs in this country, but did have a father and mother, and brothers and sisters, citizens and residents of Norway, and that he was a bachelor having no wife nor children.

It clearly appears from the evidence that no one had ever resided upon or improved or cultivated the land after the death of the entryman, and the only contention seriously presented upon this appeal is that the case should be dismissed for want of jurisdiction, because only two of the alleged heirs were served with notice of con-

test. Two of the alleged heirs of the entryman voluntarily appeared and submitted themselves to the jurisdiction of the land department.

In the case of *Major v. Heirs of Hartnett* (34 L. D., 51) it is held:

There is no provision of the homestead law by which any rights or claims to public lands, prior to the issuance of patent, can be devised or succeeded to and perfected by, or on behalf of others than citizens of the United States.

It follows in this case only the heirs who were residing in the United States could be recognized. The father, mother, brothers and sisters, who live in Norway, have no interest in the claim under the homestead laws.

Decision appealed from is affirmed.

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### JAMES W. JONES.

*Decided February 28, 1912.*

#### POWER SITE—SOLDIERS' ADDITIONAL APPLICATION—HEARING.

No such right is acquired by a mere application to locate a soldiers' additional right pending at the date of a power-site withdrawal as entitles the applicant to a hearing to determine whether or not the land is valuable for power-site purposes or is in fact a power site.

#### ADAMS, *First Assistant Secretary*:

James W. Jones, assignee etc., has appealed to the Department from the decision of the Commissioner of the General Land Office of April 27, 1911, rejecting his application, filed February 1, 1910, to enter under sections 2306 and 2307, Revised Statutes, lot 3, Sec. 30, T. 5 S., R. 4 E., B. M., Boise, Idaho, land district.

In disposing of the case the Commissioner says:

The land sought by the soldier's additional application was withdrawn February 25, 1910, under temporary power-site withdrawal No. 117, and included within power-site reserve by executive order of July 2, 1910, and also lies within coal land withdrawal Idaho No. 1, by executive order of August 24, 1910.

In view of the power-site withdrawal above cited, the soldier's additional application is hereby held for rejection, for the reason that the act of June 25, 1910 (30 Stat., 847), excepts from the force of withdrawals made under it only such lands as are embraced in homestead and desert-land entries, or upon which settlement has been made and this application cannot be considered such an "entry" as would except the land from the operation of the withdrawal (see case of *Thomas A. Cummings*, 39 L. D., 93).

Upon this appeal it is contended that it was error to hold this application for rejection without allowing applicant a hearing "to determine whether or not the land is valuable for power-site purposes or in fact a power-site;" and in connection with this contention it is asserted that the land in question is not valuable for power-

site purposes nor in fact a power-site, and such assertion is supported by the affidavit of the claimant and three other persons, two of whom state under oath that they are by occupation and profession civil engineers.

This application was pending without action having been taken thereon when the power-site withdrawal was made and after careful consideration it is the opinion of the Department that no such rights were acquired by the mere filing of such application as to entitle claimant to a hearing in regard to the character of the land. If the tract, in due course of departmental business, is restored to the public domain and becomes subject to entry, applicant may again file his application.

The decision appealed from is affirmed.

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**JAMES W. JONES.**

Motion for rehearing of departmental decision of February 28, 1912, 40 L. D., 553, denied by First Assistant Secretary Adams April 25, 1912.

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**SMITH v. STATE OF IDAHO.**

*Decided March 1, 1912.*

**SCHOOL INDEMNITY SELECTION—BASE LAND—WHEN SUBJECT TO ENTRY.**

Land within a school section assigned by the State as base for indemnity selection is not subject to appropriation, entry, or selection under the public land laws until the selection is approved and title to the base land becomes vested in the United States.

**THOMPSON, Assistant Secretary:**

Earl Z. Smith appealed from decision of the Commissioner of the General Land Office of April 6, 1911, rejecting his application for homestead entry for NE.  $\frac{1}{4}$ , Sec. 16, T. 47 N., R. 3 W., B. M., Coeur d'Alene, Idaho.

The land is within the Coeur d'Alene Indian Reservation, opened to entry and disposal under act of June 21, 1906 (34 Stat., 335), whereby section 16 in every township was granted to the State for common schools.

At a date not shown on the record, the State made indemnity selection of land based on the NE.  $\frac{1}{4}$ , Sec. 16, which has not yet been examined and approved by the Commissioner of the General Land Office. September 19, 1910, Smith applied to enter the NE.  $\frac{1}{4}$ , Sec. 16, as a homestead, which was rejected by the local office, and that action was affirmed by the Commissioner.



The appeal alleges error, because prior to Smith's application for homestead entry the State had made its indemnity selection. There was no error in so holding. Legal title to a tract of land relinquished to the United States as base for a selection does not pass until the selection is approved. Before that time the State may recede from its selection and take the land in place, or, for sufficient reason, the Commissioner may reject the selection, leaving the title of the State to its school land base unaffected by the attempted selection. The case here presented, pending a selection is in principle substantially like that in *Maybury v. Hazletine* (32 L. D., 41-42; same case, 33 L. D., 501), under act of June 4, 1897, wherein the Department held that land relinquished to the United States as base for a selection is not subject to appropriation, entry, or selection under the public land laws until the relinquishment is approved and title tendered to the United States is accepted. Title had not become vested in the United States to the land applied for by Smith by the mere relinquishment of the State. The title was merely *sub judice*, and it was due to that State that the title should not be incumbered while its selection was pending, so that should the selection be rejected the State would be restored to its entire title, unclouded by any act of the United States.

The decision is affirmed.

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### LIEDER v. LIEDER.

*Decided March 1, 1912.*

#### RULE 2 OF PRACTICE—CONTEST—QUALIFICATION.

The provision in Rule 2 of the Rules of Practice that an applicant to contest must file a statement under oath setting forth the law under which he intends to acquire title and showing that he is qualified to enter under that law was designed to insure good faith upon the part of would-be contestants and to prevent the filing and prosecution of speculative contests by those not qualified or who do not intend to acquire title to the lands under appropriate public land laws, but it was not contemplated that it should be construed with the same strictness as though required by some specific provision of law governing contests, and will not be held to prevent the acceptance of an application to contest tendered by one qualified in all respects except as to age, where he is so nearly twenty-one years old that he will in all reasonable probability attain that age prior to termination of the contest.

#### THOMPSON, *Assistant Secretary*:

Herman P. Lieder has appealed from the decision of the Commissioner of the General Land Office of August 8, 1911, rejecting his contest affidavit filed June 23, 1911, against desert-land entry, No. 07306, made June 23, 1910, by Otto E. Lieder, for the E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$

and lots 1 and 2, Sec. 18, T. 10 N., R. 8 E., Bellefourche, South Dakota, land district.

Rule 2 of the Rules of Practice requires a statement, under oath, by contestants of the grounds of contest, of the law under which contestant intends to acquire title, and of the facts showing that he is qualified so to do.

The affidavit of contest filed by Herman P. Lieder recites that the land in question is not desert in character and will produce agricultural crops without irrigation; that he desires and intends to acquire title to the land under the homestead law, and that he is qualified so to do, except that he is 20½ years of age. The register and receiver rejected the contest on the ground that, as shown by his affidavit, entryman was not qualified to make an entry if his contest were allowed and successfully consummated.

On appeal the Commissioner of the General Land Office affirmed said decision August 8, 1911.

It further appears from the record that on June 23, 1910, the register and receiver served notice on Otto E. Lieder to show cause why his desert-land entry should not be canceled for failure to submit first yearly proof within the time required by law; that he responded by filing an application for extension of time, which application was rejected August 2, 1911.

The provision of the Rules of Practice cited by the Commissioner of the General Land Office and the register and receiver was designed to insure good faith upon the part of would-be contestants and to prevent the filing and prosecution of speculative contests by those who are not qualified or do not intend to obtain title to the lands under appropriate public-land laws. In this instance it appears that in all reasonable probability, contestant Herman P. Lieder, whose affidavit shows him to be otherwise qualified, would have attained the age of twenty-one years prior to the termination of the contest sought to be prosecuted by him, and he has apparently now reached the age of twenty-one years. Accordingly, it is held that the ground for rejection of his contest affidavit was, under the circumstances disclosed, insufficient, and that the rejection of his application to contest upon the score of age was not warranted.

It was never intended that this provision of the Rules of Practice should be construed with the same strictness as though required by some specific provision of the law governing contests. Its purpose was rather to furnish the officers of the Government with such information respecting the intentions of the contestant as would enable them to determine, in the light thereof, whether the contest should be allowed to be proceeded with or refused because brought merely for a speculative or other improper purpose.

The decision is accordingly reversed.

However, attention is directed to the fact that the contestant and the contestee are of the same name, and that at the time the contest affidavit was filed contestee had failed to perform the annual labor required by law, but subsequently filed an application for extension of time within which to perform the annual labor. Whether these circumstances suggest the possibility of collusion in an effort to hold the land in the same family are questions which the Department can not undertake to decide upon the present record, but which are suggested for consideration and such action as may be deemed advisable.

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**HOLMES v. KINSEY.**

*Decided March 1, 1912.*

**RULES 1 AND 2 OF PRACTICE—CONTEST—PETROLEUM WITHDRAWAL.**

The statement and showing required of an applicant to contest by Rules 1 and 2 of Practice are designed to insure good faith on the part of would-be contestants and to prevent the filing and prosecution of speculative contests by those not qualified or who do not intend to acquire title to the lands under appropriate public land laws, and will not prevent acceptance of an application to contest, tendered by one in all respects qualified, merely because the lands are within a temporary petroleum withdrawal and it is for that reason uncertain whether contestant can make entry thereof in event of the successful termination of the contest.

*THOMPSON, Assistant Secretary:*

On September 21, 1908, David Kinsey made homestead entry, No. 01308, in the Los Angeles, California, land district, for the SW.  $\frac{1}{4}$ , Sec. 4, T. 11 N., R. 23 W., S. B. M.

May 11, 1911, Susan L. Holmes filed contest affidavit, charging that Kinsey had wholly abandoned the land embraced in his said entry for more than six months prior thereto; that she is qualified to make a homestead entry and that if successful in the contest it is her intention to acquire title to the land under the provisions of the homestead law. The register and receiver rejected the application to contest, for the stated reason that the land involved is included in petroleum reserve No. 2 and that "contestant can not be permitted to make entry of said land under the homestead law if the cancellation of the entry contested is procured."

On appeal this action was affirmed by the Commissioner of the General Land Office July 31, 1911, the Commissioner holding that in the event his decision became final the contest affidavit would be referred to the Chief of Field Division for action. Appeal from the latter decision brings the case before the Department, contestant urging that the Rules of Practice did not support the rulings below;

that contestant assumes the risk of being able to enter the land upon the termination of her contest or not; and that in any event she will be serving the public interest in securing the cancellation of an entry not maintained in accordance with the requirements of law.

Rule 1 of the Rules of Practice effective February 1, 1911, provides for the initiation of contests "by any person seeking to acquire title to or claiming an interest in the lands involved." Rule 2 requires a statement from the contestant, including, among other things, a declaration of the law under which applicant intends to acquire title, the facts showing that he is qualified so to do, and that the proceeding is not collusive or speculative, but instituted in good faith.

The purpose of the provisions cited was to insure good faith on the part of would-be contestants and to prevent, so far as possible, the filing and prosecution of speculative contests by those who are not qualified or do not intend to obtain title to the lands under appropriate public-land laws. The statements required to be made are calculated to elicit from would-be contestants such facts concerning their qualifications and intentions as will enable the land department to determine whether the proceedings should be allowed or whether the Government should refuse the proffered assistance and conduct an investigation through its own agencies. It has always been the custom of the land department to avail itself of the assistance of citizens in the procuring of information and proceeding against illegal entries or those under which the claimants have failed to comply with the requirements of the law.

The act of May 14, 1880, specifically recognized this and provided a method for rewarding such contestants as should pay the expenses of contest and secure the cancellation of such entries by according to the contestants a preference right of entry. This preference right, however, only confers a privilege on the successful contestant to enter the land in preference to others for a limited period. It is not a right that reserves the land from its devotion to public uses or prevents its withdrawal from disposition by the United States (Emma H. Pike, 32 L. D., 395, and cases cited).

The so-called withdrawal act of June 25, 1910 (36 Stat., 847), authorizes the President to temporarily withdraw any public lands for classification or other public purposes and under this act the land in question has been included in the petroleum withdrawal. It may be that upon examination of the same it will be determined to be nonmineral in character and thereafter restored to the public domain for disposition under appropriate land laws. It is possible that if found to contain deposits of petroleum legislation may be enacted analogous to that relating to coal lands, act of June 22, 1910 (36 Stat., 583), which will permit of the entry of the lands under agricultural laws with a reservation of the minerals to the United States.

Be that as it may, the existence of the temporary withdrawal should not be held a bar to the initiation and prosecution of a contest by a person who shows qualifications under the Rules, with a view to clearing the record of an invalid entry. To refuse such contests would result either in the immunity of invalid claims included within the limits of temporary withdrawals from contest or entail upon the Government the burden and expense of procuring their cancellation.

To give full and unlimited effect to the principle laid down in the decision complained of that the contest application should be denied because it is questionable as to whether the contestant can ever secure a preference right, might necessitate the rejection of all applications to contest, for, though the lands were not included within a withdrawal at date of the initiation of a contest, they might later be so withdrawn. The Rules relied on are not susceptible of this construction. When, in a case like this, by sworn affidavit of contest, facts are brought to the attention of the land department, which, if true, must result in the cancellation of the entry, and the applicant to contest has complied with the provisions of the Rules by making the showing therein required, the contest should be allowed, without any attempt on the part of the land department to determine whether or not the lands will, should the contest be successfully prosecuted and terminated, be at that time subject to the exercise of the preference right accorded by the act of May 14, 1880, *supra*.

In view of the foregoing, the decisions of the Commissioner of the General Land Office and of the register and receiver in the case at bar are reversed and the papers returned for appropriate action.

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### MARSH v. RAMBOUSEK.

*Decided March 1, 1912.*

#### RESERVOIR FOR WATERING STOCK—EXTENT OF RIGHT GRANTED.

The act of January 13, 1897, providing for use of public lands for construction of reservoirs for watering stock, contemplates the reservation of only so much land as may be necessary for the practical purposes for which the reservoir is established; and the Secretary of the Interior has the power at any time to reform the reservation and restore to settlement and entry all lands not necessary for the free use and enjoyment of the rights contemplated by the act.

#### THOMPSON, *Assistant Secretary*:

January 13, 1905, the Department approved the map of location of a reservoir constructed by Joseph Rambousek upon the NE.  $\frac{1}{4}$ , Sec. 18, T. 140 N., R. 97 W., in the Dickinson, North Dakota, land district, for the purpose of watering stock, under authority of the act of January 13, 1897 (29 Stat., 484).

August 23, 1909, Anton Marsh filed in the local office an affidavit, charging, in substance, that Rambousek does not use the reservoir for watering his own stock but has a few head of stock that obtain abundant supply on his private premises; that the maintenance of said reservoir serves no public nor private purpose, and is not now and has not been used for watering stock, and that Rambousek did not disclose the true facts in his application for the reservation. He stated that he desired to make homestead entry of the land and is informed and believes that Rambousek is maintaining the reservoir solely for the purpose of permitting a minor son to make entry of it. He asked for a hearing to establish the charge, which was allowed.

Upon the testimony taken at that hearing, the local officers found that "there is no longer any public nor private necessity for the continued reservation of this land for watering purposes." They recommended that the reservation be vacated. The General Land Office reversed their decision and found that the reservoir has been actually constructed and maintained and has been kept open to the free use of the public; that it has been and is now used by Rambousek and others for watering stock. It held that there is nothing in the law or regulations which prescribe "public or private necessity" as essential to the continuance of a reservoir, or that the declarant shall be engaged exclusively in breeding stock.

The act of January 13, 1897 (29 Stat., 484), provides for the location and construction of reservoirs upon the public lands for the purpose of watering stock and for the control of the lands upon which the same is constructed not exceeding 160 acres, by the person constructing the reservoir, under regulations to be prescribed by the Secretary of the Interior—

so long as such reservoir is maintained and water kept therein for such purposes: *Provided*, That such reservoir shall not be fenced and shall be kept open to the free use of any person desiring to water animals of any kind.

Rambousek having complied with the requirements of the statute, his map or plat of location of the constructed reservoir was approved by the Secretary of the Interior January 13, 1905. By the express terms of the act, it is declared that:

Thereafter, such lands shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

It appears from the testimony and from other parts of the record that the reservoir has been kept in repair and water kept therein and has been used by Rambousek and others at times during each year for watering stock. It also appears that it has been kept open for free use by the public.

If that were the only question to be considered upon this appeal, the decision of the General Land Office might be affirmed without

further discussion. But there is merit in the contention that it is not necessary to withhold from settlement and entry 160 acres of valuable farming land for the maintenance of a reservoir the exterior lines of which, as shown by the field notes of survey, embrace an area of 4.18 acres only.

It does not appear definitely from the testimony what area is actually flooded by the reservoir, but it is apparent that the reservation of any land, other than that embraced within the exterior lines of the reservoir as shown by the field notes, is not necessary to its maintenance and to its practical use, except such as may be necessary for keeping it in repair and to afford egress and ingress to the public.

The act does not limit the extent of the reservation except by the words "the lands upon which the same is constructed, not exceeding 160 acres," but the regulations provide that reservation may be allowed of 40 acres for a reservoir having a capacity of 500,000 gallons; 80 acres for a reservoir having a capacity of 1,000,000 gallons; and 160 acres for a reservoir having a capacity of 1,500,000 gallons. In the application of Rambousek, it was stated that the reservoir would have a capacity of 1,500,000 gallons. The engineer who made the survey certified that the reservoir as constructed has a capacity of 3,405,132 gallons and that, at the time of survey, it contained at least 2,000 gallons of water. Upon that showing, the map of location was approved for the entire northeast quarter of said section 18, although the field notes from which the plat of the reservoir was constructed, show that only 4.18 acres were embraced within the exterior limits of the reservoir.

It did not then appear, and it does not now appear, that the reservation of any greater quantity of land is necessary for the purposes contemplated than is embraced within the surveyed exterior lines of the reservoir, except for egress and ingress from the section lines.

It was not contemplated by the act that the reservoir should be made according to legal subdivisions or to extend to any lands not necessary for the practical use for which the reservoir is made. Nor does the declarant acquire such right by the approval of his map of location as will prevent the Secretary of the Interior from reforming the reservation at any time and restoring to settlement and entry all lands not necessary to the free enjoyment and use of all rights contemplated by the act. *Wilson v. Parker* (32 L. D., 148). No rights secured by declarant or the public under the act would be violated by such action.

The act of March 3, 1891 (26 Stat., 1095), grants right of way for reservoirs "to the extent of the ground occupied by the water of the reservoir . . . and fifty feet on each side of the marginal limits thereof."

The act of January 13, 1897, permits the use of public lands for the construction of reservoirs for the purpose of watering stock, and provides that a person or company constructing a reservoir shall have control of the same "and the land upon which the same is constructed."

In the former act, the extent of a reservoir is expressly limited to such land only as may be necessary for the free use and enjoyment of the grant. That extent and limitation are necessarily implied in the later act which gives no warrant or authority for the reservation of lands exorbitantly in excess of the area actually needed.

This reservoir, as shown by the plat, lies almost wholly in the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said NE.  $\frac{1}{4}$  and within a strip about 8 chains in width from east to west leaving an area of about 32 x 40 chains in the quarter quarter section that is not covered by the reservoir. No part of the reservoir is in the NW.  $\frac{1}{4}$ . It barely touches the NE.  $\frac{1}{4}$ , and a small fraction only is within the SW.  $\frac{1}{4}$ . There is testimony to the effect that the reservoir is not of equal dimensions to that originally shown by the field notes.

There appears to be no necessity whatever for the reservation of the three last mentioned 40-acre tracts and they may be restored to settlement and entry without in any manner impairing the full use and enjoyment of the reservoir by Rambousek and the public.

It is therefore directed that the reservation remain intact as to the SE.  $\frac{1}{4}$  of the quarter section, and that the NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of said NE.  $\frac{1}{4}$ , Sec. 18, T. 140 N., R. 97 W., be restored to settlement and entry.

The decision of the General Land Office is modified accordingly.

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**HERMAN H. PETERSON ET AL.**

*Decided March 5, 1912.*

**CALIFORNIA SCHOOL GRANT—IDENTIFICATION OF SCHOOL SECTIONS IN IMPERIAL VALLEY.**

Section 16, now designated in the official resurvey as tract 107, in T. 16 S., R. 12 E., S. B. M., as fixed by the private survey known as the "Imperial Extension Survey," is accepted and respected by the land department as the tract which passed to the State of California under its school grant of section 16 in that township, without prejudice to the rights of conflicting claimants as to the portions of their claims not in conflict with said tract 107.

*ADAMS, First Assistant Secretary:*

This is an appeal by the following parties from the decision of the Commissioner of the General Land Office of October 21, 1910, rejecting, and holding for cancellation, their desert land and homestead



applications for certain lands in conflict with Sec. 16, T. 16 S., R. 12 E., now designated as Tract 107 of said township, under the resurvey thereof:

Herman H. Peterson, as assignee of desert land entry, made June 14, 1907, by Frank P. Morrill, for the S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , and the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 20. September 10, 1909, application was made to adjust the entry to the same description, it being stated that the entry was originally located according to survey made by Amzi A. Henderson, November, 1903. Three annual proofs have been made, showing a total expenditure of \$500.

Mary V. Patterson. Desert land entry, made September 12, 1907, for the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 20; the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 29. Application to adjust this entry to the same description was made July 7, 1909. Three annual proofs have been made, showing a total expenditure of \$852.

James L. Jernigan. Homestead application, filed June 16, 1909, for the N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 20, it being stated that the applicant had occupied and lived on the land since November, 1906.

Clara E. Bennett, as heir of Lydia Tompkins. Desert land entry, made June 7, 1907, for 320 acres, all of which has been assigned except the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of Sec. 20. Since the assignment two annual proofs, showing an expenditure of \$175, have been made, and an application to adjust the entry to the same description was filed June 16, 1909.

Harry M. McCall. Desert land entry, made December 24, 1906, for the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 20, and the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 29. Three annual proofs have been made, showing a total expenditure of \$268. Application to adjust the entry to the same description was filed June 13, 1909.

Isaac G. McCreary. Desert land application, filed June 17, 1909, for the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 20, it being stated that the applicant had lived on the land for the year previous.

The above lands are included in certain townships ordered resurveyed by the act of July 1, 1902 (32 Stat., 728), which provided:

That the Secretary of the Interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego County, in the State of California, embraced in and consisting of the tier of townships thirteen, fourteen, fifteen, and sixteen south, of ranges eleven, twelve, thirteen, fourteen, fifteen, and sixteen east, and the fractional township seventeen south, of ranges fifteen and sixteen east, all of San Bernardino base and meridian; and all rules and regulations of the Interior Department requiring petitions from all settlers of said townships asking for resurvey and agreement to abide by the result of the same so far as these lands are concerned are hereby abrogated: *Provided*, That nothing herein contained shall be so construed as to impair the present *bona fide* claim of any actual occupant of any of said lands to the lands so occupied.

Relative to the above act the Department, in the case of Fanny A. Salisbury (39 L. D., 471), said:

The government surveys, which were extended over these townships in 1855 and 1856, were found upon examination to be very irregular. About 1900 this section of country was occupied by land companies with a view to reclaiming the lands by irrigation and to induce settlers to occupy them. At that time the corners of the public land surveys had been so far lost and destroyed as to render it difficult, if not almost impossible, to trace the subdivision of even township lines. Private surveys were therefore resorted to and all claimants and settlers occupied and described their claims according to the lines of those private surveys.

It was soon discovered that conflict between the different surveys and with the government survey was so great as to be irreconcilable. That led to the passage of the act of July 1, 1902, *supra*, which contemplated that the lands occupied by settlers and described according to the private surveys should be recognized and marked by an official survey.

The question here presented is as to the locus of section 16 of township 16 south, range 12 east, granted to the State of California in aid of common schools.

From a statement made to the Department by the Surveyor-General of California it appears that the State has sold the foregoing section as follows: The W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , to Melvin Snow, patent being issued June 22, 1908, Snow having filed his original application for purchase October 22, 1900; the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , to Melvin Snow, patent therefor being issued June 22, 1908, Snow's application for purchase having been originally filed May 11, 1901; the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , and SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , of said section, patent issuing June 22, 1908, to Melvin Snow, the original application to purchase having been filed April 18, 1901, by Ernest Snow.

The above mentioned township was originally surveyed in 1854 and 1856. The plat of said survey shows section 16 as regular in form, containing 640 acres. It can not be doubted that the title to a certain tract of land containing 640 acres passed under the grant and survey to the State of California.

It appears that the Commissioner of the General Land Office, under the above act of July 1, 1902, proceeded to make a survey of the townships named therein. The first step consisted of letting a contract to one Amzi A. Henderson, a United States Deputy Surveyor, for the resurvey of the 4th Standard Parallel South, and the retracement of the exterior lines of townships 13, 14, 15 and 16 south, ranges 13, 14 and 15 east, and fractional township 17 south, ranges 15 and 16 east. The Commissioner directed this deputy to begin his survey on the 4th Standard Parallel South "at the established corner of T. 17 S., Rs. 13 and 14 E., which original corner is reported by private surveyors to be in existence at the present time." The deputy

was then instructed to run west from that corner until he found some known and unmistakable standard township corner for T. 16 S., on said 4th Standard Parallel, and then establish proper quarter section and section corners. From the corners so established, the lines marking the exterior boundaries of said township were to be run. The deputy, having apparently ascertained in the field that the corners still in existence upon this parallel to the west were over a mile north of the corner named by the Commissioner as his starting point, requested further instructions. On October 22, 1903, the Surveyor-General amended the original instructions, and directed the deputy to begin his survey of the 4th Standard Parallel South at the standard corner of sections 33 and 34, T. 16 S., R. 11 E., as found on the ground by the deputy. From this corner he was substantially directed to run east to the northeast corner of T. 17 S., R. 12 E., whence he was directed to run south for a distance of 94 chains, from which a line run east would intersect the corner of T. 17 S., Rs. 13 and 14 E., originally directed as his starting point. The survey so made resulted in the establishment of a standard parallel having a right-angled break in it of over one mile, and did not comport with the original survey thereof.

November 17, 1904, the Commissioner directed W. O. Owen, an Examiner of Surveys, to examine the survey made by Henderson, with the view of determining whether the same had been made with due reference to the evidences of the original survey, and particularly the manner in which the 4th Standard Parallel South had been re-established. The examiner submitted his report, dated February 9, 1905. In brief, he states that the corner of T. 17 S., Rs. 13 and 14 E., assumed to be in the position required by the original survey, is not the original corner, but in all probability one established some twenty-five years later; that the old, original surveys had numerous features which weakened their accuracy; that he was informed by one Ward, County Surveyor of San Diego County, that the original authentic corner of sections 25, 26, 35 and 36, T. 16 S., R. 13 E., was still in existence. The examiner found this corner, and that Henderson's survey in nowise agreed therewith. Incidentally it might be remarked that in the records of the General Land Office there is a notation to the effect that the original corner so found by Ward was later discredited as an authentic corner in a suit between conflicting claims in the local courts. In brief, the examiner found that in his judgment the Henderson survey did not comport with the evidences of the original survey still in existence, and, further, that the old original survey did not give accurate bearings to the topographical features mentioned herein. The examiner stated that in his report he had taken no notice of what was currently known as the "Imperial

Survey," "for while many settlers had made locations based thereon, it can have no semblance of authority, for it was made at the instance of the company in its own behalf, and is of a purely private nature." After receipt of the examiner's report, the Commissioner further instructed him as follows:

His (the deputy's) instructions were based on the assumption that the corner of townships 17 south, ranges 13 and 14 east would be found by him to be a genuine original corner on the true line of the parallel.

It is all important that the starting point for this resurvey be fixed beyond question and you are requested, after a thorough inspection, if you be satisfied that the Deputy's work has not been correctly initiated, to recommend a procedure which will result in the closest approximation to a true reestablishment of these exteriors.

The examiner thereupon reinvestigated the matter, and submitted another report, dated March 20, 1905, in which he reiterated his former position, that Henderson's resurvey did not comport with the evidences upon the ground of the old survey; that it was beyond the bounds of possibility that the deputy who ran the 4th Standard Parallel South originally could have made any such break in his line as the positions of the corners established by Henderson demanded. The examiner was satisfied that the starting point for the retracement of the surveys of the townships ordered by the act, assumed by the deputy and the Commissioner, viz., the standard corner of T. 17 S., Rs. 13 and 14 E., was not correct. He further reported that he did not believe that any plan could be devised under which the township exteriors could be retraced in harmony with such corners as might still be found to be in existence. Nearly all the corners which had been established north of the 4th Standard Parallel were missing. The examiner submitted a plan for the resurvey which he thought would best harmonize the apparently irreconcilable difficulties. This plan, however, was not adopted by the Commissioner, who, on May 25, 1905, approved the Henderson survey.

It is thus apparent that these resurveys of the Imperial Valley have their starting point or foundation on the retracement of the 4th Standard Parallel South. It is further apparent that this retracement did not comport with the original survey thereof, which survey was also, it would seem, grossly inaccurate. From the lines so established, the resurvey of the township now under consideration was made under a contract with J. M. Duce, a United States Deputy Surveyor.

In the instructions issued to this deputy, September 25, 1907, he was directed as follows:

You are required to survey out by metes and bounds, all valid entries made in the townships embraced in your contract, before April 1, 1906, and all school lands in said townships.

You are herewith furnished diagrams showing all entries made prior to April 1, 1906, giving names of entrymen and character of entries, also all school lands, whether disposed of by the State or not. The diagrams are prepared from abstracts furnished by the U. S. Land Office at Los Angeles and the office of the State Surveyor General at Sacramento.

The private claims and school lands are to be rectangular and to be surveyed out on cardinal lines (East and West, and North and South) where not controlled by identified old corners of official survey, the claim boundaries to embrace the settlers' holdings on the ground, where no conflicts exist. In case there is a conflict of boundaries, you must endeavor to have adjoining claimants come to an agreement as to the position of the common boundary, and if no agreement can be reached, while you are in the field, you will survey out the tracts *as claimed*, and such claims will be platted as overlapping.

You will therefore consider very carefully all evidence in regard to the claim boundaries and use your best judgment and discretion to arrive at a satisfactory agreement between the different settlers.

Most, if not all of the private claims are located in reference to the "Imperial" surveys, made for the California Development Company.

After stating that the so-called "Imperial" survey would not be recognized in any way, the instructions then continued:

All the 16th and 36th sections or parts thereof in the townships covered by your contract, whether disposed of by the State of California or still in the possession of the State, must be segregated from the public lands, the same as the private claims above mentioned.

In locating the school sections you must be guided by the conditions on the ground and also by evidences found, the plan deemed most advisable being to segregate the school sections, if there be claims in the vicinity governed by original corners by which their position may be ascertained. If however, there are townships, where only two or three claims are entered and these would not be affected by the location of the boundaries of the school sections on the *resurveyed* lines, then these school sections may be located by *resurveyed* lines.

The school sections if in a township, where there have been improvements, and no traces of original lines or corners now exist, may be located by reference to the boundaries of claims on the ground, if said boundaries are on *original* lines. Where boundaries of claims are located on lines run by the "Imperial" survey (supposed to conform to their location, when a resurvey will be made) this procedure will not apply, as the said "Imperial" survey lines are not recognized as official lines.

Under these instructions the deputy made a resurvey of the above township, and located section 16, which he claimed would comport with its situs under the original survey, in sections 21, 22, 27 and 28, surveying it out as a rectangular tract of 640 acres. As so located by him it conflicted, to the extent of 263.98 acres, with the claims of seven entrymen. July 25, 1908, Examiner Owen reported that the methods adopted by Deputy Duee in locating section 16 were not permissible. Further speaking of the matter of identifying the situs of school sections in Imperial Valley, he stated:

No matter *what procedure* may be followed *somebody must inevitably be injured* by the location of these old school sections. Section 16 and 36 must necessarily be assigned to *some* position in this survey; and while it is a de-

plorable fact that great and grievous hardships are wrought on numerous of the settlers by the location of these old school sections as at present fixed, a similar hardship must inevitably fall upon *other* settlers if the position of these sections shall be *altered*. This is the fact that constantly confronted the examiner while in the field. It is simply *impossible* to locate these old school sections in such a manner that *no one* shall be damaged; and the only possible result to flow from an alteration of their present position is to lift the affliction from the shoulders of *one* group of settlers and transfer it to *another*. That is the actual and positive outcome of any change made in the location of those school sections. Probably the plan that would work the *least* hardship in this case would be that of arbitrarily locating secs. 16 and 36 on the lines of the so-called Imperial survey; for most of the settlers in the valley, and indeed the public generally, have presumed that this was in reality a reestablishment of the old survey of 1856, whereas as a matter of fact it is nothing of the kind and is generally somewhere from  $1\frac{1}{2}$  to  $2\frac{1}{2}$  miles from the lines as established in 1856.

February 19, 1909, the Commissioner instructed the United States Surveyor-General relative to the special instructions such as were issued to Deputy Duee, as follows:

The special instructions contemplated that the 16th and 36th sections should be surveyed out in accordance with the original survey of 1856 if any *authentic* corners to said sections could be found; also, in the absence of such corners, they might be located in accordance with nearby or adjoining claims lines, if such claims were located in accordance with authentic original corners, and, in the absence of either, the school sections (16 and 36) may be located on sections 16 and 36, of the resurveyed lines, if free from private land claims, (Paragraph 3, page 4, of the instructions).

As none of the above conditions were realized, the deputy was without instructions and without authority to proceed with reference to locating and surveying out of school sections 16 and 36, and, as before stated, he should have requested further instructions in the premises.

The Commissioner then states:

These settlers and entrymen had located their several claims by the only corners found upon the ground, which they, generally, believed to be the corners of original survey, *or in place of the corners of original survey*, and the only corners in existence by which they could severally locate their respective entries without interference, one with the other. These corners were established, because of the absence of any other corners, or evidence of any previous survey by which entrymen could locate their claims, by a regular resurvey of townships into 36 sections, executed by Engineers and surveyors employed by the California Development Company in 1900, in which the 16th and 36th section, (one mile square) in each township were surveyed in their respective proper positions, and set apart, and upon which no public land entries have been allowed, thus protecting the state, its vendees or grantees in all of their lawful rights.

The Commissioner then instructed the Surveyor-General as follows:

It must be deemed that said sections have not been heretofore located or surveyed, except by what is known as the "Imperial" survey, on the lines of which all settlements and improvements have been made, and the locations of entries and claims around school sections in these townships, as established by the "Imperial" survey will, under the present circumstances, be considered

as the true basis for the locations of the said school sections, and in pursuance of this view and decision, the said sections will be platted and located in conformity with the claim lines of adjacent sections as shown by the resurvey, and be thus segregated and reserved upon the plats of the said townships prepared by this office.

Speaking specifically of the resurvey of T. 16 S., R. 12 E., and the establishment of the locus of the school section therein by Deputy Duee, the Commissioner advised the Surveyor-General, March 31, 1909, as follows:

The alleged original sec. 16, comprising tracts 91 (480 acres), 92 (80 acres), and 93 (80 acres), disposed of by the State of California to Melvin, Laura and Ernest Snow, respectively, in 1901 and 1902, appears to have been located and surveyed out in conflict with tracts numbered 53-54-55-78-79-80 and 81 of desert and homestead entries, some of which were entered in 1900, and all located in accordance with the "Imperial survey". There is no evidence in the field notes that any corners, or evidence of original Mathewson survey of 1856, for section 16, or any other section in this township, were found, or that location corners for tracts 91-92 and 93 (sec. 16), established by private surveyors, were found upon the ground to indicate their location. The deputy appears to have arbitrarily located this section with reference to original school sec. 16-15-13, about 6 miles west and 6 miles south thereof.

The survey of tracts 91-92 and 93 (alleged orig. sec. 16) should not be approved, and so noted in the field notes, pending further evidence of the accuracy of the location or adjustment of conflicting claims.

Section 16 (640 acres), as established by the "Imperial survey" has been marked up on the plat of resurvey in secs. 20-21-28 and 29 and reserved for future survey of original sec. 16 (tracts 91-92 and 93); in the event that further evidence would show that the survey of orig. sec. 16 (tracts 91-92 and 93), as executed, is incorrect and unlawful.

April 27, 1909, the Commissioner accepted the survey of Duee, except as to the tract reserved for resurvey of school sections. May 25, 1909, the Commissioner instructed L. L. Dent, Examiner of Surveys, to survey out the tract, reserved in T. 16 S., R. 12 E., as school section 16, and to obliterate the survey of tracts 91, 92 and 93, as made by the deputy. This survey was duly made, June 17, 1909. July 16, 1910, Special Agent Satterwhite, who appears to have been assigned to the Imperial Valley country in order to assist in the adjustment of conflicts due to the resurvey, reported relative to this particular section as follows:

Tract 107, Sec. 16, T. 16 S., R. 12 E.: Although the land included within the limits of Tract 107 is claimed by four or five settlers under the public land laws, who have made improvements aggregating in cost probably four or five thousand dollars, nevertheless, I am of the opinion that the school section has been properly located in this instance. A few of the public land squatters and entrymen, the latter having secured filings, by using other numbers have been in adverse possession more than five years, and I doubt whether the state claimant can ever dispossess them; but, as it is impracticable to clear the conflicts shown within the limits of this section, as depicted upon the plat of resurvey, it

would appear that, so far as the government is concerned, nothing can be done but to locate the school section in the position as shown by Tract 107 upon the supplemental plat.

The resurvey of Sec. 16, as Tract 107, made by Examiner Dent was accepted by the Commissioner July 29, 1910.

From the above somewhat exhaustive statement of the steps taken in the resurvey of the Imperial Valley region, it is apparent that when the irrigation projects now there existing were started, practically all of the evidence of the original survey had disappeared. In order that claimants might identify their lands private surveys were made, in the present instance being known as the "Imperial Extension Survey," which, it was thought by the settlers, was a retracement of the original government survey. All land claimants filed upon their lands in accordance with these private surveys, while the records of the local land office at Los Angeles were being conducted according to the plats of the old original surveys made long prior thereto. Before this valley became settled it was a matter of indifference as to what the exact location of sections 16 and 36 was, as the country was but a vast desert. The resurvey made by the Government in the beginning was an attempt to retrace the old original survey, but, as above pointed out, such attempt failed, and it is now a physical impossibility to identify on the ground sections 16 and 36, according to the original surveys. In such a condition of affairs, it was the natural and, indeed, the only possible thing to do, to deal with the lands on the basis of the private surveys made. Sections 16 and 36, as designated by such surveys, were accepted and respected as such by the settlers in that valley. The State and its grantees have acquiesced therein, and the present applicants made their applications under the distinct understanding that they should be readjusted to the resurvey when made. In other words, the present applicants well knew that the lands which they sought to acquire were those which were recognized by the entire community as belonging to the State of California or its grantees. As it is physically impossible to identify the situs of sections 16 and 36 of the old surveys, the Department feels that the action of the Commissioner in this matter is correct, and should be affirmed.

The Department is not unmindful of the rule laid down in *Cragin v. Powell* (128 U. S., 691), to the effect that when lands are granted according to an official plat of their survey, the plat, with its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and, so far as limits are concerned, controls as much, as if such descriptive features were written out on the face of the deed or grant. The difficulty in the present matter is that there is no way to determine what land passed to the State of California under the original survey. All vestiges



of that survey have been wiped away. The lands have been settled and dealt with on the basis of certain private surveys which established the locus of sections 16 and 36, which were accepted by the public in general as their proper position. In such a condition of affairs, it is at once evident that the only possible plan to adopt is to accept the position of such school sections as made by private survey, and if such location is acceptable both to the Government and the State of California, its grantees, and the other land claimants in that locality, the Department can find no merit in the objections urged by applicants, who attempted to acquire title to the land knowing full well that it was understood to be the property of the State of California or its grantees.

The decision of the Commissioner is accordingly affirmed, without prejudice to the rights of the entrymen and applicants to those portions of their claims not in conflict with said Tract 107.

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### EDGAR A. POTTER.

#### WITHDRAWAL—SETTLEMENT—SECOND HOMESTEAD—AMENDMENT.

An application to make second homestead entry under the act of February 3, 1911, based upon settlement, can not be allowed where the settler was disqualified to make a valid settlement and the lands were withdrawn under the act of June 25, 1910, before he became qualified by virtue of said act of February 3, 1911; but if the settler is entitled to amend his original homestead to cover the land settled upon, the withdrawal will not bar his right of amendment merely because he filed application for second entry instead of for amendment.

*Assistant Secretary Thompson to the Commissioner of the General Land Office, March 9, 1912.*

January 12, 1912, you transmitted the record in the case of Edgar A. Potter, who, on January 8, 1910, filed application to make a second homestead entry for the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , lots 6, 10, 11 and 14, Sec. 3, T. 35 N., R 41 E., W. M., Spokane land district, Washington, suggesting that the Director of the Geological Survey be called upon for report as to the value of said tracts for power-site purposes, the same having been withdrawn December 1, 1910, by Executive order under the provisions of the act of June 25, 1910 (36 Stat., 847).

Under date of March 2, 1912, and in response to a call for report in the case, the Director reported the lands as having value for power-site purposes and expressed the opinion that the withdrawal should not be vacated.

It appears that Potter on September 14, 1909, made homestead entry for lots 6 and 11, NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 2, T. 35 N., R. 41 E., W. M., which he relinquished January 8, 1910, and on the

same day filed his application to make second entry for the lands first above described. In an affidavit Potter states that on account of the rough character of the country and the dense growth of underbrush, he was unable to find the corners or follow the lines of survey, and that he made a mistake in the description of the lands he intended to enter; that the lands he intended to enter have since been entered; that the lands embraced in his said entry are wholly unfit for agricultural purposs, being located on a rocky ridge and very steep hillside; that on May 11, 1910, he and his family established residence upon the land embraced in the present application and have since maintained continuous residence and placed valuable improvements thereon, having good house, chicken house, wood shed, cellar, a well, five acres cleared and under cultivation, six acres slashed and ready to clear, and a road built to the place, all to the value of \$800.

You expressed the opinion that inasmuch as Potter's first entry was made subsequently to the second homestead entry act of February 8, 1908 (35 Stat., 6), he was not qualified to make second entry under that act, and that he did not become qualified to make second entry until the passage of the act of February 3, 1911 (36 Stat., 896); therefore, that his settlement was not valid and did not prevent the withdrawal from becoming effective. You state that it is not unlikely that Potter would have been entitled to amend his entry to embrace the land now applied for if he had filed such an application.

The said act of June 25, 1910, excepts from the force and effect of any withdrawal thereunder all lands upon which any valid settlement has been made and is being maintained at the date of such withdrawal. It must be held, however, that said settlement, although made prior to the date of the withdrawal, was not valid as a basis for a second homestead entry so as to defeat the withdrawal inasmuch as the withdrawal was made prior to the date Potter became qualified to make second entry under the said act of February 3, 1911. However, if Potter was entitled to have his first entry amended so as to embrace the land now applied for it is not believed that the withdrawal should be considered a bar to such amendment simply because he filed application for second entry instead of filing application for amendment. You are directed to reject the application for second entry, but to consider the case with reference to Potter's right to have his first entry amended to embrace the land applied for, under section 2372 R. S., as amended by the act of February 24, 1909 (35 Stat., 645), and instructions thereunder. See 37 L. D., 655. In case it be found that Potter has proper cause for allowance of amendment, either upon the present showing or such supplemental showing as may be required, then his first

entry may be reinstated for the purpose of amendment to embrace the land now applied for. The case is remanded for action as above indicated.

### ALHAMBRA BRICK AND TILE COMPANY.

#### LEASE OF SURPLUS WATER IN RECLAMATION CANALS.

Water in irrigation canals constructed and operated under the reclamation act, which has not become appurtenant to any land and is not needed for irrigation, may be temporarily disposed of by lease, in the discretion of the Secretary of the Interior, the proceeds to become a part of the reclamation fund.

*Assistant Secretary Adams to the Director of the Reclamation Service, April 4, 1912.*

Your letter without date is received, requesting authorization to contract with the Alhambra Brick and Tile Company for furnishing water from the Reclamation Service canals (Salt River Valley project) for use at the plant of this Company for steam boiler and tempering of hard clays.

Water in irrigation canals constructed and operated under the Reclamation Act which has not become appurtenant to any land and is not yet needed for irrigation may be temporarily disposed of by lease in the discretion of the Secretary of the Interior, the proceeds to become a part of the Reclamation Fund. Water in this situation is property incidentally acquired under the Reclamation Act, and such disposal thereof is in accordance with the principles laid down by Department ruling of March 10, 1906 (34 L. D., 480), as to the temporary lease of lands acquired for reclamation works.

Please submit a form of contract for this purpose, with request that the same be approved by the Department and that you be authorized to contract in such form for the disposal of water in accordance with the proposal of your said letter.

### HEIRS OF SUSAN A. DAVIS.

*Decided April 4, 1912.*

#### ENLARGED HOMESTEAD—ADDITIONAL ENTRY—HEIRS.

Upon the death of a homestead entrywoman prior to completion of her entry her heirs are entitled to make additional entry of contiguous land under section 3 of the enlarged homestead act of February 19, 1909, provided they reside upon and cultivate the original entry.

*THOMPSON, Assistant Secretary:*

Fannie F. Davis has appealed from the decision of the Commissioner of the General Land Office, dated January 31, 1911, rejecting

her application to make homestead entry under section 3 of the act of February 19, 1909 (35 Stat., 639), as one of the heirs of Susan A. Davis, deceased, for the SE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and E.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 24, T. 49 N., R. 64 W., 6th P. M., Sundance, Wyoming.

It appears that said Susan A. Davis made homestead entry No. 3303 (serial 02190), for the W.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 24, and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 25, T. 49 N., R. 64 W., on March 27, 1906.

The application was rejected principally for the reason that the heirs of the deceased entryman are not qualified as such to make entry under section 3 of said act.

The sole question, therefore, in this case, is whether the heirs of an entryman are qualified to make entry under section 3 of said act, known as the enlarged homestead act. The said section 3 reads as follows:

That any homestead entryman of land of the character herein described upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act, contiguous to his former entry, which shall not, together with the original entry, exceed 320 acres, and residence upon, and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry.

It was held in the case of Alice C. St. John *et al.* (38 L. D., 577) that the section quoted "is remedial and is but an enlargement of an existing incomplete homestead entry."

In her application for entry under said section as one of the heirs, the applicant did not, as contemplated in the section, state that she or the other heirs were residing upon and cultivating the land embraced in the original entry. In the appeal, however, it is stated, under oath, that the heirs have lived upon and cultivated the land and have built a good house, barn and other buildings on the land since the death of the entryman, and have also cultivated a part of the land desired as an adjoining entry.

In the case of Lillie E. Stirling (39 L. D., 346) it was held that the widow of a deceased homestead entryman has the same right to enlarge the original entry of her deceased husband by an additional entry under section 3 of said act as he would have, if living, provided she continues to maintain residence upon the original entry.

This conclusion was reached on consideration of the provisions of section 2291, Revised Statutes, which makes the widow the first statutory successor of her deceased husband, giving her the right to perfect her husband's original entry and take patent in her name and right as widow. In holding the entry made by her husband and completing title to same by compliance with law, she is regarded, to all intents and purposes, an entryman within the meaning of the section quoted.

Upon the death of an entryman section 2291 gives his heirs, in case he left no widow, the same right in the land entered, as the widow would have if living. The heirs in such case may hold and complete the entry by complying with the homestead laws and in their own right receive patent.

The same reason which gives the widow, under the facts stated, the right to make additional entry under the section quoted, obtains in case of the heirs when both the entryman and his widow are deceased.

In this case, on the death of the entryman, the right descended direct to the heirs who hold the entry and may complete title. These heirs, or rather the applicant herein, for and in behalf of herself and the other heirs, may make the additional entry, on submitting corroborated affidavit, permission for which is asked, to the effect that the heirs have continued to reside upon, cultivate and improve the land since the death of the entryman, and are now residing there. Relation of heirs to entryman should also be shown.

The action appealed from is accordingly modified.

#### OPENING OF FORT BERTHOLD INDIAN LANDS.

##### EXECUTIVE ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, April 4, 1912.*

SIR: It is respectfully recommended that the date for the opening of the ceded portion of the Fort Berthold Indian lands, in North Dakota, fixed as May 1, 1912, by Proclamation of June 29, 1911 [40 L. D., 151], be changed to May 4, 1912, and that persons to whom numbers have been assigned for these lands be permitted to make their selections on such dates on and after May 4, 1912, as may be assigned to them for that purpose.

It is further recommended that the selections be made at Minot, North Dakota, before an officer designated for that purpose and that said officer shall issue certificates which will authorize the persons named therein to enter the lands designated by them at any time within fifteen days from the dates of such certificates.

Very respectfully,

WALTER L. FISHER,  
*Secretary.*

THE PRESIDENT,  
WHITE HOUSE.

Approved April 4, 1912:  
WM. H. TAFT.

## OPENING OF FORT BERTHOLD INDIAN LANDS.

## REGULATIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, April 16, 1912.*

REGISTER AND RECEIVER,  
*Minot, North Dakota.*

SIRS: Paragraph 18 of the regulations of June 29, 1911 (40 L. D., 154, 159), relative to the opening of the Fort Berthold Indian Reservation, in North Dakota, is hereby amended to read as follows:

Applications filed prior to October 1, 1912, to contest entries allowed for these lands will be immediately forwarded by you to the General Land Office where they will be at once carefully examined and forwarded to the Secretary of the Interior with proper recommendations, when the matter will be promptly decided, and this regulation will supersede, during the period between May 4, and October 1, 1912, all existing rules of practice or regulations relative to contests in so far as they affect entries for said lands.

The procedure relative to the presentation, amendment, allowance and rejection of applications to file soldiers' declaratory statements and applications to enter said lands will be controlled by existing regulations and rules of practice and not by the provisions of this paragraph as they heretofore existed.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved April 16, 1912:

SAMUEL ADAMS,  
*First Assistant Secretary.*

GUST HAMMAR.

*Decided April 16, 1912.*

## DESERT LAND ENTRY—AMENDMENT.

Where a desert entry is made for a less area than the entryman is entitled to take under the law, in the belief that the tract entered is all the land susceptible of irrigation from the available water supply, but it subsequently develops that the water supply may be conserved and made available to irrigate another adjoining tract, he may be permitted, in the absence of adverse claim, to amend his entry to include such adjoining tract.

THOMPSON, *Assistant Secretary:*

Gust Hammar appeals from the decision of the Commissioner of the General Land Office rejecting his application to amend his desert land entry made June 4, 1909, for the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 27. T. 11 N., R. 1 E., Boise, Idaho, to include the N.  $\frac{1}{2}$  of said NW.  $\frac{1}{4}$ .

Appellant states that prior to the time of making said entry he examined the land carefully and looked into the matter of water supply for the irrigation of that portion of the land which was susceptible of practical irrigation; that the source of water supply was a spring with a small stream flowing therefrom, which he believed would be sufficient to water the irrigable land in one forty-acre only. In the spring of 1910 he constructed a reservoir and ditches to convey and conserve the said waters, and in the latter part of the summer of 1910, while a special agent of the General Land Office was surveying out the lines of adjoining entries, he became convinced that by constructing a second reservoir up the creek, he could secure enough water also to irrigate all of the lands susceptible of practical irrigation in the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of said section 27. He states that only about five or six acres in each forty-acre subdivision are susceptible of irrigation and cultivation and the balance of the land is only suitable for grazing purposes; that there is no timber of any character thereon and it is unoccupied and unclaimed by any person adversely to applicant.

The rule permitting amendment of entries is liberally construed where through ignorance or misinformation the entryman is misled as to his rights and no adverse claim has intervened. Josiah Cox (27 L. D., 389). The allowance of amendment rests largely in the discretion of the land department and may be allowed for land not originally applied for where there is manifest good faith and the reasons for not embracing the land in the original entry was because of ignorance or misinformation of existing conditions that no prudent man could have foreseen. That rule is especially applicable to entries of desert lands where the purpose is to increase the duty of the water in the reclamation of lands.

Amendment has been allowed by permitting the entryman to enlarge his entry where he could not, at the date of entry, take the full area allowed by law because of a withdrawal of the land. Bridget Thibedeau (39 L. D., 48). And where the entry did not include the entire area allowed by law because there was no vacant land adjoining susceptible of irrigation and reclamation, amendment was allowed to include land of that character that thereafter became vacant. Ella Pollard (33 L. D., 110). Also, where to avoid conflict with a subsequent entry, amendment was allowed to include the land not originally applied for. Frank S. Garred (16 L. D., 171).

The allowance of amendment does not depend upon any particular condition but ordinarily it will not be permitted where failure to include land in the original entry was due to lack of information that could have been obtained by the exercise of ordinary prudence and proper investigation.

It does not appear that claimant was aware of the availability of sufficient water to irrigate more than the irrigable land in the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  until he constructed his reservoir and ditches for the conservation of the water when for the first time he became convinced that by constructing a second reservoir he could secure water enough to irrigate all the land susceptible of practical irrigation in both forty-acre tracts.

Hammar's application was rejected because he did not, at the time of his entry, intend to take the land now applied for but only the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  of the section and does not come within the act of February 24, 1909 (35 Stat., 645), and the instructions of April 22, 1909 (37 L. D., 655), issued thereunder.

That act was to amend section 2372, Revised Statutes, and is mandatory in cases of mistake in description when such facts are shown to the satisfaction of the land department; but it does not limit or take from the Secretary of the Interior the discretionary power which has always existed. "This continuance of the discretionary power, unimpaired, is recognized and affirmed by the instructions of April 22, 1909." Elbert L. Sibert (40 L. D., 434).

Hammar's showing brings him within the rule that ordinarily governs in allowance of amendment and his application should have been granted. The decision of the General Land Office is reversed.

### ENLARGED HOMESTEADS—SETTLEMENT RIGHTS—ADDITIONAL ENTRIES.

#### INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, April 16, 1912.*

#### REGISTERS AND RECEIVERS,

*United States Land Offices, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.*

GENTLEMEN: The following instructions are issued for your guidance in the administration of the act of Congress approved February 19, 1909, "to provide for an enlarged homestead" (35 Stat., 639), and are supplemental to, and in modification of, the instructions contained in Circular No. 10, Suggestions to Homesteaders, approved April 20, 1911, pages 17 to 21, inclusive.

An entryman under section 2289, Revised Statutes, who makes an additional entry under section 3 of the enlarged homestead act, may continue both residence and cultivation upon the original entry, but final proof may not be made for the land embraced in the additional



entry until full compliance with the requirements of said act has been effected beginning with the date of such additional entry. Final proof must be made on the original entry within the statutory period of seven years.

The cultivation required in such cases is an amount equal to one-eighth and one-fourth of the area embraced in the additional entry, commencing with the second and third years, respectively, of such additional entry. If such proportionate area, or any part thereof, is of land embraced in the original unperfected entry, there must be such additional cultivation of the original entry as would ordinarily be required to perfect title thereto if it stood alone.

Prior to the designation of land as subject to entry under the enlarged homestead act, a settlement right may be acquired to not more than approximately 160 acres of unsurveyed land, and should such settlement claim be extended, after all the land involved has been designated as subject to entry under the act, to embrace additional land with a view to entry under the said act, title may be acquired to the enlarged area only by continued residence, and cultivation as required by section 4 of the act, for the full period after the date of designation and extension of settlement.

All former instructions not in harmony with the foregoing are vacated, and superseded hereby, and you will mail a copy of this circular to every person having an unperfected entry under the enlarged homestead act in your district. You will also inclose it with each "Suggestions to Homesteaders" which you may hereafter send out in response to inquiries under the homestead laws.

These instructions apply also to the act of June 17, 1910 (36 Stat., 531), providing for an enlarged homestead in the State of Idaho.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

SAMUEL ADAMS,  
*First Assistant Secretary.*

## RECLAMATION—TIETON UNIT, YAKIMA PROJECT, WASHINGTON.

### PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,  
*Washington, April 18, 1912.*

In pursuance of the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows:

1. Water will be furnished from the third district, Tieton Unit, Yakima Project, Washington, under the provisions of the Reclama-

tion Act, beginning in the irrigation season of 1912, for the public land farm units shown on the farm unit plats of—

*Willamette Meridian,*

T. 12 N., R. 16 E.,  
 T. 12 N., R. 17 E.,  
 T. 12 N., R. 18 E.,  
 T. 13 N., R. 16 E.,  
 T. 13 N., R. 17 E.,  
 T. 13 N., R. 18 E.,

approved by the Secretary of the Interior December 14, 1911, and on file in the local land office at North Yakima, Washington.

2. Homestead entries, accompanied by applications for water-rights and the first instalment of the charges for building, operation and maintenance, may be made under the provisions of said act for the undisposed of farm units shown on said plats, in the manner hereinafter provided.

3. The limit of area per entry, representing the acreage which, in the opinion of the Secretary of the Interior, may be reasonably required for the support of a family on the lands entered subject to the provisions of the Reclamation Act, is fixed at the amounts shown on the plats for the several farm units.

4. The charges which shall be made per acre of irrigable land in the said entries, for which water will be furnished, beginning in the irrigation season of 1912, as aforesaid, are in two parts as follows:

(a) The building of the irrigation system, \$93 per acre of irrigable land, payable in not more than ten annual instalments, each payment not less than \$9.30, or some multiple thereof, per acre. Full payment may be made at any time of any balance of the building charge remaining due, subject to the regulations of the General Land Office.

(b) For operation and maintenance for the irrigation season of 1912, and annually thereafter until further notice, \$1.50 per acre of irrigable land, whether water is used thereon or not. As soon as the data are available the operation and maintenance charges will be fixed in proportion to the amount of water used, with a minimum charge per acre, whether water is used thereon or not.

5. There will be not to exceed 44 farm units opened to general entry. Each unit contains approximately 40 acres, the irrigable acreage running from 20 acres upwards. Persons making entry for these farm units will be required to comply with all the terms and conditions of the homestead laws, and, before patent is issued, they will be required to reclaim one-half of the irrigable area of the land and to pay the water-right building charges, amounting to \$93 per acre of irrigable land and the yearly operation and maintenance charge to be determined from time to time, which at present is fixed

at \$1.50 per year for each irrigable acre. The exact description of the units opened can not now be given, but farm unit plats will be on file in the local land office at North Yakima on and after May 6, showing the units to be opened to entry, and printed slips containing descriptions of the lands will then be available for distribution.

6. Homestead applications for the farm units shown on said plats may be executed by any person qualified to make homestead entry, at any time on and after May 6th, and up to and including May 25, 1912, before any duly authorized officer within the land district. Each homestead application must be accompanied by a properly executed water-right application and by a certified check on a National Bank, or money order drawn to the order of the receiver, Alfred C. Steinman, at North Yakima, Washington, for the amount of the first instalment of the water-right charges for building, \$9.30 per acre of irrigable land, and for operation and maintenance for the season of 1912, \$1.50 per acre of irrigable land, and also the required fees and commissions amounting to \$6.50 per entry. The homestead application, the water-right application and the certified check, or money order, and all other papers necessary to show the applicant to be a qualified homesteader must be enclosed in a sealed envelope, addressed to the register and receiver at North Yakima, Washington, and the upper left hand corner of the envelope must contain the name and address of the applicant and the description of the land by farm unit, section, township and range, and be marked "Tieton Unit." The papers so prepared and enclosed in a sealed envelope may be filed in person, through another or through the mail in the United States Land Office at North Yakima, Washington, on May 25, 1912, between 9 a. m. and 4.30 p. m. All persons sending in their applications by mail should post them at such time as to insure their being received at the local land office between these hours. All applications filed before 9 o'clock of that day will be returned without opening, and all applications filed after 4.30 of that day will be held until all applications filed hereunder are disposed of, when, if there are any vacant farm units for which delayed applications are filed, they will then be considered.

7. Warning is hereby expressly given that no rights can be obtained by settlement made on the land since the date of their withdrawal under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and prior to the allowance of entry hereunder, nor will any person be allowed to obtain preference right or other advantage through priority in presenting homestead application at the United States Land Office, or by holding a place in any line formed at that office, nor in any other manner than as herein provided for.

8. Where two or more persons apply for the same farm unit on the date above specified, the right to enter will be determined in the manner hereinafter prescribed, on June 5, 1912, at the United States Land Office at North Yakima, Washington.

9. No person will be allowed to present application to enter more than one farm unit, which must be specifically and fully described in the homestead application and water right application, according to legal subdivision, section, township and range, and also by farm unit description, in accordance with the approved farm unit plat for the township. If any person presents application for more than one farm unit, none of his several applications will be considered.

10. It shall be the duty of the register and receiver and the project engineer of the Tieton Reclamation Project to arrange all envelopes containing applications presented hereunder in alphabetical order, according to the names of the applicants shown on the outside thereof, without opening the same. They shall also prepare cards or slips of paper of uniform size, color, and appearance, and the names of the several applicants shall be written, one on each slip of paper, with a description of the farm unit applied for, and such cards or slips of paper shall be arranged according to the farm units applied for, so that all cards representing applications for one particular farm unit shall be assembled together.

11. The right of entry for each farm unit shall be determined in public, and before the right for each farm unit, for which more than one person has applied, is determined, it shall be the duty of the register of the local land office to make public announcement that such right is about to be determined. All cards or slips of paper representing applications to enter such farm unit will then be placed in a box or other receptacle provided for that purpose and the register of the land office shall publicly announce the name of each applicant at the time the card or slip of paper bearing his name is placed within the receptacle. All cards or slips of paper in the receptacle shall be thoroughly mixed and one card or slip of paper will then be drawn therefrom by some impartial and disinterested person, designated by the officer in charge, and the right to enter the farm unit will be accorded to the applicant whose name appears on the card or slip so drawn, provided he is duly qualified to make homestead entry, and the envelope containing his application will be immediately opened, and the papers examined by the local land office, and, if found to comply with the law and regulations thereunder, they will be given a serial number, and upon approval of the water right application by the project engineer, both the homestead and water right applications will be allowed by the local land officers, but the receiver will not issue a receipt until the certified check where such accompanied the application, has been paid. While applicants may

be present at time right of entry is awarded, yet such presence is not necessary, as the applications of successful persons will be immediately allowed on the papers already filed and notice at once mailed the successful applicants.

12. The slips of paper bearing the names of the other applicants for the particular farm unit will be retained in the receptacle, and if on examination it shall be found that the applicant whose name is first drawn is not qualified to make a homestead entry, or the papers filed in support thereof are unsatisfactory, the register will thereupon reject his application, assigning reasons therefor, and allow the applicant the usual right of appeal, whereupon a second slip will be drawn from such receptacle in the same manner as the first slip was drawn, and the person whose name appears on said second slip shall be accorded the right to make entry of the unit, if duly qualified and his showing is satisfactory. Such procedure shall be followed until a person is found who is qualified to make homestead entry and has met all requirements. Where a second drawing is necessary and entry is allowed thereon, such entry will be subject to the rights of the party whose application was first drawn, if upon appeal, the action of the local land officers in rejecting his application be set aside.

13. When the right to enter all of the farm units applied for has been determined, the envelopes remaining unopened shall each be at once enclosed in an official Government envelope and returned by the local land officers to the persons whose names appear on the outside thereof.

14. In order that every person desiring to execute and present application for any of the farm units may be enabled to do so at the time allowed, without causing a rush, warning is hereby given that all such applications should be prepared and executed before some of the officers authorized by law at as early a date as possible after May 6, 1912.

15. After the expiration of the period for entry hereinbefore provided for, all entries made for any of the lands described, whether for lands not heretofore entered or for lands covered by prior entries which have been canceled by relinquishment or otherwise, shall be accompanied by applications for water rights in due form, and by all charges for building, operation and maintenance then due, except where payments have been duly made by the prior applicants and credits therefor duly assigned in writing. The second instalment of building charges shall become due on December 1, 1913. Subsequent instalments shall become due on December 1 of each year thereafter until fully paid. All instalments of charges shall become due and payable as herein provided, whether or not water-right application is made therefor or water is used thereon.

16. The regulation is hereby established that no water will be furnished in any year until all operation and maintenance charges levied for that year and for prior years shall have been paid in full.

17. Failure to pay any two instalments of the charges when due, on entries made subject to the Reclamation Act, shall render such entries and the corresponding water-right applications, if any, subject to cancellation, with the forfeiture of all rights under the Reclamation Act, as well as of any moneys already paid.

18. All charges are payable at the local land office, North Yakima, Washington.

SAMUEL ADAMS,  
*First Assistant Secretary.*

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JOHN C. CLARK ET AL.

Motion for rehearing of departmental decision of October 2, 1911, 40 L. D., 311, denied by First Assistant Secretary Adams April 22, 1912.

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ISOLATED TRACTS—SECTION 2455, R. S., AS AMENDED BY ACT  
OF MARCH 28, 1912.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., April 30, 1912.*

REGISTERS AND RECEIVERS,  
*United States Land Offices.*

SIRS: Your attention is directed to the act of Congress approved March 28, 1912 (Public, No. 111), amending section 2455, Revised Statutes of the United States, to read as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section twenty-four hundred and fifty-five of the Revised Statutes of the United States be amended to read as follows:

SEC. 2455. It shall be lawful for the Commissioner of the General Land Office to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents an acre, any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: Provided, That any legal subdivisions of the public land, not exceeding one quarter section, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of said commissioner, be ordered into the market and sold pursuant to this Act

upon the application of any person who owns lands or holds a valid entry of, lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this Act: Provided further that this Act shall not defeat any vested right which has already attached under any pending entry or location.

Approved, March 28, 1912.

The material change is found in the first proviso, authorizing the sale of legal subdivisions, not exceeding one quarter section, the greater part of which is mountainous or too rough for cultivation, upon the application of any person who owns, or holds a valid entry of, lands adjoining such tract, and regardless of the fact that such tract may not be actually isolated by the entry or other disposition of surrounding lands. It is left entirely to the discretion of the Commissioner of the General Land Office to determine whether a tract shall be sold, and it will not be practicable to prescribe a set of rules governing the conditions which would render a tract susceptible to sale under the proviso. Applications will be disposed of by you in accordance with the isolated tract regulations contained in circulars of January 19, 1912, No. 71 (General) [40 L. D., 363], and No. 72 (Kinkaid Territory in Nebraska) [40 L. D., 369], except that paragraph 7, of circular No. 71, and paragraph 22, of circular No. 72, are not applicable, and no tract within the territory affected by the Kinkaid Act, in Nebraska, exceeding 160 acres in area, will be ordered into the market under the first proviso to Sec. 2455. Applications may be made upon the forms provided (4-008B and 4-008C) and printed in the circulars above named, properly modified as necessitated by the terms of the proviso. In addition, the applicant must furnish evidence of his ownership of adjoining land, or that he holds a valid entry embracing adjoining land, in connection with which entry he has fully met the requirements of law; also detailed evidence as to the character of the land applied for, the extent to which it is cultivable, and the conditions which render the greater portion unfit for cultivation; also a description of any and all lands theretofore applied for under the proviso or purchased under section 2455 or the amendments thereto. This evidence must consist of an affidavit by the claimant, corroborated by the affidavits of not less than two disinterested persons having actual knowledge of the facts.

No sale will be authorized under the proviso upon the application of a person who has procured one offering thereunder except upon a showing of strong necessity therefor owing to some peculiar condition which prevented original application for the full area allowed to be sold at one time, 160 acres. And in no event will an application be entertained where the applicant has purchased under section 2455 or the amendments thereto an area which, when added to the area applied for shall exceed approximately 160 acres.

Unless it becomes necessary to reprint the same (when a new supply will be furnished you), you will use the form of notice for publication now provided for isolated tract sales, but in all cases, whether the sale is ordered under the body of the act, or the proviso, you will insert, in lieu of "June 27, 1906 (34 Stat., 517)," the words "March 28, 1912 (Public, No. 111)," and where the sale is authorized under the proviso you will add after the description of the land: "This tract is ordered into the market on a showing that the greater portion thereof is mountainous or too rough for cultivation."

The provisions of Sec. 2455 relating to the sale of tracts actually isolated are not changed by this act, and such applications will be governed by the regulations contained in circulars Nos. 71 and 72, *supra*, as heretofore.

Very respectfully,

FRED DENNETT,  
*Commissioner.*

Approved:

SAMUEL ADAMS,  
*First Assistant Secretary.*

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CLARENCE A. WOOD.

Motion for rehearing of departmental decision of December 14, 1911, 40 L. D., 351, denied by Assistant Secretary Thompson May 1, 1912.

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SARAH E. ALLEN.

*Decided March 11, 1912.*

RECLAMATION WITHDRAWAL—SCHOOL SECTION—SETTLEMENT PRIOR TO SURVEY.

A withdrawal of lands susceptible of irrigation from an irrigation project is effective as to lands in a school section upon which a settlement was existing at the date of the township survey and at the date of such withdrawal, where the settler failed to make entry within the period allowed by law to settlers to place their claims of record; and thereafter the settler in making entry is restricted to any one of the farm units covered by his settlement.

OPERATION OF RECLAMATION WITHDRAWAL UPON SCHOOL SECTION.

A settlement upon part of a school section existing at the date of the township survey subjects the land to homestead entry by that settler as public land of the United States, but does not except the land absolutely from the grant to the State, the State's right being held in abeyance while the right of the settler is *in fieri*, unless in the meantime it elects to avail itself of the privilege of selecting lands in lieu thereof; and while so held in abeyance the fee remains in the United States and the land retains its character as public land and comes under the operation of a withdrawal for its reclamation as any other tract of public land.



ADAMS, *First Assistant Secretary*:

The question involved in this appeal is whether a withdrawal of lands, susceptible of irrigation from a reclamation project, is effective as to a school section, upon which a settlement was existing at the date of the township survey and at the date of such withdrawal, where the settler fails to make entry within the period allowed by law to settlers to place their claims of record.

The land in question is the SW.  $\frac{1}{4}$ , Sec. 16, T. 151 N., R. 104 W., and is part of the lands within the former Ft. Buford military reservation, which were made subject to disposition by the act of May 19, 1900 (31 Stat., 180). The township plat of survey was approved December 8, 1902, and the lands became subject to entry July 15, 1903, after the filing of the plat in the local office and the preliminary notice required by the regulations had been given. August 24, 1903, a withdrawal was made of lands susceptible of irrigation from a reclamation project, which included within the limits of said withdrawal the land in question.

March 4, 1904, Mrs. Sarah E. Allen filed application to make entry of the land in question, which was rejected for reasons unnecessary to be considered in the determination of this appeal. September 15, 1905, she made the present application, as the head of a family, alleging settlement in June, 1901. Her application was transmitted to the General Land Office, which, by letter of January 15, 1906, held that she was a duly qualified entryman as the head of a family, and that her application was regular, but as the land in question is a school section (16), the local officers were directed to notify the State of the allowance of said entry as required by circular of June 21, 1905 (33 L. D., 638).

Pursuant to published notice, Mrs. Allen appeared before the local office, October 6, 1906, and submitted final proof, at which time and place the State appeared, by its representatives, and protested against the allowance of the same, alleging that the State had acquired title to said land under its grant for school purposes and that Mrs. Allen was not a *bona fide* settler upon said tract at date of survey, upon which a hearing was had. The issue presented by the State upon its protest was decided adversely to it and, by decision of the General Land Office of November 6, 1908, it was held that Mrs. Allen's settlement and residence upon said tract at date of survey had been sufficiently established and, as the head of a family, her right to make entry of said tract was superior to the claim of the State. No appeal having been taken from said decision within time, the case was formally closed April 15, 1909, and final certificate was issued by the local officers April 19, 1909, in accordance with the instructions of the General Land Office in its said decision of November 6, 1908.

April 15, 1911, the General Land Office held that its action in directing the issuance of final certificate was error, and it was stated in said decision that it was not intended to question the validity of Mrs. Allen's entry, as all questions relative to her settlement rights, as the head of a family, were regular and her homestead application had already been decided by that office, but as the land became subject to entry July 15, 1903, her failure to make entry within ninety days from that time brought the tract within the operation of the reclamation withdrawal, and therefore final certificate should not issue until she had complied in all respects with the provisions of the Reclamation Act, her said entry being allowed subject to conformation to such farm unit as may be established by the Secretary of the Interior. The final certificate was therefore held for cancellation.

In the case of William Boyle (38 L. D., 603), it was held that a settler on unsurveyed land, which was subsequently embraced within the limits of a withdrawal under the Reclamation Act, may, upon survey of the land, make and complete his entry for the full area allowed by law and appropriated by his settlement, and that such settlement "when followed with diligence in making his claim of record in the land office," takes the land out of the operation of the withdrawal. But settlement alone would not have such effect unless the claimant made known the purpose of his settlement and placed his claim of record within the time limited by the statutes recognizing the rights of persons to initiate claims to the public lands by settlement. Mrs. Allen failed to make entry within the three months allowed settlers to make entry, after the filing of the township plat. In that respect it differs from the case cited.

With reference to said withdrawal, the Director of the Geological Survey, while the Reclamation Service was within its jurisdiction, requested to be advised whether the withdrawal of August 24, 1903, of lands within said former military reservation will be effective as to entries made subsequent to withdrawal and after three months from the filing of the township plat. He was advised by the Department that said lands are subject to withdrawal under the Reclamation Act, as other portions of the public domain.

Hence, where such lands have not been entered within three months from the filing of the township plats in the local office and prior to the withdrawal of the lands for reclamation purposes, the withdrawal will be effective, as all such lands and entries thereof will be subject to the limitations and restrictions of the reclamation act. (Opin., 34 L. D., 347-348.)

It is urged in the argument upon this appeal that school sections are not affected by a reclamation withdrawal and that the land in question therefore belongs either to the State or to the person having the prior right thereto; that the settlement of Mrs. Allen, existing

at date of the township survey, secured to her priority of right to said tract which, being a school section, was not subject to said withdrawal, and she is therefore entitled to make entry of the entire 160 acres covered by her settlement right. In other words, that the priority of right which she acquired by her settlement carries with it every right the State had to the land including its immunity from the operation of the withdrawal.

Settlement upon part of a school section existing at date of the township survey subjects it to homestead entry by that settler as public lands of the United States and not as State land, but it does not except the land absolutely from the grant to the State. The State's right is held in abeyance while the right of the settler is *in fieri*, unless in the meantime it elects to avail itself of the privilege of selecting lands in lieu thereof. If the settler fails to perfect his right by making entry and complying with the homestead laws, or if the right acquired by such settler is lost, in whole or in part, for failure to comply with the homestead laws, or from any cause, the State's right revives and attaches to every part of the tract that the settler fails to acquire, as if no settlement right had existed. But, so long as the State's right is held in abeyance, the fee remains in the United States, and the land retains its character as public land, and comes under the operation of a withdrawal for its reclamation, as any other tract of public land.

It is subject to homestead entry by such settler, because the Reclamation Act prohibits a withdrawal of lands from homestead entry, but the act also expressly declares that the lands so withdrawn "shall be subject to all the provisions, limitations, charges, terms and conditions" of the act, one of the conditions being that the Secretary of the Interior may prescribe such "limit of area per entry" as in his judgment may be reasonably required for the support of a family. The area so limited is the extent of the right that the settler acquires by virtue of his settlement upon the school section, and the State's right and title to the remaining portion covered by such settlement revives and attaches to the exclusion of every other right.

The decision of the General Land Office requiring appellant to elect which of the farm units covered by her settlement she will take is affirmed. The remaining farm units included in said SW.  $\frac{1}{4}$  will be treated as property in private ownership unless the State has heretofore taken indemnity in lieu thereof, which does not appear from the record.

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SARAH E. ALLEN.

Motion for rehearing of departmental decision of March 11, 1912, 40 L. D., 586, denied by First Assistant Secretary Adams May 13, 1912.

**PARSONS v. PACK.**

*Decided March 19, 1912.*

HOMESTEAD—EXTENSION OF TIME FOR RESIDENCE—CONTEST—ACT OF FEBRUARY 13, 1911.

The act of February 13, 1911, merely extends the time within which certain homestead entrymen are required by law to establish residence until May 15, 1911; and where residence is not established on or before May 15, on an entry within the act made more than six months prior to that date, such entry is subject to contest for abandonment immediately thereafter.

*THOMPSON, Assistant Secretary:*

September 21, 1910, Leo W. Pack made homestead entry 08774 for the NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , Sec. 28, NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 29, T. 4 S., R. 32 E., B. M., Blackfoot, Idaho, land district.

May 16, 1911, Edward Parsons filed application to contest said entry charging:

That said entryman has never established any residence upon said land; that he had never resided thereon at all and has entirely abandoned said tract since entry.

May 20, 1911, the contestant's attorney filed his affidavit showing service of notice of contest by registered mail upon the contestee, attaching to said affidavit registry receipt for the letter containing the notice, said receipt having been signed May 18, 1911 by Leo W. Pack by Herbert John Pack.

June 23, 1911, the local officers reported that the contestee had failed after notice to answer to the contest charges within the time allowed under the rules and recommended that the entry be canceled.

By the Commissioner's letter "H" of July 22, 1911, the entry was canceled and the case closed.

By decision of the Commissioner of the General Land Office of September 16, 1911, the former action of the Commissioner canceling the entry was revoked and order issued to show cause why the contest should not be dismissed. From this decision, the contestant, Parsons, has appealed to the Department. The later action of the Commissioner was because "six months not having expired between May 15, 1911, and the filing of the contest, the latter was premature and should have been rejected."

The entry under consideration, as said by the Commissioner, "comes within the operation of the act of February 13, 1911 (36 Stat., 903), extending the time for establishing residence to May 15, 1911," and the action of the Commissioner is based upon the holding that such extension of time protects the entry from cancellation until six months after May 15, 1911. In this holding the Department does not concur. The act of February 13, 1911, merely extends the time

for establishing residence to May 15, 1911. This entryman had six months from September 21, 1910, to establish residence upon the land and his entry would have been subject to contest for abandonment and failure to establish residence after six months and one day from the date it was made but for the act of February 13, 1911. The effect of this act was to substitute the date May 15, 1911, in place of March 21, 1911, as the time when he must establish residence upon the tract, and the entry after the passage of the act was subject to contest after May 15, 1911, under the terms of said act, exactly the same as it would have been subject to contest after March 21, 1911, if such act had not been passed.

It follows that the decision appealed from is erroneous and must be and the same is hereby reversed.

In the record is found a letter, signed by Leo W. Pack, of date August 21, 1911, in which he explains his failure to establish residence upon the land embraced in his entry on account of illness. The physical disability or illness of an entryman has never been held sufficient reason for failure to establish residence upon a tract of land embraced in an entry within the time required by law.

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### LORENZO J. HURLEY.

*Decided March 19, 1912.*

LIEU SELECTION BY RAILROAD SETTLER—COAL WITHDRAWAL—SURFACE PATENT. Where land selected under the act of March 4, 1907, in lieu of land within the grant to the Mobile and Girard railroad lost to a homestead settler, is withdrawn for appraisal as coal land prior to submission of the necessary proof to support such selection, and is subsequently classified as coal, the selection can be permitted to stand only upon election by the selector to accept surface patent for the land under the act of March 3, 1909.

THOMPSON, *Assistant Secretary*:

Lorenzo J. Hurley, by Thomas R. Benton, appealed from decision of the Commissioner of the General Land Office of May 31, 1911, requiring election to take surface patent under act of March 3, 1909 (35 Stat., 844), for SW.  $\frac{1}{4}$ , Sec. 19, T. 30 N., R. 56 E., Glasgow, Montana.

April 5, 1910, Hurley, by Benton, attorney in fact, selected the land at the local office in lieu of his homestead lost to him in Alabama, under act of March 4, 1907 (34 Stat., 1408). April 20, 1910, the land selected was withdrawn from selection, entry, or filing. May 14, 1910, the selector filed proof of publication and posting, and affirmative proof required by circular of April 11, 1907 (35 L. D., 502), under act of March 4, 1907, *supra*.

By executive order of July 9, 1910, under act of June 25, 1910 (36 Stat., 847), the former withdrawal was ratified and continued in force, and the land was withdrawn and reserved from any disposal for classification and appraisal with respect to coal value. February 7, 1911, the Commissioner informed the selector that he could avoid delay by electing to take a patent under act of March 3, 1909 (35 Stat., 844), reserving to the United States coal deposits in the land. March 11, 1911, the selector acknowledged the suggestion and stated that entry was made in accordance with act of March 4, 1907, *supra*, and regulations thereunder, and June 7, 1910, he deeded the land to Dakota and Great Northern Townsite Company, which, by deed, June 8, 1910, deeded a 300-foot wide right of way across the land to the Great Northern Railway Company and the remainder to Medicine Lake Realty Company, which had platted it as the townsite of Froid, wherein it is, and has been selling lots; that the land was not selected for any supposed coal value, and neither the selector nor any officer of either of the grantee companies had reason to believe that the land was mineral or had coal or other mineral value; that the act of March 3, 1909, provides that a selector or entryman may have a hearing to determine the character of the land, and that neither company can accept a patent reserving coal within the land to the United States, and they are entitled to patent unless at time of final proof the land shall be shown to be chiefly valuable for its coal.

March 21, 1911, the land was classified as coal land, valued at \$20 per acre for coal entry, and March 31, 1911, was by executive order restored to coal entry at \$20 per acre. The Commissioner held that as the land was withdrawn for coal deposits before Hurley submitted his proofs, and has since been classified as coal land valued at \$20 per acre, it is not subject to selection under act of March 4, 1907, and, unless selector accepts benefit of the act of March 3, 1909, the selection will be canceled without further notice.

There was no error in the ruling of the Commissioner. The final proof was not submitted until May 14, 1910, after withdrawal of the land for ascertainment of coal character and value. Under act of March 4, 1907, *supra*, no mineral land was subject to selection. But for the act of March 3, 1909, this selection must necessarily be canceled, and only by compliance therewith can it be permitted to stand. Cases cited by the selector in his brief, that title to lands not known to be mineral at time of completion of their appropriation as nonmineral land, will not be affected by later discovery of mineral character, are not applicable to a case of this character where different facts exist. The decision is affirmed.

## ISAAC CULVER.

Decided March 19, 1912.

## LIEU SELECTION BY RAILROAD SETTLER—COAL WITHDRAWAL—SURFACE PATENT.

Where land embraced in a subsisting coal withdrawal was selected under the act of March 4, 1907, in lieu of land within the grant to the Mobile and Girard railroad lost to a homestead settler, and was subsequently classified as coal, the selection can be permitted to stand only upon election by the selector to accept surface patent therefor under the act of June 22, 1910.

THOMPSON, *Assistant Secretary*:

Isaac Culver, by Ambrose B. Olson, attorney in fact, appealed from decision of the Commissioner of the General Land Office of May 24, 1911, requiring election to take surface patent under act of June 22, 1910 (36 Stat., 583), for W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 24, T. 34 N., and W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 23, T. 31 N., both R. 55 E., M. M., Glasgow, Montana.

June 1, 1910, Culver, by Olson, selected the land at the local office in lieu of his homestead lost in Alabama, under act of March 4, 1907 (34 Stat., 1408). April 20, 1910, the land selected was withdrawn from selection, entry, or filing. July 9, 1910, the selector filed proof of publication and posting, and affirmative proof required by circular of April 11, 1907 (35 L. D., 502), under act of March 4, 1907, *supra*.

By executive order under act of June 25, 1910, the former withdrawal was ratified and continued in force, and the land was reserved from any disposal for classification and appraisalment as to coal value. February 11, 1911, the Commissioner notified the selector he could avoid delay by electing to take surface patent under act of June 22, 1910, *supra*. March 14, 1911, the local office transmitted response of Thomas R. Benton, as attorney for Great Northern Railway Company, Medicine Lake Realty Company, and Isaac Culver, stating that selection was made by Olson, attorney in fact for Culver, in accordance with act of March 4, 1907, *supra*, and regulations thereunder, and July 25, 1910, he deeded the lands to Dakota and Great Northern Townsite Company, which July 26, 1910, deeded a strip, three hundred feet wide, across them to the Great Northern Railway Company, and the same day deeded the residues to the Medicine Lake Realty Company, which had platted them as townsites of Homestead and Antelope; that the land was and is agricultural, and not mineral, and neither the selector nor any officer of either grantee company knew or had reason to believe the land had any value for coal or other mineral; that the act of March 3, 1909, provides that one who in good faith selected or entered any land afterward classified, claimed, or reported as valuable for coal, may receive a patent therefor containing reservation to the United States, with right to prospect for, mine, and remove

it, with right to a hearing to determine the character of the land; that neither present corporate owner can accept a patent reserving to the United States coal that may be found in the land, and are entitled to a hearing and to patent, without reservation, without further proof by them, unless the land at such hearing is shown to be valuable for coal.

March 3, 1911, the land in T. 31 N., R. 55 E., was classified as coal by the Director of the Geological Survey and valued at twenty dollars per acre for coal entry, and restored to coal entry by executive order of that day. The land in T. 34 N., R. 55 E., is not yet classified, but remains so suspended.

The Commissioner held that selection having been made after withdrawal of April 20, 1910, the land is subject to act of June 22, 1910, and not to act of March 3, 1909, and that the selection will be allowed to stand only by compliance with the proviso to section 1, act of June 22, 1910, *supra*.

There was no error in so holding. The land was withdrawn when selected. Under act of March 4, 1907, *supra*, no mineral land is subject to selection. But for the act of June 22, 1910, this selection must necessarily be canceled, and only by compliance therewith can it stand. Cases cited in the selector's brief, that title to land not known to be mineral at date of completion of their entry will not be affected by later mineral discovery, are not applicable to a case of this character, upon different facts, where the land was withdrawn at time of selection, and has since been definitely classified as coal.

The decision is affirmed.

### NORTHERN PACIFIC RY. CO. v. DUNLAP.

*Decided March 21, 1912.*

#### ENTRY ERRONEOUSLY ALLOWED—PROCEDURE.

Where an entry or selection is erroneously allowed for land embraced in an entry of record, the lifetime of which has expired, such erroneously-allowed entry or selection should not, for that reason, be canceled, but the entryman under the earlier entry should be called upon to show cause why his entry should not be canceled, with a view to permitting the later entry or selection to stand.

**THOMPSON, Assistant Secretary:**

The Northern Pacific Railway Company appealed from decision of the Commissioner of the General Land Office of July 11, 1911, canceling its selection list for W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 14, T. 11 N., R. 28 E., W. M., Walla Walla, Washington.

November 23, 1892, Keith Wallace Dunlap made desert-land entry for these and four other tracts. June 12, 1894, his entry was can-



celed, but was reinstated September 10, 1894, and first yearly proof was duly submitted.

April 16, 1903, Roy S. Bloss was permitted to make desert-land entry for the tracts here in question, notwithstanding Dunlap's old entry. March 26, 1907, William H. Ardrey filed a contest affidavit against the entry charging default of second and third year annual proofs and failure to improve or reclaim the land. Notice issued and was personally served on Bloss April 1 and for hearing May 4, 1907. Bloss made default and evidence was taken. May 10, 1907, the local office found for plaintiff Ardrey and recommended cancellation of the entry: Notice of this action was served by registered mail on Bloss, who personally receipted. No appeal was taken, and February 12, 1908, the General Land Office canceled Bloss's entry and closed the case, giving contestant Ardrey notice of his preference right.

He did not exercise it, but November 4, 1909, the Northern Pacific Railway Company, at Ardrey's instance and for his use, selected the lands under acts of July 1, 1898 (30 Stat., 597), and May 17, 1906 (34 Stat., 197), in lieu of lands lost to its grant. July 17, 1911, the Commissioner of the General Land Office, discovering the irregularity of Bloss's entry, awaked Dunlap's old, forgotten, sleeping, and, doubtless, long-abandoned entry, and held:

As at the time the company's list was filed, the land was embraced in a pending entry, it was not subject to other disposition, and as long as such entry remains of record the land cannot be otherwise appropriated.

This was erroneous. At the time of Dunlap's entry, the life of a desert-land entry was but four years, under the act of March 3, 1891 (26 Stat., 1095). After four years Dunlap had no right to offer final proof. His rights under his entry expired November 23, 1896. Later, by act of March 28, 1908 (35 Stat., 52), an extension of three years might be granted to him on application, but that time had expired before this permitting act. The most that should have been done under any circumstances, on discovery of the erroneous procedure, would have been to issue notice to Dunlap to show cause why his entry should not be canceled. His inaction, together with errors of the land department, had caused Bloss expense of entry and Ardrey of a contest, both in full faith that Dunlap's entry no longer existed. The land office so regarded it, else Bloss's entry and Ardrey's contest could not have been permitted. Had Dunlap sought to make final proof on his entry in face of Bloss's subsequent entry, Bloss could have proved Dunlap's inaction and acquiescence as a complete bar to his right.

It was held by Chancellor Kent in *Wendell v. Van Rensselaer*, 1 Johnson's Chancery, N. Y., 344, that:

There is no principle better established, in this court, nor one founded on more solid considerations of equity and public utility, than that which declares,

that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel.

The same doctrine was applied on somewhat different facts in *Dickerson v. Colgrove*, 100 U. S., 578. In *Gillespie v. Sawyer*, 15 Neb., 540, legal title was lost by the owner's conduct in permitting another to improve property in faith of adverse right. In the recent case of *Moran v. Horsky*, 178 U. S., 205, the court applied the doctrine, and said:

We need only refer to the many cases decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an abandoned right which no court will enforce. Among others see *Felix v. Patrick*, 145 U. S. 317; *Gallihier v. Cadwell*, 145 U. S. 368, and cases cited in the opinion. There always comes a time when the best of rights will pass beyond the protecting reach of the hands of equity.

As the Dunlap entry had been lost sight of so long, and was forgotten by both Dunlap and the Government, there was no occasion to resurrect it for defeat of a *bona fide* attempt to appropriate the land by one entitled to do so. As matter of form, lest Dunlap may have reclaimed the land and be occupying it, notice will be issued to him to show cause why his entry should not be canceled, and, if no meritorious case be shown, it will be regarded as abandoned long prior to Bloss's entry, and, if no other objection appear, the railway selection will be accepted. The decision is therefore reversed and case is remanded for further proceedings consonant to this decision.

### MANSUR v. BEAVER.

*Decided March 23, 1912.*

#### TOWNSITE SETTLERS—PREFERENCE RIGHT OF PURCHASE—ACT JUNE 21, 1906.

The provision in the act of June 21, 1906, giving townsite settlers in certain unsurveyed townsites in the Flathead Indian reservation a preference right to purchase, after survey, at the appraised value, a residence lot and a business lot on which they have substantial and permanent improvements, contemplates improvements in keeping with pioneer town settlements.

#### THOMPSON, *Assistant Secretary*:

Counsel for Guy H. Mansur filed petition for rehearing of departmental decision of December 28, 1911 (unreported), affirming decisions of the local office and General Land Office rejecting his application under act of June 21, 1906 (34 Stat., 354), and preference right to purchase lot 4, in block 11, Polson, Montana.

After proceedings not necessary here to recount, hearing was had at the local office, which found against the application. That action

was affirmed by the Commissioner and by the Department, December 28, 1911 (not reported). February 9, 1912, counsel for Mansur served on opposite counsel a petition for rehearing, to which no response has been made, and the motion is now ready for decision.

The townsite was surveyed in 1908, and work of the appraisers was commenced December 31, 1908, and closed January 2, 1909. In their report they make no mention of improvements on lot 4. Notwithstanding such omission, Mansur applied to purchase the lot alleging that he had upon it a log-house, fourteen by twenty feet, gravel roof, two windows, one door, and the house was floored with matched lumber, the improvements being valued at \$100 to \$150. The local office rejected his application, which action the Commissioner affirmed, and on appeal to the Department, November 15, 1910, the decisions were vacated and the case remanded for a hearing. In the meantime, public sale of lots in Polson was held, September 10, 1909, and lot 4 was bid in by T. G. Beaver for \$540, no certificate being issued to him because of pendency of Mansur's application.

Hearing was had at the local office, both parties appearing and adducing evidence. The local office found in favor of Beaver and against Mansur's application, which action the Commissioner affirmed, April 26, 1911, and on Mansur's appeal that action was affirmed.

There is no conflict in the evidence as to the fact that the building, because of which Mansur claims a preference right of purchase, was constructed fifteen years ago and long prior to the townsite survey. Upon the survey being made it was found that lot 3 contained a log dwelling house, occupied by one Redeker, who was living in this house and claimed a preference right of purchase, which was recognized. In addition to that house, there was another log house, which, according to the evidence least favorable to Mansur, stood about one-half on lot 4 and one-half on lot 3. According to Mansur's evidence, only three or four feet of this house stood on lot 3, the remaining twenty or twenty-one feet extending on to lot 4. The entrance to this house was on lot 3. This house had been built and changed hands at least twice. The original builder used it as his residence, after which it was sold to one who rented it from time to time as a dwelling to various families. After that it was sold to a lumber firm, who used it for storage of milled lumber and building material, and afterward sold it to Mansur for \$25, and he used it for storage of cement and building material, making concrete blocks on the rear of the lot, conducting a business of concrete construction in that vicinity.

As to what portion of this house stood on lot 3 and what portion stood on lot 4, there is a conflict in the evidence, but the Department, on reconsideration of the case, deems that immaterial. It is not surprising that settlers in a frontier town should so place their buildings

that when a town lot survey was made the lot lines would pass through the building constructed before survey. The evidence, however, is clear that long before any town lot survey there were two distinct ground holdings—one appurtenant to the dwelling by the survey placed wholly on lot 3, and one appurtenant to the dwelling afterward used for business purposes by the survey placed partly upon lot 3 and partly upon lot 4. On the survey, as in case of settlers on unsurveyed lands, these adjoining squatter proprietors would necessarily have to conform their land-holdings to the lines of survey. This Mansur appears to have done. It was commendable to do so, tending to public peace and good order. It was merely the conformation of his holding to the lines of survey, as is permitted and required in case of settlers upon larger holdings upon agricultural lands.

The act of June 21, 1906, *supra*, was intended to give pioneers of civilization a preference right to buy a residence lot and a business lot in those centers of trade which their enterprise had located and developed on the unsurveyed public lands. By substantial improvements one must understand such improvement as others conducting similar business made upon their holdings, and were suitable to the business conducted at such point. It would be absurd to say that these must be brick or stone structures—ornaments to densely populated and old centers of trade. A log store and log post-office are in the sense of the act permanent structures, if others engaged in similar business used such structures for their trade and residence. Judged by this standard, Mansur was owner of permanent improvements upon lot 4. The improvements appear to compare favorably with those upon lot 3, where the preference right was recognized. He was entitled to a preference right of entry at the appraised value.

The departmental decision of December 28, 1911, is therefore recalled and vacated, and the decisions of the Commissioner and local office appealed from are reversed. Mansur's preference right of purchase will be recognized.

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#### MANSUR v. BEAVER.

Petition for exercise of the supervisory power of the Secretary to review departmental decision of March 23, 1912, 40 L. D., 596, denied by Assistant Secretary Thompson, May 25, 1912.

**BERT L. RUARK.**

*Decided March 23, 1912.*

**BITTER ROOT FOREST RESERVE—LANDS OMITTED IN ADJUSTMENT OF BOUNDARIES.**

The fact that the diagram upon which the proclamation of July 1, 1908, adjusting the lines of lands theretofore reserved for forest purposes so as to eliminate certain lands from the Bitter Root reservation and place them in reservations of other designations, erroneously showed certain tracts within the withdrawal for the Bitter Root forest reserve made by the proclamation of May 22, 1905, to have been omitted from such reservation, does not have the effect to release them from reservation, in view of the provision in the later proclamation that it was not intended by such adjustment to release any land from reservation, and the lands so erroneously omitted from the diagram are not therefore subject to appropriation as unreserved public lands.

**THOMPSON, *Assistant Secretary:***

Bert L. Ruark has appealed from decision of July 29, 1910, by the Commissioner of the General Land Office, holding for cancellation his declaratory statement filed in the local land office at Missoula, Montana, February 3, 1910, for lots 3 and 4, Sec. 5, T. 3 N., R. 21 W., under the act of June 5, 1872 (17 Stat., 226).

The action taken by the Commissioner was based upon the fact that the lands applied for were withdrawn by President's proclamation of May 22, 1905, for the Bitter Root Forest Reserve, and remained so withdrawn. The contention of claimant is that the land was released from withdrawal by virtue of the President's proclamation of July 1, 1908, which fixed new boundaries for the Bitter Root National Forest.

An examination of said proclamation discloses that said tracts are within the forest reservation as fixed by the proclamation of May 22, 1905, which defined the boundaries by survey description; that the proclamation of July 1, 1908, which fixed the boundaries of the Bitter Root reservation, eliminating certain lands from the reservation under that name and placing them under reservations of other designations, defined the boundaries of the Bitter Root reservation by accompanying diagram and not by survey descriptions. According to said diagram the tracts here in question are not within the reservation. It is clear, however, from the language of the proclamation, which must be considered in connection with the diagram, that said tracts were not released from reservation. The concluding sentence of the proclamation reads as follows:

It is not intended by this order to release any land from reservation or to reserve any land not heretofore embraced in a national forest.

The purpose of the proclamation was simply to adjust the lines of lands reserved for forest purposes so as to place them into reserva-

tions under different names. It is clear that it was intended to retain these tracts in the Bitter Root National Forest, and that they were so retained notwithstanding the error in the diagram. The action of the Commissioner is clearly correct and the decision appealed from is accordingly affirmed.

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J. E. ENMAN.

*Decided March 23, 1912.*

RECLAMATION—WATER RIGHTS—PAYMENTS—ACTUAL AREAS OF LEGAL SUBDIVISIONS.

Where the irrigable area of a legal subdivision embraced in an entry within a reclamation project is shown on the duly-approved farm-unit plat to be greater than the entire area of such legal subdivision shown on the prior township plat, applications for water rights and payments therefor should be made on the basis of the actual irrigable area, and not on the basis of the acreage shown on the township plat.

ADAMS, *First Assistant Secretary:*

J. E. Enman has appealed from the decision of the Director of the Reclamation Service, dated January 12, 1911, refusing to approve application for a water right for the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and lots 3 and 4, Sec. 17, T. 40 S., R. 10 E., Lakeview, Oregon, land district, for 144 acres of irrigable land, on the ground that the actual area of the irrigable land in said subdivisions is 147 acres.

The survey of township 40 south, range 10 east, approved March 31, 1885, describes lots 3 and 4 of section 17, which lie on the west side of the meanders of Lost River, as containing areas of 45.5 and 18.5 acres, respectively, and the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of said section as containing 80 acres, making the total area of the three subdivisions 144 acres.

The farm unit plat of said township, showing areas irrigable under the Klamath Reclamation Project, and approved by the Secretary of the Interior November 16, 1908, shows the area of said lots 3 and 4 to be 47 and 20 acres, respectively, and the area of the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  to be 80 acres, or a total irrigable area in the three subdivisions named of 147 acres.

Mr. Enman, relying upon the original survey of the township and the patent issued for the subdivisions in question, contends that he should be permitted to file water-right application and receive water for the irrigation of the land upon payments based upon an area of 144 acres of irrigable land. The Reclamation Service, applying the rule laid down by the Secretary of the Interior May 15, 1905, to the effect that where the actual areas of legal subdivisions, as

found by farm unit surveys, duly approved, differ to the extent of 2 per cent from those shown on the original plats of survey, the charges for water rights shall be in accordance with the actual irrigable areas.

The patents issued by the United States for lands disposed of under the public-land laws in cases like this, while based upon the description contained in the approved plat and field notes of survey, recite that the tracts patented contain — acres, more or less, and it is the general rule that any statement in a patent as to acreage of the land conveyed must yield to the terms of description therein employed (31 L. D., 272).

In this connection it may also be stated that Mr. Enman's stock subscription contract, while stating the area of land for which he made application for water, also specifies that it contains — acres, "more or less."

Section 5 of the reclamation act authorizes the sale of the right to the use of water for land in private ownership within Government reclamation projects and the said act of June 17, 1902 (32 Stat., 388), contemplates and requires that each acre irrigated with water furnished under a reclamation project shall return to the reclamation fund its proportionate share of the cost of construction of the irrigation works.

The authority for farm unit surveys to be made by the Reclamation Service and approved by the Secretary of the Interior is impliedly contained in the reclamation act and directly given in the act of June 27, 1906 (34 Stat., 519). It is essential, not only to secure the proper return of construction charges to the reclamation fund, but in fairness to land owners under the project who are required to contribute their proportionate share of its cost, that surveys of the lands be made to determine the areas irrigable thereunder. If such surveys disclose the fact that the actual irrigable area in any subdivision or subdivisions is greater than that named in the patent or in the original plat of survey, the former survey must yield to the latter and special survey made primarily to determine the actual irrigable area.

In this case the project engineer reports that the survey was carefully executed and checked up, and there is no doubt as to the correctness of the area of irrigable land (147 acres) returned. Mr. Enman has the land, the Reclamation Service is prepared to furnish water for its irrigation, and it is but just and equitable that he should pay therefor upon the basis of the actual area irrigable and for which water is supplied.

The decision of the Director of the Reclamation Service is accordingly affirmed.

## BUTTE OIL COMPANY.

*Decided March 25, 1912.*

## PLACER MINING CLAIM—DISCOVERY—ACT OF FEBRUARY 11, 1897.

A small seepage of oil upon the surface of a spring of water, and a slight flow of natural gas, insufficient for commercial purposes and without value, from a drilled well which failed to develop oil, are not sufficient to constitute a discovery of oil as a basis for a placer mining location under the act of February 11, 1897.

## INVALID PLACER LOCATION—GLACIER NATIONAL PARK—SUBSEQUENT DISCOVERY.

A placer mining location upon which no discovery had been made at the date of the act of May 11, 1910, creating the Glacier National Park, was invalid and did not except the land covered thereby from the operation of that act; and a discovery after the reservation of the land as a national park would be of no avail.

• ADAMS, *First Assistant Secretary:*

This is an appeal by the Butte Oil Company from the decision of the Commissioner of the General Land Office of April 12, 1911, affirming the recommendation of the register and receiver and holding for rejection its mineral application for patent No. 30 filed October 24, 1905, at Kalispell, Montana, for Lake No. 11 and Excess No. 2 Placers, Surveys Nos. 7638 and 7639, embracing lands lying along the shore of Lower Kintla Lake within the Glacier National Park in supposed T. 37 N., R. 21 W., unsurveyed. The Commissioner also declared the locations invalid and void.

The Lake No. 11 claim is stated to have been located May 6, 1901, and the Excess No. 2, August 17, 1901. The location notices do not state the kind of mineral claimed but the record shows that they were made as oil locations. The Glacier National Park was created by the act of May 11, 1910 (36 Stat., 354) which provided in part:

all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom: *Provided*, That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States or the rights of such claimant, locator, or entryman to the full use and enjoyment of his land.

Proceedings were initiated in this case upon the report of an officer of the Forest Service, which charged "that there has been no discovery of mineral of value upon the land embraced in these locations, or either of them;" and the Department will consider only the question of whether there has been a valid discovery upon either of the two claims.

Land containing petroleum and other mineral oils may be entered and patented under the placer mining laws in accordance with the act of February 11, 1897 (29 Stat., 526), which provides:

That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims.



Upon the Lake No. 11, the company drilled a well to the depth of 1,400 feet but struck no oil, after which it discontinued its operations in August, 1904. A small flow of natural gas, however, was developed, insufficient for commercial purposes and without value. One witness testified that by conserving the flow and using small pipes, the gas might be sufficient for a range used by a resident of the near vicinity. Upon the Excess No. 2, there was a seepage of oil beneath a large rock upon the surface of a spring of water which had stained some of the surrounding rocks. It could be skimmed off the surface and collected in a bottle and one sample so collected by one of the Government's witnesses upon analysis proved to be petroleum oil.

The appellant contends that the above developments, taken into consideration with the geological conditions, constitute a valid discovery. It introduced at the trial a copy of a report entitled, "Oil of the Northern Rocky Mountains," by Bailey Willis, a geologist who, speaking of a possible oil reservoir in this region, says:

2. *Nature of Reservoir.*—A reservoir in which oil in any quantity might accumulate from this source should naturally be an extensive stratum of porous rock so situated that the oil penetrating it could not escape. No such stratum is definitely known to exist. It is true of the uppermost members of the Cretaceous, as it is of the lowermost formations of the pre-Cambrian, that they are cut off by the over-thrust fault, and it is entirely possible that a porous sandstone of Cretaceous age may underlie the Rocky Mountains; but so far as the writer's observation and reading go, such an hypothesis is without foundation in observed fact. On the other hand, in the shattered condition of the uppermost Cretaceous sandstones and the lowermost pre-Cambrian limestones a reservoir of limited capacity is presumably established in both of them along the zone of the overthrust, and it is reasonable to suppose that any oil generated in the Cretaceous would rise and occupy this broken zone.

3. *The Cover.*—The cover of such reservoir may be found in the overlying Paleozoic strata. These present a structure which is alike unfavorable to free escape of any accumulating oil, and at the same time sufficiently open to permit small quantities to reach the surface from very considerable depths. Throughout the entire thickness of 10,000 feet of shale, quartzite and limestone, joint planes of nearly vertical position divide every formation. They are an effective condition of the development of cliff walls many hundreds of feet in height and a universal phenomenon throughout the length and breadth of the range. Along these joint planes it is probable that oil and gas as well as water slowly make their way to the surface, not by any direct course, but by a series of ascents and offsets, the latter occurring along bedding planes where impervious strata overlie more pervious beds. The only condition controlling the course which might be traversed by the oil is that it must in general continuously ascend. This is consistent with a long route by which it might come to the western outcrop, chiefly along the bedding planes from strata beneath the heart of the range. The fact that the seepages along the western side of the range appear from strata beneath the red shales which are relatively impervious bears upon this hypothesis.

In conclusion, Mr. Willis stated:

If the inference as to the irregular line of ascent of the oil from its unknown source be correct, the particular point at which the oil escapes to the surface is not significant as an indication of the position of a subterranean reservoir.

From the above, it is apparent that the existence of the oil seepage upon the land is not an indication that the particular tract is underlain with a reservoir of oil. In fact, if it indicates the presence of a reservoir at all, it does not indicate that that reservoir is under the place of seepage. On the contrary, the indication is that the reservoir, if any, is at some distance therefrom. While a flow of natural gas is frequently present in connection with the oil wells, a slight flow of gas, valueless in itself, does not demonstrate the existence of oil upon the particular tract upon which it is encountered.

The question of what constitutes a discovery of oil has been considered by the various courts and the Department. In Nevada *Sierra Oil Co. v. Home Oil Co.* (98 Fed. Rep., 673) the evidence showed that there had not been any seepages of oil upon the tract in controversy, but that sandstone and shale had been discovered thereon as well as on adjoining lands and that there were seepages of oil upon some of the adjoining land as well as wells on the adjoining tracts which were producing more or less oil. This was held not to constitute a discovery. Judge Ross holding that:

But these were nothing more than indications of existing oil under the surface of the ground in question, which might or might not prove to be true. Mere indications, however strong, are not, in my opinion, sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land of the United States under the mining laws, a discovery of mineral within the limits of the claim.

In *Olive Land & Development Co. v. Olmstead et al.* (103 Fed. Rep., 568) the answer set up the following statement of facts:

The answer avers that the land in controversy is of no agricultural value, and of but little, if any, value for grazing purposes, and has no appreciable value for any purpose except for petroleum that may be obtained by boring or drilling therein; that it is in a well-recognized petroleum producing belt, and that adjacent properties in the belt are actually producing petroleum in large and profitable quantities, and that the surface indications of such producing lands and upon the lands in controversy are the same; that the surface rock and sand and the surface geological formation and stratification upon the lands in controversy are such as would lead any experienced petroleum expert or any practical geologist familiar with petroleum-bearing lands in California to pronounce the same oil or petroleum territory, and chiefly valuable therefor; that one of the most pronounced and well-marked anticlinal folds of sandstone and shale formation in Ventura county runs through the land in controversy and has its apex thereon, and that where said anticlinal fold is most exposed, by a declivity which sharply cuts the same, bituminous sand several feet in thickness and 100 or more feet long is clearly visible, which sand, when excavated, gives out a distinct odor of petroleum; that such bituminous sand,

in the formation in which it is found, shows the land in controversy to be mineral or petroleum in character, and constitutes such a discovery as would justify any prudent petroleum miner in locating the same as petroleum land, and in spending his time and money in developing the same for its petroleum product; that \* \* \* discovery of bituminous sand in said sandstone and shale formation having been made upon the land in controversy by eight persons, \* \* \* citizens of the United States, and over the age of 21 years, they did \* \* \* locate \* \* \* the lands in controversy, as placer petroleum lands and as a placer petroleum mining claim.

The court held that this location amounted to nothing: "for the reason that no discovery of oil or other mineral had been made, nor, indeed, has yet been made."

In *Miller v. Chrisman* (73 Pacific, 1083) the evidence relied upon to show a discovery of oil is set out by the Supreme Court of California as follows:

Upon the question of discovery the sole evidence is that of Barieau himself. Giving fullest weight to that testimony, it amounts to no more than this: that Barieau had walked over the land at the time he posted his notice, and had discovered "indications" of petroleum. Specifically, he says that he saw a spring, and "the oil comes out and floats over the water in the summer time when it is hot. In June, 1895, there was a little water with oil and a little oil with the water coming out. It was dripping over a rock about two feet high. There was no pool; it was just dripping a little water and oil—not much water."

The court holds this not to be a discovery, stating:

This is all of the "discovery" which it is even pretended was made under the Barieau location, and we think it clear that such testimony does not establish a discovery, within the meaning of the law. To constitute a discovery, the law requires something more than conjecture, hope, or even indications. The geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications, such as seepage of oil. All these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered; but one and all they do not, in and of themselves, amount to a discovery. This view finds support in the *Nevada Sierra Oil Co. v. Home Oil Co.* (C. C.) 98 Fed., 673, where the circuit court was dealing with this precise question, in regard to this precise piece of land, under these identical circumstances. While perhaps it would be stating it too broadly to say that no case can be imagined where a surface discovery may be made of oil sufficient to fill the requirements of the statute, yet it is certainly true that no such case has ever been presented to our attention, and that in the nature of things such a case will seldom, if ever, occur.

So in *Bay v. Oklahoma Southern Gas, Oil & Mining Co. et al.* (73 Pac. Rep., 936) the Supreme Court of Oklahoma, at page 940, expresses the same view:

Neither will mere surface indications support a location. It is the common experience of persons of ordinary intelligence that petroleum in valuable quantities is not found on the surface of the ground, nor is it found in paying quantities seeping from the earth. Valuable oil is found by drilling or boring

into the interior of the earth, and either flows or is pumped to the surface; and until some body or vein has been discovered from which the oil can be brought to the surface, it cannot be considered of sufficient importance to warrant a location under the mineral laws.

In *New England & Coalinga Oil Co. v. Congdon et al.* (92 Pac., 180) the Supreme Court of California held that the following facts under *Miller v. Chrisman*, *supra*, did not constitute a discovery:

Evidence that the land was oil bearing consisted of the testimony of plaintiff's superintendent that he had found on the land "some oil sand stained with oil and a ridge of fossil," and that oil had been discovered in neighboring locations; the nearest well being some two miles distant. The geological formation indicated the probable existence of oil-bearing strata in the claim.

The Department in *Southwestern Oil Co. v. Atlantic and Pacific R. R. Co.* (39 L. D., 335) held (syllabus):

The disclosure of a stratum of bituminous sandstone or shale from which a small quantity of oil seeps, not sufficient to impress the land with any value for mining purposes, does not constitute a sufficient discovery to support a valid mining location.

Under the above authorities and the record in this case, it is apparent that the decision of the Commissioner, that there has been no discovery upon either of the claims, here under consideration, must be affirmed. The slight flow of gas and the small seepage of oil were indications that there possibly is a reservoir of oil lying at an unknown depth and situated at some unknown distance from the land and cannot be regarded as a discovery of oil as a basis of a placer mining location under the act of February 11, 1897.

It is not necessary in the decision of this case to hold that under no conceivable circumstances could there be such seepages or flows of oil on the surface of land as when found by one attempting to locate a mining claim would constitute a discovery. It is sufficient that in this case the seepage shown is not of such character as in the opinion of the Department to constitute a discovery.

Counsel requests that in the event that the application for patent be denied, the locations be permitted to remain intact in order that the claimant may prosecute further development work. This request must be denied. As a discovery is a condition precedent to the making of a valid mining location, the present claims were invalid at the time of the creation of the Glacier National Park; the lands embraced therein became a part of that park by virtue of the act of May 11, 1910, and a later discovery of oil would be of no avail.

The decision of the Commissioner, both in rejecting the application and declaring the locations null and void, is affirmed.

**BEACH v. HANSON.**

*Decided April 3, 1912.*

**RECLAMATION WITHDRAWAL—PENDING CONTEST—PREFERENCE RIGHT.**

Where land embraced in a homestead entry was withdrawn for use in connection with a reclamation project pending a contest which resulted in cancellation of the entry, the successful contestant, upon restoration of the land, is entitled to a period of thirty days from the date of such restoration within which to exercise his preference right of entry.

THOMPSON, *Assistant Secretary*:

Harry E. Beach appealed from decision of the Commissioner of the General Land Office of June 29, 1911, rejecting his application for homestead entry for SE.  $\frac{1}{4}$ , Sec. 4, T. 8 N., R. 29 E., W. M., Walla Walla, Washington.

February 23, 1902, Fred A. Hall made homestead entry for this land, against which George E. Hanson filed contest, which effected its cancellation January 22, 1908.

December 29, 1905, the land was withdrawn for use in Yakima Project, and was restored August 18, 1910, to settlement November 8, and to entry December 8, 1910, on which day Beach filed homestead application alleging settlement November 8, 1910.

December 12, 1910, Hanson was allowed to make desert-land entry in exercise of his preference right as successful contestant, and Beach's homestead application was that day rejected for conflict therewith. The Commissioner affirmed that action.

It is assigned as error of the decision that paragraph 6, instructions of January 19, 1909 (37 L. D., 365), and of October 15, 1910 (39 L. D., 296), and act of June 25, 1910 (36 Stat., 835), absolutely terminated any preference right of Hanson.

It is true that Hanson got no right as against the United States to enter the land embraced in Hall's entry, then withdrawn for use in Yakima Project. This is because the paramount supposed interest of the United States will not permit another entry. But if it be found that no interest of the United States requires appropriation of the land to public use, and that the withdrawal was made under misapprehension of fact, the preference right attaches, for that is statutory, granted by act of May 14, 1880 (21 Stat., 140). The land department has no authority by regulation to disregard the act or deny the right. The regulations apply to land under proper withdrawals for public use and for protection of public interest. Thus, in *Wright v. Francis et al.*, 36 L. D., 499, the Department held that where exercise of a contestant's preference right was prevented by withdrawal of the land for reclamation before expiration of the preference period, and it was restored to entry, the right may be exercised within thirty days after such restoration. The present case,

like that in *Wright v. Francis*, involves land withdrawn pending contest. The two cases differ in no material respect.

In respect to the act of June 25, 1910, counsel do not specify the ground of contention, that the preference right was thereby taken away. Presumably, the fifth section is intended, prohibiting any entry after date of the act until fixing of farm units and announcement of water charges. Giving that section full force, it could only postpone exercise of the right until farm units are established and water charges announced.

The record does not show any provision of this act was disregarded, and so does not disclose error.

The decision is affirmed.

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### BEACH v. HANSON.

Motion for rehearing of departmental decision of April 3, 1912, 40 L. D., 607, denied by Assistant Secretary Thompson, May 25, 1912.

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### HEIRS OF ROBERT M. AVERETT.

*Decided April 11, 1912.*

HEIRS OF DECEASED CONTESTANT—PREFERENCE RIGHT—ACT OF JULY 26, 1892.

Under the act of July 26, 1892, the heirs of a deceased contestant, qualified under the law, succeed to the same rights that contestant would have had had his death not occurred, and burdened with the same duties and obligations as to residence, cultivation, and improvement, upon making entry in exercise of the preference right, as would have rested upon contestant had he himself exercised the right; but the heirs have no authority to assign the right or to delegate another to perform for them the duties and obligations required by the homestead law.

THOMPSON, *Assistant Secretary*:

George M. Averett has appealed from a decision of the General Land Office, rejecting his application to make homestead entry of the SE.  $\frac{1}{4}$ , Sec. 36, T. 2 S., R. 5 W., Vernal, Utah, as heir of Robert M. Averett.

The land in question had formerly been embraced in the homestead entry of one Samuel L. Malaby, which was successfully contested by Robert M. Averett, who died on or about June 2, 1908, prior to the order of the General Land Office of September 28, 1908, cancelling the entry.

October 31, 1908, George M. Averett, a brother of the deceased contestant, applied to make entry of said land, in behalf of the heirs

of Robert M. Averett, under the act of July 26, 1892 (27 Stat., 270). That act reads as follows:

That should any person who has initiated a contest die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States, may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred.

The application was rejected because applicant had previously made entry of other lands in his own right, which he relinquished, and had submitted no showing as to his right to make a second entry.

The application was returned to the local office by the General Land Office with instructions to require applicant to show his relationship to Robert M. Averett, the deceased contestant, and that, under the laws of Utah, he was an heir to the said Robert M. Averett and entitled to make the proposed entry by virtue of the provisions of said act of July 26, 1892, *supra*.

The facts disclosed by the additional proof submitted under such instructions show that the deceased contestant left no widow, child, or children. His father and mother and the applicant herein, a brother, survived him. Whether the parents of contestant have other direct heirs beside the claimant is not disclosed.

Under the title "Succession", sections 3 and 4, chapter 4, of the Compiled Statutes of Utah (1907), 947, property rights, real and personal, are thus disposed of:

If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother in equal shares, or if either be dead, then to the other.

Section 4, under that title, reads as follows:

If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation.

From the foregoing reference to the laws of Utah it will be seen that the father and mother of the deceased contestant, who are still living, are the only heirs of Robert M. Averett and alone succeed to the preference right to make entry of said land in virtue of the successful termination of the contest initiated by him while in life.

The purpose of the act of July 26, 1892, was to provide a means whereby the heirs of a deceased contestant might derive the same benefits from a contest commenced by their ancestor in his lifetime that such ancestor himself might have been entitled to had he lived; that is, the joint right of the heirs to continue the prosecution of a contest and a preference right to make entry of the land by all of said heirs who are citizens of the United States. *Biggs v. Fisher* (33 L. D., 465); *Lenertz v. Malloy* (36 L. D., 170).

The brother of the deceased contestant is not an heir so long as the father and mother are living, and the renunciation by them of their right to contest the entry will operate as an abatement, as they have no more authority to assign that right, even to one who might, in the event of their death, be an heir, than the deceased contestant would himself have had, and that is practically the effect of their renunciation.

Appellant seeks to sustain his right to make entry under his application in virtue of a waiver by the father and mother in his favor of their right under said act of July 26, 1892. But the right given by the act is merely such right as the contestant would have been entitled to had the contest been terminated in his lifetime, and that is a preference right to make entry of the land by such of the heirs as may be qualified and to complete it by making full compliance with the homestead laws.

The heirs acquire the same right burdened with the same duties and obligations as to residence, cultivation, and improvement of the land that the contestant would have had and would have been required to perform. *Becker v. Bjerke* (36 L. D., 26).

The heirs, to whom the right is given by the statute can neither assign it nor delegate anyone else to perform the duties and obligations for them that are required by the homestead law.

The decision of the General Land Office is affirmed.

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### WILLIAM G. PLESTED ET AL.

*Decided April 19, 1912.*

#### COAL LANDS—PRICE.

The provision in section 2347, Revised Statutes, that coal lands should be sold at "not less than" ten dollars per acre for lands situated more than fifteen miles from a completed railroad, and twenty dollars per acre for lands situated within fifteen miles of such road, fixes a minimum price at which such lands may be sold, but leaves the Interior Department to prescribe, by regulations authorized by section 2351, a higher price for any such lands, if in its judgment the conditions would seem to warrant it.

*ADAMS, First Assistant Secretary:*

This case is before the Department on the appeal of William G. Plested and Charles Beuchat from the decision of the Commissioner of March 1, 1911, rejecting their application to purchase, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands, lots 1, 2, 3 and 4, Sec. 8, and lots 3 and 4, Sec. 9 (containing 240 acres), T. 34 S., R. 65 W., 6th P. M., Pueblo land district, Colorado.



It appears that the entire area embraced in said T. 34 was, on July 27, 1906, pursuant to departmental order of July 26, 1906, as later modified by departmental order of December 17, 1906, withdrawn from disposition under the coal land laws. April 12, 1907, pending such withdrawal, the said Plested and Beuchet presented at the local office a coal declaratory statement covering the above described tracts, based upon the alleged possession of the land and the opening and improvement of a mine, subsequent to the said departmental withdrawal. This was promptly rejected by the local officers because in conflict with the withdrawal, and that action was affirmed on the successive appeals by the claimants, by the Commissioner's decision of March 30, 1908, and departmental decision (unreported) of January 30, 1909. In the meantime, however, the claimants, on April 18, 1908, filed a "notice of claim" to the land, under departmental circular of March 21 1908 (36 L. D., 318), said notice to become effective in the event of the ultimate refusal of the land department to recognize any rights in the claimants under their declaratory statement.

By letter of June 25, 1910, the Commissioner notified the local officers that all of said tracts had been classified as coal land and appraised or valued, at the following prices per acre: Lots 1, 2, 3 and 4, Sec. 8, at \$125; lot 3, Sec. 9, at \$115; and lot 4, Sec. 9, at \$135. Three days thereafter, it is alleged by claimants, the local officers notified them that they would be allowed sixty days in which to assert formal claim to the land, in accordance with the provisions of the coal land laws and the regulations thereunder. Thereupon the claimants, on July 22, 1910, filed the application to purchase the land here in question, and notice thereof appears to have been contemporaneously published and posted for the necessary thirty-day period, which ended September 3, 1910.

By letter of September 9, 1910, the local officers notified the claimants of the prices at which each of the tracts embraced in their application had been valued or appraised (the aggregate amount for the 240 acres being \$30,000); that they would be allowed thirty days in which to pay "this purchase price" for the land; and that, in default, their application would be rejected.

September 22, 1910, the claimants who, in the meantime, had supplied the necessary proof of the publication and posting of the notice of their application, tendered to the local officers in payment for the land, at the rate of \$20 per acre, the sum of \$4,800. This amount, however, the local officers declined to accept and, on October 25, 1910, notified the claimants that their application had been that day rejected for failure to make compliance with the terms of the local officers' said letter of October 9, 1910, requiring payment for the land in the sum of the appraised price of \$30,000. On appeal by the

claimants, this action was, for the reason given by the local officers, affirmed by the decision of the Commissioner herein appealed from.

The appeal, in part, challenges the correctness of the local officers' action in rejecting the claimants' declaratory statement presented in 1907, for the reason that the land was then covered by departmental withdrawal of July 27, 1906; that matter, however, was finally passed upon and determined by the Department adversely to the claimants' then, as well as present, contentions and will not therefore be again considered.

It is further urged in the appeal that the Department is without authority to exact in payment for land a sum in excess of the prices specifically named in section 2347, Revised Statutes, to wit, \$10 per acre for lands situated more than fifteen miles from a completed railroad, and \$20 per acre for lands situated within fifteen miles of such railroad. In this connection, however, it is to be observed that Congress in said section did not establish a fixed price at which coal lands should be sold but prescribed merely that "not less than" the prices named, depending upon the distance of a particular tract from the completed railroad, should be required to be paid therefor, thus leaving the Commissioner free, by regulations authorized by section 2351, Revised Statutes, to establish a higher price for any tract if, in his judgment, the conditions would seem to warrant it. It is true that, for many years succeeding the enactment of the coal land laws, the minimum prices named therein were, by regulations of the land department, prescribed and accepted as the maximum rates at which such lands might be sold. This, however, was changed by the regulations of April 12, 1907 (35 L. D., 665), paragraph 6 of which reads as follows:

Information will be furnished registers and receivers by the Commissioner of the General Land Office of the price at which all coal lands in their respective districts will be offered. The local land offices will from time to time be furnished with schedules and maps (1) showing lands known to lie without ascertained coal areas and open to entry under the general land laws, according to the character of each particular tract; (2) showing lands known to contain workable deposits of coal, whereon prices will be fixed upon information derived from field examination; and (3) showing lands containing coal of such character as may, from their location at a distance from transportation lines, be sold at the minimum price fixed by the statute as hereinafter stated.

Local land officers will allow coal entries for lands in the first and third classes at the minimum price fixed by the statute, and for those in the second class at the prices stated in the schedules and maps furnished them. Lands listed in classes 2 and 3 are subject to entry under the coal-land laws only, unless shown by the applicant to be of such character as to be subject to entry under some other law. For those lands listed as of the first and third classes (when entered under the coal-land laws) the price is not less than \$10 per acre when situated more than 15 miles from a completed railroad and \$20 when situated within 15 miles of a completed railroad; and where the lands lie partly without such limit, the higher price must be paid for each smallest legal

subdivision the greater part of which lies within 15 miles of such railroad. The term "completed railroad" is construed to mean a railroad *actually constructed, equipped, and operating* at the date of entry. The distance is to be calculated from the point on such railroad nearest the lands applied for, and the facts in each case must be shown by the affidavit of the applicant, corroborated by the affidavit of some disinterested credible person having actual knowledge thereof.

In adopting and issuing these regulations, the Commissioner is well within the plain terms of the coal land law, and the scope of the authority thereby conferred upon him. Pursuant to those regulations, the land in question has been examined, classified, valued and ordered to be disposed of at prices ranging from \$115 to \$135 per acre and schedules and maps showing such valuation had been duly forwarded to the local officers and received by them prior to the date of the filing of the application here in question. These figures then constituted the prices at which the several tracts embraced in the application may be sold, and not the minimum price of \$20 per acre named in the act for lands situated within fifteen miles of a completed railroad.

The decision appealed from is accordingly affirmed.

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### WALKER v. BURGESS.

*Decided April 25, 1912.*

#### SECOND HOMESTEAD—ACT OF FEBRUARY 3, 1911.

The right of second homestead entry accorded by the act of February 3, 1911, is not limited to instances where the original entry was lost, forfeited, or abandoned prior to the act, but is equally applicable where the original entry, made prior to the date of the act, was lost, forfeited, or abandoned subsequent to that date.

#### PRACTICE—CONTEST—PROTEST.

Where entry has been allowed upon a showing of proper qualifications on the part of the applicant, any attack upon the entry on the ground of the entryman's disqualification should be by contest and not by protest.

#### ADAMS, *First Assistant Secretary*:

Frank D. Walker has filed a petition requesting the Secretary to direct the Commissioner of the General Land Office to certify the record in the above entitled case to the Department for consideration.

By departmental decision of July 21, 1911, it was directed that Frank D. Walker's homestead entry for the NE.  $\frac{1}{4}$ , Sec. 12, T. 96 N., R. 71 W., Gregory, South Dakota, land district, be canceled upon the contest of William C. Burgess upon the condition that Burgess, within thirty days from receipt of notice of preference right of entry, file his application showing proper qualification to make entry

of the land described. A motion for rehearing of said decision was denied November 22, 1911, and the case was closed by Commissioner's letter of November 29, 1911. December 7, 1911, Burgess was notified of his preference right of entry. He accordingly filed his application showing qualifications and was allowed to make second entry on January 6, 1912, for the land described. He had prior thereto, viz., on July 19, 1910, made homestead entry for lots 3, 4 and 5 of Sec. 31, T. 95 N., R. 71 W., which on January 6, 1912, he relinquished, as he avers, without consideration. A brother of Burgess made entry of the land relinquished on the same date. Walker's entry was accordingly canceled as of date January 6, 1912, at the time of filing of the application of Burgess. January 16, 1912, Walker filed protest against allowance of the entry of Burgess, alleging that the latter was not qualified to make entry for the reason that he had made a prior homestead entry for lands of the same general character as the land here involved, and which former entry was not relinquished until January 6, 1912; that the relinquished lands had not been abandoned either before or since filing the relinquishment, the entryman having resided thereon during the year 1911, and down to the time of filing protest; that the relinquishment was merely filed for the purpose of attempting to qualify himself to make second entry, and to afford another member of his family an opportunity to make entry of the land embraced in the said prior entry of Burgess; that Burgess, if he in fact abandoned the land embraced in the former entry, relinquished same for a consideration, and is thus within the inhibition contained in the act of February 3, 1911 (36 Stat., 896), authorizing allowance of homestead entry under certain circumstances.

March 27, 1912, the Commissioner dismissed the protest of Walker and denied the right of appeal upon the ground that Burgess had shown himself qualified to make second entry; that the protest was filed after the entry of Burgess was made; that the proceedings were strictly in accord with the departmental directions.

The petition urges that the action of the Commissioner has denied Walker a substantial right; that Burgess was not qualified to make a second entry for the reason that his former entry was not lost, forfeited or abandoned prior to said act of February 3, 1911, and for the further reason that fraud is evident in the pretended relinquishment and that if his claim to the land was really abandoned, that he received consideration for the relinquishment. It is strongly urged that the Commissioner wrongly interpreted the said act of February 3, 1911, and that said act does not authorize second entry unless the former entry was lost, forfeited, or abandoned prior to the date of said act. Said act reads as follows:

That any person who, prior to the approval of this act, has made entry under the homestead or desert-land laws, but who, subsequently to such entry,

from any cause shall have lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry had not been made, and any person applying for a second homestead or desert-land entry under this act shall furnish a description and the date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished his former entry for a valuable consideration in excess of the filing fees paid by him on his original entry.

This language is clear and specific. It speaks for itself. No extraneous aids are needed to show the intention of the lawmaking body. Nothing is left for interpretation except to follow the plain, ordinary meaning of the words employed. The following are well-established principles of law concerning the interpretation of statutes:

If a statute is plain, certain, and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices; then interpretation is needless. . . . The rules of construction with which the books abound apply only where the words used are of doubtful import; they are only so many lights to assist the courts in arriving with more accuracy at the true interpretation of the intention. . . . Courts are not at liberty to speculate upon the intentions of the legislature where the words are clear, and to construe the act upon their own notions of what ought to have been enacted. [Lewis' Sutherland Statutory Construction, vol. 2 (second edition), pp. 695-697].

When a statute is ambiguous, it is proper to seek in every legitimate way for the intent of the lawmaking power, and debates in Congress upon the bill while pending, and especially reports of committees, have often been drawn upon for light in seeking for the intent and purpose of the law. These are never infallible guides, however, as is shown in this particular instance. In the brief submitted herein, numerous excerpts from the records of the debates upon the bill in the House of Representatives are given in support of the contention of counsel. One of the members is quoted as follows:

There have been a good many things said in this debate that have somewhat clouded a very simple issue. . . . There is no essential difference between the bill now before the House and the act of 1908. The language is practically identical, except that it gives the right to one who had received as much as the filing fee as a consideration. We are simply bringing what now is the law down to date and making it clear as to its intent.

This speaker may have been correct in his statement that the debate had clouded the issue, but he was clearly in error in saying that the language in the act of February 3, 1911, and that of the act of February 8, 1908, is practically the same. The language of the respective acts is essentially different upon the point here involved. The said act of February 8, 1908 (35 Stat., 6), reads as follows:

That any person who, prior to the passage of this act, has made entry under the homestead laws, but from any cause has lost, forfeited, or abandoned the same, shall be entitled to the benefits of the homestead law as though such former entry had not been made, and any person applying for a second home-

stead under this act shall furnish the description and date of his former entry: *Provided*, That the provisions of this act shall not apply to any person whose former entry was canceled for fraud, or who relinquished the former entry for a valuable consideration.

The Department held that an applicant under the latter act must show not only that the former entry was made prior to the date of the act, but also that it had been lost, forfeited, or abandoned prior to the date of the act. See instructions of February 29, 1908 (36 L. D., 291). But as to the act of February 3, 1911, *supra*, the Department has held that where the former entry was made prior to the date of the act, it is immaterial at what date thereafter it was lost, forfeited, or abandoned, because the act provides that if "subsequently to such entry" it be lost, forfeited, or abandoned, such entryman shall be entitled to make second entry provided he comes within all of the other provisions of the act. See subdivision "C", Sec. 13, of instructions of April 20, 1911 (40 L. D., 40). The Department holds to this view of the law, and therefore the contention of counsel to the contrary can not be concurred in.

Another feature of this case deserves consideration, namely, the contention that Burgess was not entitled to make second entry under the said act of February 3, 1911, because he relinquished his former entry for a consideration, or that if he did not relinquish it for a consideration he has not in fact abandoned his claim to the said land but only relinquished it to allow his brother to hold it for the benefit of Burgess. Affidavits are submitted in support of this contention. However, this protest was filed after the second entry of Burgess was allowed upon the showing of proper qualifications. If that showing be false, the entry is subject to attack, and while it may be possible for Walker to show that Burgess has not as a matter of fact lost control of the land embraced in his former entry, or that he relinquished same for a consideration, yet it is believed that if he wishes to attack the present entry of Burgess, it should be done by way of contest and not upon protest. If Burgess was not qualified to make second entry, his present entry is illegal and is subject to contest in the usual way. Walker must be relegated to that procedure.

The petition is accordingly denied and the papers transmitted to the General Land Office for filing.

## RECLAMATION—OKANOGAN PROJECT.

### ORDER.

DEPARTMENT OF THE INTERIOR,

Washington, April 29, 1912.

Whereas, in pursuance of the acts of Congress approved June 17, 1902 (32 Stat., 388), and February 13, 1911 (36 Stat., 902), respec-

tively, an order was promulgated on March 28, 1911, for the Okanogan project, Washington, granting until further notice a stay of proceedings looking to the cancellation of entries and water-right applications because of failure to make payment of the building charge, the said order being effective as to all entries and water-right applicatitons subject to public notices and orders theretofore issued, upon payment on or before May 1, 1911, of \$1.00 per acre of irrigable land on account of the building charge, plus all charges for operation and maintenance due on or before said date, and subject also to compliance with the conditions of a public notice to be thereafter issued; and

Whereas, it is not feasible at the present time to announce the amount of the charges which shall be made per acre of irrigable land nor the rate at which said charges shall be paid, and negotiations with the Water Users' Association and by the Association with individual land owners are in progress for the purpose of assuring payment of an increased building charge which may amount to \$100 or more, per acre, to cover proposed improvements of such character as to conduce to the better assurance of the water supply;

Now therefore, in pursuance of the said acts of Congress:

1. An additional stay of proceedings is hereby offered to all entrymen and water-right applicants subject to the provisions of the public notices and orders theretofore issued, who on or before May 15, 1912, execute and file in the local land office at Waterville, Washington, an acceptance in the form set forth in paragraph 7 of this order. Printed copies of this order may be used for such purpose. Such acceptance must be accompanied by payment of a rental charge for the season of 1912 of \$3.00 per acre of irrigable land in the area within the project held by the water-right applicant. The stay of proceedings herein granted shall remain in effect until further announcement by public notice or otherwise. Applicants who file such acceptance shall be subject to the provisions of the public notices hereafter to be issued fixing the annual rental charges and the increased cost of the project.

2. All water-right applicants who availed themselves of the former stay of proceedings, but who elect not to avail themselves of the stay of proceedings, hereby offered, shall be subject to the public notices heretofore issued and to a building charge of \$70 per acre of irrigable land. The unpaid balance of said sum shall be due and payable in annual instalments of \$8.00 each, the first of which shall be due on May 1, 1912. The last payment shall be \$8.00 or such less sum as may be necessary to complete the payment of the building charge of \$70 per acre.

3. An entryman against whose entry there is no pending charge of non-compliance with the law or regulations, or whose entry is not

subject to cancellation under the Reclamation Act, may relinquish his entry to the United States and assign in writing to a subsequent entryman any credits he may have for payments made on his water-right application, and such assignee shall have the right to continue payment at the same building charge. A private land owner against whose water-right application there is no pending charge of non-compliance with the law or regulations, or whose water-right application is not subject to cancellation may in like manner make written assignments of credits for payments made, and his grantee shall have the right to continue payment at the same building charge.

4. All entries and water-right applications hereafter made without valid written assignment of credits for payments theretofore made, shall be subject to a building charge of \$100 or more per acre, as may be hereafter fixed, and pending the issuance of public notice providing therefor, shall receive water upon payment of the rental charges herein or hereafter provided.

5. Operation and maintenance charges for all lands where the stay of proceedings under this order is not taken advantage of shall until further notice be \$2.25 per acre of irrigable land.

6. Upon failure to make payment as herein required on or before May 15, 1912, or the annual charges which may be hereafter announced, or to file water-right application as required by public notice, to be hereafter issued, the entry or water-right application, or both, as the case may be, which would otherwise be subject to cancellation will be promptly cancelled. The acceptance of this order shall not be complete, notwithstanding the signature of the acceptance in paragraph 7 hereof, until formal execution and record of a contract for covenants running with the land to secure proper application for a water right subject to the terms of the public notice hereafter issued announcing the charges as ultimately determined by the Secretary of the Interior. Such contract, as well as necessary amendatory contract with the Okanogan Water Users' Association must be made prior to July 1, 1912.

7. Acceptance of the further stay of proceedings herein offered shall be in the following form and may be executed on a copy of this order:

I, entryman or owner of \_\_\_\_\_, Section \_\_\_\_\_, Twp. \_\_\_\_\_ N., R. \_\_\_\_\_ E., W. M., on the Okanogan project, Wash., do hereby accept the stay of proceedings offered in paragraph 1 hereof subject to all conditions announced in this order, and enclose herewith the sum of \$3.00 per acre for the irrigable land herein described.

Date \_\_\_\_\_

Witness as to signature: \_\_\_\_\_



8. The stay of proceedings granted by the order of March 28, 1911, shall terminate on May 15, 1912, except as to those accepting this order; provided, however, that notwithstanding the filing of such acceptance, such stay of proceedings shall terminate on July 1, 1912, if the provisions of paragraph 6 hereof relative to the execution and recordation of contracts shall not have been fully complied with.

SAMUEL ADAMS,

*First Assistant Secretary of the Interior.*

### RECLAMATION—LOWER YELLOWSTONE PROJECT—PAYMENT.

#### ORDER.

DEPARTMENT OF THE INTERIOR,

*Washington, April 30, 1912.*

By virtue of the authority contained in the act of Congress approved June 17, 1902 (32 Stat., 388), it is hereby ordered that any settler under the Lower Yellowstone project, Montana-North Dakota, may receive water for irrigation in the season of 1912 without prior payment of the portion of the instalment for operation and maintenance amounting to \$1.75 per acre, being the balance due for operation and maintenance for 1911, \$1.25 plus the advance payment required by existing public notices and orders for 1912, 50 cents per acre of irrigable land, subject, however, to the following conditions, viz:

1. Application for such extension of time of payment must be made to the Project Engineer through the Lower Yellowstone Water Users' Association not later than June 1, 1912.

2. Payment must be made not later than December 1, 1912, and the amount to be paid shall be \$1.95 per acre of irrigable land instead of \$1.75, and also the balance of \$2.00 per acre which shall be due on that date for operation and maintenance for the season of 1912, provided, however, that if payment has heretofore been made of the \$1.25 balance for 1911, the amount to be paid on December 1, 1912, shall be \$2.55 per acre instead of 50 cents and \$2.00 as required by the public notices and orders heretofore issued.

SAMUEL ADAMS,

*First Assistant Secretary of the Interior.*

## BETTANCOURT ET AL. v. FITZGERALD.

*Decided January 29, 1912.*

## PLACER CLAIM—CLAY SUITABLE FOR USE IN MANUFACTURE OF CEMENT.

A deposit of clay suitable only for use in the manufacture of Portland cement does not render the land containing it subject to disposition under the placer mining laws.

THOMPSON, *Assistant Secretary*:

This case comes before the Department on the appeal of John Z. Bettancourt from the Commissioner's decision of May 25, 1911, dismissing his protest against the application (Serial 01303) of Minnie B. Fitzgerald, widow of Hiram E. Fitzgerald, deceased, by her attorney in fact John F. Leghorn, to select, under the act of July 1, 1898 (30 Stat., 597, 620), and May 17, 1906 (34 Stat., 197), a certain unsurveyed area, aggregating 80 acres, described by metes and bounds, lying within what, when surveyed, will be T. 39 N., R. 43 E., W. M., Spokane land district, Washington, in lieu of the SW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 5, T. 4 N., R. 2 E., same land district, relinquished by her.

The application was filed October 20, 1908, and, April 14, 1909, John Z. Bettancourt filed a protest against it, charging that the land is mineral in character and is embraced in the Mark Tapley placer mining location made February 5, 1902. Previous to the filing of Fitzgerald's application, certain proceedings with respect to the land, not necessary to be here stated, were had. As a result thereof, however, a number of residents of the town of Metaline, situated within the limits of the tract here in question, on September 9, 1908, filed a protest against the patenting of the land embraced in the Mark Tapley mining location to said Bettancourt, or any other person or corporation, charging that the area is not and never has been mineral in character; that a portion thereof has been for many years used for townsite purposes, and that the entire area is chiefly valuable therefor.

Hearing was ordered on both sets of charges and was duly had, commencing September 15, 1909, the two proceedings being consolidated for trial purposes. In the meantime, however, to wit, on July 14, 1909, Fitzgerald filed a relinquishment of her right, title and interest in and to certain area, of approximately 19 acres, embraced in her application, alleged to be occupied and claimed for townsite purposes; and, October 7, 1909, the townsite protestants dismissed their protest, so far as it had reference to the unrelinquished portion of the application, but specifically continued it as to the mineral claim of Battancourt. This left the proceeding a matter between Bettancourt and the selector, on the one hand, and the townsite claimants and Battancourt, on the other.

As result of the hearing, the local officers found the land embraced in the mining location to be nonmineral in character, thus sustaining the protest of the townsite people against Battancourt's claim. They also, for the same reason, recommended that the protest of Battancourt against the selection be dismissed. This action was affirmed in the decision appealed from.

The only substance of a mineral nature possessing any claimed economic importance that is shown to exist upon or within the area embraced in the Mark Tapley mining location, which also includes the entire area selected by Fitzgerald, is a deposit of clay. This deposit, it is testified by the witnesses for the mineral claimants, is such a substance as, if mixed in proper proportions with limestone and subjected to the usual process of burning and grinding, would produce a commercial quality of Portland cement. They also testified that the deposit existed upon the land in such quantities as to warrant the establishment of a cement manufacturing plant at or near that point for the purpose of so utilizing it. It is denied by witnesses for the nonmineral claimants that a mixture of this clay, in any conceivable proportion, with a limestone would produce a satisfactory Portland cement. They further state that the substance exists upon the land in such small quantities and is so intimately intermixed or associated with sand and gravel that, even if it otherwise possessed the necessary properties as a cement material, it would be impracticable to attempt to make use of it for cement manufacturing purposes.

Upon consideration of the voluminous record presented in the case, the Department believes that it fails to disclose the existence upon any portion of the land in question of any deposit of clay of such quality and dimensions as would render practical its removal for use in the manufacture of Portland cement. But, whatever the facts may be, the Department is of opinion, from an examination of standard authorities on cement materials and manufacture, that clay suitable for use in the manufacture of Portland cement is so widely distributed; that its value in a natural state in place constitutes such a small element of the cost of the manufactured product; and that its practical availability as a cement ingredient is so largely dependent upon the existence of certain extremely favorable artificial as well as natural conditions, it can not properly be regarded in and of itself as a valuable mineral deposit within the meaning of the mining laws.

In Dunluce Placer Mine (6 L. D., 761), the Department held that the existence within the limits of a tract of a deposit of ordinary brick clay would not warrant the classification of the tract as mineral nor afford any proper basis for the entry thereof under the placer mining laws. This ruling was reaffirmed in *King et al. v. Bradford* (31 L. D., 108), involving a tract expressly found by the Department to be more valuable on account of a deposit of ordinary brick

clay thereon than for agricultural purposes, it being there held that Congress did not intend that lands containing merely a deposit of brick clay should be dealt with and disposed of as mineral lands. There is no substantial distinction, so far as the mining laws are concerned, between a deposit of clay suitable for the manufacture of ordinary bricks and one capable of being utilized in the production of Portland cement. The rule applied to the former is therefore clearly applicable to the latter.

For the reasons above stated, it must be held that the area in question is not mineral in character, within the contemplation of the mining laws. The judgment appealed from is accordingly affirmed.

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**BETTANCOURT ET AL. v. FITZGERALD.**

Motion for rehearing of departmental decision of June 8, 1912, 40 L. D., 620, denied by First Assistant Secretary Adams, June 28, 1912.

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**GEORGE H. UPTHEGROVE.**

**DESERT-LAND ENTRY IN RECLAMATION PROJECT—RELINQUISHMENT.**

An unperfected desert-land entry in a reclamation project which has been reduced to 160 acres by relinquishment of the excess area under the act of June 27, 1906, and has thereby become subject to the reclamation act and qualified to take water from the project, may be assigned in part under the provisions of the act of March 28, 1908.

*First Assistant Secretary Adams to George H. Upthegrove, Secretary of the Umatilla River Water Users' Association, Hermiston, Oregon, March 11, 1912.*

I further reply to your letter of October 23, 1911, I enclose, for your information, copy of my letter of February 23, to the Chairman of the Senate Committee on Public Lands, reporting adversely upon Senate Bill 4206, "To authorize the issuance of final certificates and patents to desert-land entrymen in certain cases," and giving the reason why the Department opposes the policy advocated by your letter and embodied in said bill.

You are in error in stating that an unperfected desert-land entry in a reclamation project which has been reduced to 160 acres by relinquishment of the excess area under the act of June 27, 1906 (34 Stat., 520), and has thereby become subject to the reclamation act and qualified to take water from the project, can not be assigned in part. Departmental instructions of January 20, 1912 (40 L. D., 386), to the Commissioner of the General Land Office, held that a desert-land entry, reduced to 160 acres or less by assignment of a part

thereof under the act of March 28, 1908 (35 Stat., 52), authorizing such assignments, is not thereby qualified to take water from a reclamation project under the said act of June 27, 1906, but that the relinquishment to the government of the excess over 160 acres, as required by the act last cited, is the only method whereby the part retained can be qualified to take water from the project. Nothing in said decision prevents a desert-land entryman who has so qualified by relinquishing the excess over 160 acres from assigning, under said act of March 28, 1908, parts of the 160 acres retained.

### HEIRS OF C. H. CRECIAT.

*Decided March 21, 1912.*

#### JURISDICTION OF LAND DEPARTMENT AFTER PATENT—ADVERSE CLAIM—HEARING.

After patent has issued the land department has no jurisdiction to inquire into and determine the rights of one claiming adversely to the patentee, any proceeding instituted by it after patent being for its own information to determine whether proper ground exists for suit to cancel the patent; and one claiming adversely to the patentee is not entitled to be heard in any such proceeding.

#### SUIT TO CANCEL PATENT—WHEN ADVISED BY LAND DEPARTMENT.

Suit for cancellation of a patent will not be advised by the land department merely because patent inadvertently issued; but it must appear that some interest of the government, or of some party to whom it is under obligation, has suffered by such inadvertent action.

#### THOMPSON, *Assistant Secretary*:

Louisa A. Creciat, heir of C. H. Creciat, deceased, appealed from decision of the Commissioner of the General Land Office declining to recommend suit to cancel patent issued to Southern Pacific Railroad Company for Sec. 7, T. 9 N., R. 12 W., S. B. M., Los Angeles, California.

January 30, 1909, C. H. Creciat and five others petitioned that suit be instituted by the United States to cancel patent issued November 21, 1903, to the Southern Pacific Railroad Company for this land, filing therewith several affidavits that the land was known to be mineral before issue of patent. No evidence of service on the railroad company was with the papers, which were returned for service. July 22, 1909, they were returned with proof of service and an answer by the company. July 27, 1909, the Commissioner submitted them to the Secretary of the Interior, with request that hearing be ordered to determine advisability of suit to cancel patent. July 28, the Secretary directed the papers be sent to chief of field division to make examination of the land in conference with petitioners, after which, if the facts developed justified that course, the Commissioner

was directed to prepare the case for transmission to the Attorney-General.

Such investigation was made, and September 17, 1909, the chief of field division reported that September 2 and 5, in company with W. A. Barr, principal owner, and E. C. Bailey, another owner of the mining claim, he made examinations and found on SE.  $\frac{1}{4}$  Sec. 7 a 10-stamp mill, cyanide plant, air compressor, engine, two steam boilers, a good and complete set of mining tools, costing probably \$15,000 to \$20,000. The plant was not in operation and appeared to have put through but a small amount of material. With these owners he went through the mine, finding a 700-foot tunnel in porphyry, with stopes, from which he took samples which Barr said were the best of the ore. These samples were assayed and showed no values. The rock showed no mineral veins, but in places showed fractures, which contained "clay gouges," containing few pounds only that might contain very little gold.

Another sample of material intended to pass into the mill for treatment was taken and assayed ninety-one cents per ton gold and silver. Cost of mining and treatment would not be less than four dollars per ton.

With Barr, Bailey, and L. Row, the special agent, went to three other mineral workings, including Creciat's, where they found a tunnel, one hundred and thirty feet long, on none of which claims did they find any mineral or mineral indications. They also examined other claims on NW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$ , Sec. 7; also other claims in sections 8, 10, 11. In Sec. 11 there was a mineral vein and mine, which were reported to have produced \$200,000 of ore. He pronounced Sec. 7 non-mineral, and expressed opinion that, if suit were brought to cancel patent, it must fail of success.

On such report the Commissioner denied the petition for institution of suit. The appeal alleges error that petitioners have not been granted a hearing to prove mineral character of the land, and their rights have been determined unheard.

There was no error in the Commissioner's decision. After patent the land department has no jurisdiction to try and determine a question of right to lands. The issue of patent places such questions outside the jurisdiction of the land department. No rights of the petitioners in the lands have been determined, nor could they be determined by the land department so long as title is out of the United States.

After patent has issued, the purpose of inquiry and investigation is for information of the Department, whether proper ground exists to seek cancellation of the patent by suit. Such proceeding is not an adversary one, but is an administrative proceeding for information of the Department and may be conducted in such manner as

suits its own convenience, and as is, in its own judgment, best calculated to attain its object. It determines no right of parties adversely claiming land no longer public, or property of the United States.

Suit for cancellation of patent will not be advised by the land department merely because patent inadvertently issued, but it must appear that some interest of the Government, or of some party to whom it is under obligation, has suffered by issue of patent. *Mary E. Coffin*, 34 L. D., 298.

The object of this inquiry was to determine if any duty was due to the mineral claimant, and if the grant to the railroad company was exceeded by patenting under its grant of nonmineral lands land that was known to be mineral at the time patent issued.

In the view of the Department, the investigation made satisfies all purpose of such inquiry and shows that suit to cancel patent is inadvisable and would probably fail. Petitioners are not thereby concluded from asserting such mineral character and seeking in the courts to maintain their rights under the mining laws against holder of the legal title. The United States merely determines that it is inadvisable to bring suit for cancellation of the patent.

The decision is affirmed.

### PHILLIPPINA ADAM ET AL.

*Decided March 23, 1912.*

#### HOMESTEAD—DEATH OF ENTRYMAN—WIDOW AND HEIRS.

Where a homestead entryman dies leaving a widow and children surviving, and the widow renounces her right to complete the entry under section 2291, Revised Statutes, in favor of the heirs, the children are entitled to perfect the entry and take title to the land just as though the widow were dead.

#### ADAMS, *First Assistant Secretary*:

This petition is filed by Phillippina Adam, in behalf of herself and other heirs of John Baumstark, praying that the homestead entry of said Baumstark, made May 15, 1902, for the SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 29, T. 154 N., R. 74 W., Devils Lake, North Dakota, upon which petitioners submitted final proof in behalf of said heirs and received final certificate, be reinstated in the exercise of the supervisory authority of the Department.

This petition was transmitted by the Department to the General Land Office with instructions to report the facts pertaining to the cancellation of said entry and return the petition with said report, for consideration by the Department.

From the report of the General Land Office and the petition it appears that Baumstark made entry of said land May 15, 1902, and continued to reside thereon, with his wife and children, until the time of his death, January 3, 1905; that he left a widow who remarried

and removed to Canada where she has since resided; that on March 19, 1909, Phillippina Adam, one of the daughters and heirs of said John Baumstark, submitted final proof in behalf of said heirs, in which it was shown, in addition to the facts above stated, that the said Phillippina Adam had resided on, improved, and cultivated the land for herself and the other heirs ever since the death of the said John Baumstark.

The register and receiver suspended said proof and required supplemental proof that the widow had abandoned her right to the land. In response to such requirement, petitioner filed the affidavit of Margaretta Frelich, formerly Margaretta Baumstark, widow of John Baumstark, stating that, after her former husband's death, she married Carl Ludwig Frelich and emigrated to Canada, where she then resided with her husband, and that she agreed to the action of Phillippina Adam, her daughter, in making proof on behalf of the heirs, and requested that the final proof be approved and patent issued to the heirs of John Baumstark. April 14, 1909, final certificate was issued to said heirs.

January 31, 1910, the General Land Office, after reciting the facts in the case, rejected the proof upon authority of the decision of David R. Weed (33 L. D., 682) that final proof can not be received if made by the heirs of a deceased homesteader during the lifetime of the widow, and held the entry for cancellation, inasmuch as the statutory period had expired, subject to the right of appeal to the Department.

Notice of such action was given to Phillippina Adam and to Mrs. Frelich and, no action having been taken thereon, the entry was canceled by the General Land Office November 12, 1910, and the case closed.

The land was entered January 28, 1911, by Anton T. Fettig, under the homestead law.

The entry of Baumstark, upon which final certificate had issued in favor of the heirs upon the submission of sufficient proof, was improperly canceled.

The homestead law (section 2291, Revised Statutes) provides that, if an entryman be dead, his widow, or, in the event of her death, his heirs or devisees, may perfect the entry. That provision creates an order of succession. Under civil law one or more heirs may renounce their right to the estate and, in that case, the next heirs, in the order of succession, take the estate. So, where a legacy is renounced or has lapsed and there is no effective residuary gift, it will go to the heirs or next of kin, as in cases of intestacy.

No reason is perceived why any different rule should be applied to said section 2291. It is true, as the court observes in *Bernier v. Bernier* (147 U. S., 242, 246), the object of the act was to "provide the method of completing the homestead claim and obtaining a patent



therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate." But the statute itself provided that the heirs or devisees, as well as the widow, in the order named in the statute, may complete the homestead claim and obtain a patent therefor.

The widow, by reason of priority in the order of succession, is entitled to avail herself of the statutory right to the exclusion of all others, and obtain a patent in her own right. But, if she be dead, the heirs may then complete the entry for their sole benefit. No valid reason can be urged why renunciation by the widow of her statutory right, or disqualification that would prevent her from completing the entry, would not be as effective to pass the right to the heirs and leave them free to perfect the claim, as if she were dead. "The words of the statute are clear, and express who in turn shall be its beneficiaries." *McCune v. Essig* (199 U. S., 382, 389). There is nothing in the decision cited in the Commissioner's decision in conflict with this view.

The widow of John Baumstark had not only disqualified herself from completing the entry in her own behalf, but had expressly renounced the right given her by the statute, and consented that the entry might be perfected in favor of the heirs.

The law has been fully complied with by petitioner, acting for herself and in behalf of the other heirs of John Baumstark, and the equitable title has been earned from the Government by the rightful party. The issuance of the final receipt upon sufficient and satisfactory proof entitled the heirs of Baumstark to a patent for the land, and the cancellation of the entry was error.

As the entry was erroneously canceled, the General Land Office is directed to notify Fettig that he will be required to show cause why his entry should not be canceled and the entry of the heirs of Baumstark be reinstated.

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### ERNEST FARRINGTON.

*Decided April 3, 1912.*

#### RECLAMATION—WITHDRAWN LANDS—PROVISO TO ACT OF FEBRUARY 18, 1911.

The proviso to the act of February 18, 1911, that "where entries made prior to June 25, 1910, have been or may be relinquished in whole or in part, the land so relinquished shall be subject to settlement and entry under the homestead law as amended by the act of June 17, 1902," has reference solely to lands withdrawn as susceptible of irrigation and subject to homestead entry at the time of application therefor, and has no application to lands withdrawn by the government for use in the construction and operation of the project.

THOMPSON, *Assistant Secretary*:

Ernest Farrington appeals from a decision of the General Land Office, rejecting his application to make homestead entry of the

NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 20, T. 9 N., R. 6 E., Bellefourche, South Dakota, designated as farm unit "K," in the Bellefourche irrigation project.

These lands were withdrawn July 18, 1903, under authority of the act of June 17, 1902 (32 Stat., 388), as land believed to be susceptible of irrigation from the waters of the Bellefourche irrigation project.

A preliminary farm unit plat of said township was approved by the Secretary of the Interior March 27, 1909, and the land embraced in Farrington's application was designated as farm unit "K."

June 22, 1909, one William F. Rader, Junior, made homestead entry of said tract, which was relinquished April 27, 1911. Previous to said relinquishment, to wit, September 22, 1909, the land was withdrawn, under authority of said act of June 17, 1902, for use in the construction and operation of the project and, upon the relinquishment by Rader of his entry, it immediately came under the operation of said last-mentioned withdrawal.

Farrington's application was tendered April 27, 1911. He insists that, under the provisions of the act of February 18, 1911 (36 Stat., 917), the land became subject to settlement and entry under the homestead law upon the relinquishment of Rader's entry.

The material portion of that act, so far as it affects this application, is contained in the proviso as follows:

That where entries made prior to June 25, 1910, have been or may be relinquished in whole or in part, the land so relinquished shall be subject to settlement and entry under the homestead law as amended by the act of June 17, 1902 (32 Stat., 388).

That provision has reference solely to lands withdrawn as lands susceptible of irrigation and subject to homestead entry at the time of the application to make entry and not to lands that have been withdrawn by the Government for appropriation so long as that withdrawal remains in force.

At the time Farrington's application was made, this land had been withdrawn from all manner of disposition for use by the Government, under authority of the Reclamation Act aforesaid, and it was not subject to entry of any kind.

The decision of the General Land Office is affirmed.

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**ELLEN S. EUSTANCE.**

*Decided April 9, 1912.*

**PATENT TO HEIRS OR DEVISEES OF DECEASED ENTRYMAN.**

Upon the death of a homestead entryman prior to the submission of final proof, leaving no widow, or minor children, entitled to claim under section 2292, R. S., patent upon proof subsequently submitted will issue to his heirs generally, unless it appear from the record, prior to the issuance of patent, that the entryman made a will purporting to devise his interest in the

entry, in which event patent will issue to his heirs or devisees, leaving it to the local courts to determine who the heirs are and what their interests may be.

**PATENT TO HEIRS OF DECEASED ENTRYMAN—DEVISEE.**

Where the land department upon the showing in the record then before it properly issued patent to the heirs of a deceased entryman, and it subsequently developed that the entryman had left a will devising the entry, it will not accept a surrender of the patent accompanied by a deed executed by the devisee purporting to reconvey the land to the United States, and issue a new patent to the devisee of the entryman, but will leave it to the local courts to determine who under the patent already issued is entitled to the land.

*THOMPSON, Assistant Secretary:*

Ellen S. Eustance has appealed from decision of July 31, 1911, by the Commissioner of the General Land Office, denying her request for cancellation of a patent issued to the "heirs of Matilda Peterson" for the SE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 19, NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 30, T. 21 N., R. 6 E., M. M., Great Falls, Montana, land district, and for issuance of a new patent to her as devisee of said Matilda Peterson.

It appears that the entrywoman, Matilda Peterson, died prior to making final proof and that Ellen S. Eustance, as one of the heirs, made final proof and final certificate and patent issued to the heirs of Matilda Peterson, deceased. At that time it was not disclosed that the entrywoman had made a will. The patent was correctly issued upon the record. Mrs. Eustance, in her petition, alleges that she kept up the improvements and made proof as one of the heirs on behalf of all of the heirs; that the entrywoman made a will prior to her death devising her estate to the petitioner and petitioner's brother, M. J. Schellquist; that petitioner did not know until recently that she was entitled to make proof as devisee. She accordingly requests that patent be canceled and new patent issued to her. She forwarded the original patent (unrecorded), also a certified copy of a deed from her brother, M. J. Schellquist, conveying his interest in the tract to her, and a certified copy of the will of the entrywoman. She also executed a deed conveying the tract to the United States, which has been recorded in the county wherein the land is situated.

The Commissioner declined to accept the reconveyance of the tract and returned the deed and the other papers transmitted.

It is the established practice of the Department to issue patent to the heirs generally of a deceased entryman, if there be no widow, or minor children entitled to claim under section 2292, R. S. Or if it be shown in the record prior to issuance of patent that the entryman has made a will purporting to devise his interest in the entry, then the patent is issued to the heirs or devisees of the deceased entryman

where there is no widow, or minor orphan children entitled to claim under section 2292, R. S. It is left for the local courts to determine in such cases who the heirs are and what their individual interests may be. As above stated the patent was correctly issued in this case upon the showing made in the record. The Department now has no jurisdiction to cancel the patent. Whether it could again obtain such jurisdiction by securing consent from all of the heirs to such cancellation it is unnecessary here to determine. It is stated in the brief in support of the petition that the petitioner and M. J. Schellquist are not the only heirs of the deceased. It is clear, therefore, that the Department would have no authority to cancel the patent upon the present showing, and it would decline to cancel it upon any showing, as such action would involve an adjudication and finding as to who the heirs are, which the Department declines to undertake. It would still be necessary even if the old patent were canceled and a new one issued to the heirs or devisees, to resort to court procedure for determination as to the proper claimant or claimants under the patent and their respective interests. It is suggested that the proper procedure for the petitioner is, in case she claims to be the sole and only proper claimant of the land involved, to file a bill in equity in the proper local court to have the title declared vested in her.

The decision appealed from is affirmed.

### SARAH V. WHITE.

*Decided April 12, 1912.*

#### PATENT—EFFECT OF ISSUANCE—ENTRY.

By the issuance of a patent for the land embraced in an entry the entry becomes merged in the patent and is thereafter non-existent.

#### CANCELLATION OF PATENT—ENTRY OF LAND.

By final decree of cancellation of a patent, by a court of competent jurisdiction, the land embraced in the patent becomes part of the public domain, subject to settlement, if unappropriated, but does not become subject to entry until opened to entry by proper order of the General Land Office.

#### THOMPSON, *Assistant Secretary*:

Sarah V. White appealed from decision of the Commissioner of the General Land Office of September 6, 1911, rejecting her application under act of June 3, 1878 (20 Stat., 89), to purchase NE.  $\frac{1}{4}$ , Sec. 20, T. 14 S., R. 3 E., W. M., Roseburg, Oregon.

December 2, 1910, White filed application, which the local office rejected because the land had been entered by and patented to Sadie E. Puter. The Commissioner affirmed that action. The appeal alleges error in the decision because by a decree rendered October,

1910, in United States Circuit Court, Oregon, in suit of United States *v.* Nils O. Werner, the patent was canceled and title revested in the United States.

The ground of decision was inaccurate, in that the local office and Commissioner held that "the land is embraced in an entry of record." The term entry "means that act by which an individual acquires an *inceptive* right to a portion of the unappropriated soil of the country by filing his claim" in the land office. *Chotard v. Pope*; 12 Wheat., 586, 588; *Sturr v. Beck*, 133 U. S., 541, 549. It is that record in the land office "which reserves land" from other appropriation. *Nelson v. Northern Pacific Railway Co.*, 188 U. S., 108, 127. It is the land office record which is in effect an executory contract between the entryman and the Government that it will convey the land to him when he shall have performed the acts and done the things that the law requires in that particular mode of entry. *Parsons v. Venzke*, 164 U. S., 89, 92. The entry, like any other inceptive, initiatory, or executory contract or proceeding, merges into the patent, or other evidence of title. It is then at an end, existing only until, and no longer than, the inceptive right becomes consummate and a patent issues or other evidence of passing of title. As patent for this land had issued, there was no longer an entry existing, and the ground of decision was erroneous.

The conclusion arrived at was correct, though the reason was misstated. By the patent the land passed out of the jurisdiction of the land department. It was held in *Alice M. Reason*, 36 L. D., 279, 281:

The government owes to its grantees of title the obligation of every grantor to do no act afterwards in derogation of their right or that of their grantees, tending to embarrass their title, except as any other grantor might properly do. . . . If title be recovered by judicial proceedings, it is not certainly revested until the decree is final. In the face of proceedings pending in a proper court questioning the finality or conclusiveness of such a decree, the land department should not permit another entry of the land. It follows that the land department may properly require evidence of the finality and conclusiveness of the decree purporting to cancel a patent before permitting another entry for the same land.

In the present case there is no competent evidence that the decree canceling the patent, said to have been rendered, is final. The appropriate evidence that such decree has been rendered and is final is an authentic copy of the decree, with proper evidence of its finality and conclusiveness, so as to revest the land department with its lost jurisdiction. That operates like the *remittitur* or *procedendo* of a court of superior jurisdiction to that of inferior jurisdiction to which a cause is returned after appellate proceedings. When that jurisdiction is restored, the land department must consider whether the land is to be disposed of under the land laws as subject to private appro-

priation, or whether public necessity exists for its reservation to public use. By a final decree of cancellation of patent, land once patented becomes part of the public domain, subject to settlement, like unsurveyed or surveyed public lands, if unappropriated, but does not become subject to entry until opened to entry by the General Land Office. Until such order of restoration and opening to entry, land once patented is *sub judice*, either in the courts, or, after evidence of cancellation of patent, in the land department, to determine the propriety of its disposal under the public land laws. This action has not been taken. The land is not subject to entry.

For these reasons, the action of the Commissioner in rejecting White's application is affirmed.

### BARBOUR v. SOUTHERN PACIFIC R. R. CO.

*Decided April 19, 1912.*

#### CONFLICTING RAILROAD GRANTS—TEXAS PACIFIC AND SOUTHERN PACIFIC.

The sole right accruing to the Texas Pacific Railroad Company under the act of March 3, 1871, prior to the forfeiture of its grant by the act of February 28, 1885, was a prospective right in the odd-numbered sections embraced within the withdrawal made for its benefit upon the filing of its map of general route; and as no map of definite location was ever filed, nor its line otherwise definitely located, neither its place nor indemnity limits were ever defined, and only the odd-numbered sections so withdrawn conflicted with and were excluded from the branch line grant to the Southern Pacific Railroad Company under section 23 of the act of March 3, 1871.

#### ADAMS, *First Assistant Secretary:*

May 28, 1904, the Southern Pacific Railroad Company filed its list No. 128 at Los Angeles, California, on account of the grant contained in section 23 of the act of March 3, 1871 (16 Stat., 579), generally known as its branch line grant. Included therein was Sec. 5, T. 13 S., R. 13 E., S. B. M., claimed to be within the place limits of said grant and designated as containing 641.44 acres. The original survey of this township was made in 1856 and shows section 5 as containing the above area. The township was one of those resurveyed under the act of July 1, 1902 (32 Stat., 728). As resurveyed, section 5 contains 1425.48 acres and is largely covered by various claims under the public land laws which were surveyed out as private tracts and given appropriate numbers. The area within the section exclusive of that covered by such private tracts, is 723.25 acres. April 27, 1909, the Commissioner requested the attorney for the Southern Pacific Railroad Company, in view of the resurvey of this township—to file a rearrangement of said list No. 128 in the local office within a period of ninety days, . . . designating therein the lands claimed by it as having been listed under its said listing of May 23, 1904.

Upon the same day he transmitted to the register and receiver a copy of the township plat according to the resurvey upon which the limits of the Texas Pacific grant under the above act of March 3, 1871, were delineated. May 22, 1909, the Commissioner directed the register and receiver to allow no entry in this township in odd numbered sections listed by the Southern Pacific Railroad Company under the old survey, or in any sections lying north of the limits of the Texas Pacific grant, as so designated.

July 1, 1909, the Southern Pacific Railroad Company filed its amended list designated as list No. 128 A, in which it claimed the entire section 5 according to the resurvey. The railroad company also claimed that the northerly limits of the Texas Pacific grant, as delineated upon the resurveyed township plat by the Commissioner, was erroneous and that the proper location of such limit was approximately  $1\frac{1}{2}$  miles further south. By decision of December 16, 1909, the Commissioner adhered to his location of the limits of the Texas Pacific grant and also held that while the Southern Pacific list was not segregated at the time of the resurvey, the lands in the resurvey corresponding to and occupying the situation of section 5 as originally listed in list 128 and which should have been segregated for the benefit of the railroad company, were part of lot 4, lots 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 26, 28, 31, Sec. 4, and lot 1, part of lot 2, lots 13, 14, 15, 16, 26, 27, 28, and 30, Sec. 5. These aggregated approximately 690 acres, or an excess of approximately 50 acres above the area as originally listed. That part of the Commissioner's decision fixing the northerly limit of the Texas Pacific grant was affirmed by the Department upon appeal, May 4, 1910, which decision became final September 27, 1910.

February 25, 1909, Earl L. Barbour filed his desert land application for lots 5, 8, 9, 14, 15, 17, 18 and 31, Sec. 4, T. 13 S., R. 13 E., according to the resurvey, which was suspended June 10, 1910, by the register and receiver pending adjustment of the above original lists and rejected by them January 21, 1911, for the reason that the lands were included in that adjustment. Their action was affirmed by the Commissioner in his decision of July 3, 1911, from which Barbour has appealed to the Department.

The contentions of the appellant may be briefly summarized as follows:

1. That the Southern Pacific did not receive this section as within the place limits of its branch line grant, for reasons more fully set out below.
2. That the township having been resurveyed, the Southern Pacific cannot take a section under that grant designated by even numbers under the resurvey.

The act of March 3, 1871 (16 Stat., 573), incorporating the Texas Pacific Railroad Company, provided in section 9:

That for the purpose of aiding in the construction of the railroad and telegraph line herein provided for, there is hereby granted to the said Texas Pacific Railroad Company, its successors and assigns, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as such line may be adopted by said company, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have *not have* been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed. In case any of said lands shall have been sold, reserved, occupied, or pre-empted, or otherwise disposed of, other lands shall be selected in lieu thereof by said company, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections first above named, and not including the reserved numbers. If, in the too near approach of the said railroad line to the boundary of Mexico, the number of sections of land to which the company is entitled cannot be selected immediately on the line of said railroad, or in lieu of mineral lands excluded from this grant, a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections nearest the line of said railroad may be selected as above provided; and the word "mineral," where it occurs in this act, shall not be held to include iron or coal: *Provided, however*, That no public lands are hereby granted within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid, and then not to exceed twenty miles from the lands originally granted.

Section 12 provided:

Said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within forty miles on each side of said designated route within the Territories, and twenty miles within the State of California, to be withdrawn from pre-emption, private entry, and sale: *Provided, however*, That the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, "An Act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, and the amendments thereto, shall be, and the same are hereby, extended to all other lands of the United States on the line of said road when surveyed, except those hereby granted to said company.

Section 23 provided:

That, for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six:



*Provided, however,* That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company.

Section 18 and section 3 of the act of July 27, 1866 (14 Stat., 292), granted the Southern Pacific Railroad Company certain odd numbered sections and certain rights to make indemnity selections. The grant to the Texas Pacific Railroad Company was declared forfeited by the act of February 28, 1885 (23 Stat., 337).

The appellant contends that the land here involved is within the indemnity limits of the Texas Pacific Railroad Company's grant and, therefore, under the proviso to section 23 of the act of March 3, 1871, is excepted from the grant to the Southern Pacific. It also appears to be his contention that as the route of the Texas Pacific south of the land here in controversy is located about seven miles from the north boundary of Mexico, the land under section 9 of the act of March 3, 1871, is within the place grant of the Texas Pacific. He cites, in support of his contention, the cases of *United States v. Southern Pacific R. R. Co.* (146 U. S., 570), *United States v. Colton Marble and Lime Co.* (146 U. S., 615), which involve a conflict between the grants of the Atlantic and Pacific and the Southern Pacific, and *Southern Pacific Railroad Company v. United States* (189 U. S., 447).

The Texas Pacific filed its map of general route in the Department August, 1871, and in October, 1871, the Department, in accordance with section 12 of the act of March 3, 1871, withdrew in California the odd sections within the 20 mile limit of the designated route from preemption, private entry and sale. The land here involved was beyond the 20 miles and not included within that withdrawal. The Texas Pacific never filed a map of definite location, nor was its line otherwise definitely located. (*Southern Pacific R. R. Co. et al. v. United States*, 109 Fed. Rep., 913; *United States v. Southern Pacific R. R. Co. et al.*, 94 Fed. Rep., 427.) The Atlantic and Pacific, whose grant was also later forfeited (act of July 6, 1886, 24 Stat., 123), did file its maps of definite location in California, which were approved by the Department and held sufficient by the Supreme Court. (*United States v. Southern Pacific R. R. Co.*, 146 U. S., 570.)

In the case last cited, the Supreme Court held that lands within the primary limits of the Atlantic and Pacific, as determined by its maps of definite location, passed to it under its grant, and under the proviso to section 23 of the act of March 3, 1871, did not pass to the Southern Pacific, notwithstanding that the Atlantic and Pacific grant was later forfeited, which forfeiture was held to inure to the benefit of the United States and not to the Southern Pacific. In *United States v. Colton Marble and Lime Company*, *supra*, it was likewise

held that the indemnity lands of the Atlantic and Pacific were exempted from the branch line grant to the Southern Pacific Company. The Supreme Court has also recently held (decision of February 26, 1912, Southern Pacific R. R. Co. *et al.* v. United States, case No. 121, October term, 1911) that the Southern Pacific was not entitled to make indemnity selections under its branch line grant within either the granted or indemnity limits of the Atlantic and Pacific. In Southern Pacific Railroad Company v. United States (189 U. S., 447) the court held that the rights of the Southern Pacific Railroad Company, under its branch line grant, were subordinate to those of the Texas Pacific Railroad Company; that when the Texas Pacific grant was forfeited, the forfeiture did not vest the Southern Pacific with the lands forfeited but inured to the benefit of the United States. It should be noted that the land there in controversy was an odd numbered section within 20 miles of the general route of the Texas Pacific and one of those withdrawn by the Department under section 12 of the act of March 3, 1871. This Department has also made a similar ruling (4 L. D., 216, 220).

The appellant contends that these decisions are controlling, but the argument overlooks one essential feature, viz., that the Texas Pacific never filed a map of definite location, nor was its line otherwise ever definitely located. It has been the uniform ruling under railroad grants that while they are grants *in praesenti*, the railroad company's right to any particular section within the granted limits does not vest until the filing of its map of definite location. (Van Wyck v. Knevals, 106 U. S., 360; Buttz v. N. P. R. R. Co., 119 U. S., 55; Sioux City, &c., Land Co. v. Griffey, 143 U. S., 32; United States v. Oregon and California R. R. Co., 176 U. S., 28.) The withdrawals made upon the filing of a map of general route, such as filed by the Texas Pacific, were made in order to protect the railroad company's prospective right in the odd numbered sections when established by the filing of its map of definite location. Prior to filing said map, it is impossible to determine what sections fall within the granted limits or the location of the indemnity limits. The Texas Pacific never having filed a map of definite location, never had vested in it any particular odd numbered section, nor was its indemnity limits ever defined. The sole right it received was a prospective right in the odd numbered sections withdrawn for its benefit, and these sections alone were excluded from the branch line grant of the Southern Pacific under section 23 of the act of March 3, 1871. This holding is in harmony with the case of United States v. Southern Pacific Railroad Company *et al.* (94 Fed. Rep., 427) and Southern Pacific Company *et al.* v. United States (109 Fed. Rep., 913). The first contention of the appellant is accordingly overruled.

The second contention involves the question of the locus of section 5 under the resurvey made of this township under the act of April 1, 1902, *supra*, which provided in part:

That the Secretary of the Interior be, and he is hereby, authorized to cause to be made a resurvey of the lands in San Diego County, in the State of California, embraced in and consisting of the tier of townships thirteen, fourteen, fifteen and sixteen south, of ranges eleven, twelve, thirteen, fourteen, fifteen and sixteen east. . . . *Provided*, that nothing herein contained shall be so construed as to impair the present bona fide claim of any actual occupant of any of said lands to the lands so occupied.

The resurvey of one of the above townships as to the location of section 16 has recently been considered by the Department in *Ex parte Herman H. Peterson et al.*, decided March 5, 1912, and the history of the resurvey fully set forth. It cannot be doubted that upon the filing of its map of definite location by the Southern Pacific, its title to sec. 5 as established by the survey of 1856 attached. By the time, however, that it filed its list for patent, all vestiges of the 1856 survey had been destroyed and section 5 was delineated upon the ground according to a private survey generally known as the "Imperial Survey." All of the settlements were made according to such private survey and the settlers, and the community in general, respected section 5, according to the private survey, as belonging to the railroad company under its grant. In fact, it was the general understanding that the private survey was a re-establishment of the original Government survey, and while upon the ground the settlements and claims were made according to the private survey, they were entered upon the records of the local land office according to the original Government survey, the evidences of which upon the ground no longer exist. In harmony with its decision in *Ex parte Herman H. Peterson et al.*, the Department is of the opinion that the locus of section 5, as fixed by the Commissioner, is correct.

In one respect, however, the decision of the Commissioner must be modified. A reference to the plat of T. 13 S., R. 13 E., as resurveyed, discloses that sections 4 and 6 each containing 640 acres, as entered prior to the resurvey, have been surveyed out as private tracts, tracts 123 and 124, each of 320 acres, comprising what was formerly known as section 4, and tract 128, 320 acres, tracts 129 and 130, each 160 acres, comprising what were formerly known as section 6. As the Southern Pacific list No. 128 was pending at the time of the resurvey, the land known as section 5 should also been surveyed out as a private tract and as so surveyed would have comprised 640 acres. Between the north line of tracts 123, 124, 128 and 130 and the north line of the township, there is a narrow strip which was designated as lots and not awarded to the entrymen of such private tracts. By projecting a line from the northwest corner,

tract 123, westwardly to the northeast corner of tract 128, the true north boundary of section 5, as it existed on the ground at the time the Southern Pacific filed its list, is established and gives it a section of 640 acres, which more closely approximates the area to which it is entitled under its grant, and not an excess of approximately 50 acres, as permitted by the Commissioner. The Commissioner will accordingly designate section 5 as a tract by its appropriate number upon the township plat, in harmony with the above, and relet those portions of lots 4, 5 and 6, section 4, and lots 1 and 2, section 5, north of the line so projected, such portions to be then opened to acquisition under the appropriate land laws. Barbour's application, if no other objection appear, may in that event be allowed for that portion of lot 5, section 4, so excluded from the railroad company's readjusted list.

As so modified, the Commissioner's decision is affirmed and the matter remanded for further proceedings in harmony herewith.

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**BARBOUR v. SOUTHERN PACIFIC R. R. CO.**

Motion for rehearing of departmental decision of April 19, 1912. 40 L. D., 632, denied by First Assistant Secretary Adams, July 5, 1912.

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**SNOW v. HEIRS OF STOTTS.**

*Decided April 20, 1912.*

**MINOR HEIRS OF DECEASED HOMESTEADER—SECTION 2292, R. S.**

Section 2292, Revised Statutes, is applicable only in case both parents are dead and only minor heirs survive; and where a homesteader dies leaving surviving a former wife, from whom he was divorced, and their minor child, his only heir, the rights and obligations of the minor under the homestead law are governed by the provisions of section 2291, Revised Statutes, and not by section 2292.

*ADAMS, First Assistant Secretary:*

Bud Snow has appealed from decision of February 10, 1911, by the Commissioner of the General Land Office, affirming the action of the local officers and dismissing the contest of Snow against the homestead entry made by Vinton E. Stotts, August 10, 1908, for the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 26, S.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 27, T. 7 S., R. 20 E., Phoenix, Arizona, land district.

The contest affidavit was filed August 12, 1909, alleging in substance the death of the entryman October 10, 1908, and that thereafter his heirs had wholly abandoned the land and failed to reside upon, cultivate or improve the same. Notice was issued and hearing

was had October 19, 1909. The local officers considered the testimony thus offered and by letter of February 1, 1910, a further hearing was ordered by them and set for March 31, 1910.

By decision of June 29, 1910, the local officers rendered decision in favor of the defendant and dismissed the contest upon the ground that the sole heir of the entryman being a minor was entitled to protection under the provisions of section 2292, R. S., and hence that the charge of abandonment would not lie. The Commissioner affirmed said decision as above stated. The testimony shows that the entryman resided on the land and improved the same as required by law up to the time he was taken sick in October, 1908, when he was removed to a hospital where he died on or about November 9, 1908. It does not appear that anyone representing the heirs of the entryman has made any improvements upon the land, and the minor, the sole and only heir, has not resided upon the land. It appears that at the time the entryman made the entry he was not married, as his former wife, Birdie Stotts, had procured a decree of divorce from him on April 25, 1903, by which decree the wife was given custody of the only child, Charles Leslie Stotts, who was at the time of the hearing, about eleven years old.

Under the conditions above stated, it was held by the local officers and the Commissioner that the minor child was the sole and only heir and was entitled to patent without residence or cultivation under the provisions of section 2292, R. S. The Department can not agree with this view. The said section has no application under the circumstances here shown, as the mother of the minor is still living. Said section applies only in case both parents be dead and only minor heirs survive. In this case the minor child appears to be the only heir, but his rights and obligations are to be governed by the provisions of section 2291, R. S., and not by section 2292.

The decision appealed from is therefore reversed and the case remanded for further proceedings in consonance with the holding herein made.

# LAWS AND REGULATIONS

## RELATING TO THE RECLAMATION OF ARID LANDS BY THE UNITED STATES.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., April 29, 1912.

### STATUTES.

#### GENERAL ACTS.

An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho; Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this act: *Provided,* That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the act of August thirtieth, eighteen hundred and ninety, entitled "An act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

SEC. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said land to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry, only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made under this act.

SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall

constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident of such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this act.

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this act: *Provided*, That when the payments required by this act are made for the major portions of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

SEC. 7. That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

SEC. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of



the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

SEC. 9.<sup>1</sup> That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: *Provided*, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

Approved, June 17, 1902 (32 Stat., 388).

An Act Authorizing the use of earth, stone, and timber on the public lands and forest reserves of the United States in the construction of works under the national irrigation law.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in carrying out the provisions of the national irrigation law, approved June seventeenth, nineteen hundred and two, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under rules and regulations to be prescribed by him, such earth, stone, and timber from the public lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone, and timber from the forest reserves of the United States for the same purpose, under rules and regulations to be prescribed by him.

Approved, February 8, 1905 (33 Stat., 706).

An Act To provide for the covering into the reclamation fund certain proceeds of sales of property purchased by the reclamation fund.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be covered into the reclamation fund established under the act of June seventeenth, nineteen hundred and two, known as the reclamation act, the proceeds of the sales of material utilized for temporary work and structures in connection with the operations under the said act, as

<sup>1</sup> Sec. 9 of this act repealed by act of June 25, 1910.

well as of the sales of all other condemned property which had been purchased under the provisions thereof, and also any moneys refunded in connection with the operations under said reclamation act.

Approved, March 3, 1905 (33 Stat., 1032).

**An Act Providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes.**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior may withdraw from public entry any lands needed for townsite purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, not exceeding one hundred and sixty acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes.

SEC. 2. That the lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for cash, and the lots offered for sale and not disposed of may afterwards be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe. Reclamation funds may be used to defray the necessary expenses of appraisal and sale, and the proceeds of such sales shall be covered into the reclamation fund.

SEC. 3. That the public reservations in such townsites shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as municipal corporations the said reservations shall be conveyed to such corporations by the Secretary of the Interior, subject to the condition that they will be used forever for public purposes.

SEC. 4. That the Secretary of the Interior shall, in accordance with the provisions of the reclamation act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken.

SEC. 5. That whenever a development of power is necessary for the irrigation of lands under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privilege as will impair the efficiency of the irrigation project.

Approved, April 16, 1906 (34 Stat., 116).

## An Act To extend the irrigation act to the State of Texas.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, be, and the same are hereby, extended so as to include and apply to the State of Texas.

Approved, June 12, 1906 (34 Stat., 259).

## An Act Providing for the subdivision of lands under the reclamation act, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever, in the opinion of the Secretary of the Interior, by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the reclamation act, he may fix a lesser area than forty acres as the minimum entry and may establish farm units of not less than ten nor more than one hundred and sixty acres. That whenever it may be necessary, for the purpose of accurate description, to further subdivide lands to be irrigated under the provisions of said reclamation act, the Secretary of the Interior may cause subdivision surveys to be made by the officers of the Reclamation Service, which subdivisions shall be rectangular in form, except in cases where irregular subdivisions may be necessary in order to provide for practicable and economical irrigation. Such subdivision surveys shall be noted upon the tract books in the General Land Office, and they shall be paid for from the reclamation fund: *Provided,* That an entryman may elect to enter under said reclamation act a lesser area than the minimum limit in any State or Territory.

SEC. 2. That wherever the Secretary of the Interior, in carrying out the provisions of the reclamation act, shall acquire by relinquishment lands covered by a bona fide unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made.

SEC. 3. That any townsite heretofore set apart or established by proclamation of the President, under the provisions of sections twenty-three hundred and eighty and twenty-three hundred and eighty-one of the Revised Statutes of the United States, within or in the vicinity of any reclamation project, may be appraised and disposed of in accordance with the provisions of the act of Congress approved April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes;" and all necessary expenses incurred in the appraisal and sale of lands embraced within any such townsite shall be

paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund.

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SEC. 5. That where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: *Provided*, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert-land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid act of June seventeenth, nineteen hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation act.

Approved, June 27, 1906 (34 Stat., 519).

An Act Providing for the reappraisalment of unsold lots in town sites on reclamation projects, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within town sites on projects under the reclamation act heretofore or hereafter appraised under the provisions of the act approved April sixteenth, nineteen hundred and six, entitled "An act providing for the withdrawal from public entry of lands needed for town site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," and the act approved June twenty-seventh, nineteen hundred and six, entitled "An act providing

for the subdivision of lands entered under the reclamation act, and for other purposes;” and thereafter to proceed with the sale of such town lots in accordance with such acts.

SEC. 2. That in the sale of town lots under the provisions of the said acts of April sixteenth and June twenty-seventh, nineteen hundred and six, the Secretary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of six per centum per annum on deferred payments.

Approved, June 11, 1910 (36 Stat., 465).

An Act Providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years, the same as though said entry had been made under the original homestead act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: *Provided,* That all assignments made under the provisions of this act shall be subject to the limitations, charges, terms, and conditions of the reclamation act.

Approved, June 23, 1910 (36 Stat., 592).

An Act To authorize advances to the “reclamation fund,” and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That to enable the Secretary of the Interior to complete Government reclamation projects heretofore begun, the Secretary of the Treasury is authorized, upon request of the Secretary of the Interior, to transfer from time to time to the credit of the reclamation fund created by the act entitled “An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,” approved June seventeenth, nineteen hundred and two, such sum or sums, not exceeding in the aggregate twenty million dollars, as the Secretary of the Interior may deem necessary to complete the said reclamation projects, and such extensions thereof as he may deem proper and necessary to the successful and profitable operation and maintenance thereof or to protect water rights pertaining thereto claimed by the United States, provided the same shall be approved by the President of the United States; and such sum or sums as may be required to comply with the foregoing authority are hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided,* That the sums hereby authorized to be transferred to the reclamation fund shall be so transferred only as such sums shall be actually needed to meet payments for work performed under existing law:

*And provided further*, That all sums so transferred shall be reimbursed to the Treasury from the reclamation fund, as hereinafter provided: *And provided further*, That no part of this appropriation shall be expended upon any existing project until it shall have been examined and reported upon by a board of engineer officers of the Army, designated by the President of the United States, and until it shall be approved by the President as feasible and practicable and worthy of such expenditure; nor shall any portion of this appropriation be expended upon any new project.

Sec. 2. That for the purpose of providing the Treasury with funds for such advances to the reclamation fund, the Secretary of the Treasury is authorized to issue certificates of indebtedness of the United States in such form as he may prescribe and in denominations of fifty dollars, or multiples of that sum; said certificates to be redeemable at the option of the United States at any time after three years from the date of their issue and to be payable five years after such date, and to bear interest, payable semiannually, at not exceeding three per centum per annum; that principal and interest to be payable in gold coin of the United States. The certificates of indebtedness herein authorized may be disposed of by the Secretary of the Treasury at not less than par, under such rules and regulations as he may prescribe, giving all citizens of the United States an equal opportunity to subscribe therefor, but no commission shall be allowed and the aggregate issue of such certificates shall not exceed the amount of all advances made to said reclamation fund, and in no event shall the same exceed the sum of twenty million dollars. The certificates of indebtedness herein authorized shall be exempt from taxes or duties of the United States as well as from taxation in any form by or under State, municipal, or local authority; and a sum not exceeding one-tenth of one per centum of the amount of the certificates of indebtedness issued under this act is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expenses of preparing, advertising, and issuing the same.

Sec. 3. That beginning five years after the date of the first advance to the reclamation fund under this act, fifty per centum of the annual receipts of the reclamation fund shall be paid into the general fund of the Treasury of the United States until payment so made shall equal the aggregate amount of advances made by the Treasury to said reclamation fund, together with interest paid on the certificates of indebtedness issued under this act and any expense incident to preparing, advertising, and issuing the same.

Sec. 4. That all money placed to the credit of the reclamation fund in pursuance of this act shall be devoted exclusively to the completion of work on reclamation projects heretofore begun as hereinbefore provided, and the same shall be included with all other expenses in future estimates of construction, operation, or maintenance, and hereafter no irrigation project contemplated by said act of June seventeenth, nineteen hundred and two, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States.

Sec. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes

until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and made public announcement of the same.

SEC. 6. That section nine of said act of Congress, approved June seventeenth, nineteen hundred and two, entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," is hereby repealed.

Approved, June 25, 1910 (36 Stat., 835).

An Act Granting leaves of absence to homesteaders on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all qualified entrymen who have heretofore made bona fide entry upon lands proposed to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, known as the national irrigation act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: *Provided,* That the period of actual absence under this act shall not be deducted from the full time of residence required by law.

Approved, June 25, 1910 (36 Stat., 864).

An Act To provide for the sale of lands acquired under the provisions of the reclamation act and which are not needed for the purposes of that act.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever in the opinion of the Secretary of the Interior any lands which have been acquired under the provisions of the act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), commonly called the "reclamation act," or under the provisions of any act amendatory thereof or supplementary thereto, for any irrigation works contemplated by said reclamation act are not needed for the purposes for which they were acquired, said Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons, to be appointed by him, and thereafter to sell the same for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land.

SEC. 2. That upon payment of the purchase price, the Secretary of the Interior is authorized by appropriate deed to convey all the right, title, and interest of the United States of, in, and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations, or conditions as said Secretary may deem proper: *Provided,* That not over one hundred and sixty acres shall be sold to any one person.

SEC. 3. That the moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been acquired.

Approved, February 2, 1911 (36 Stat., 895).

An Act To authorize the Secretary of the Interior to withdraw public notices issued under section four of the reclamation act, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior may, in his discretion, withdraw any public notice heretofore issued under section four of the reclamation act of June seventeenth, nineteen hundred and two, and he may agree to such modification of water-right applications heretofore duly filed or contracts with water users' associations and others, entered into prior to the passage of this act, as he may deem advisable, or he may consent to the abrogation of such water-right applications and contracts, and proceed in all respects as if no such notice had been given.

Approved, February 13, 1911 (36 Stat., 902).

An Act To amend section five of the act of Congress of June twenty-fifth, nineteen hundred and ten, entitled "An act to authorize advances to the 'reclamation fund,' and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes."

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section five of an act entitled "An act to authorize advances to the 'reclamation fund,' and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes," approved June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and thirty-five), be, and the same hereby is, amended as follows:

"SEC. 5. That no entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and make public announcement of the same: *Provided,* That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an act entitled 'An act appropriating the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight)."

Approved, February 18, 1911 (36 Stat., 917).

An Act To authorize the Government to contract for impounding, storing, and carriage of water, and to cooperate in the construction and use of reservoirs and canals under reclamation projects, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the



project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: *Provided, however,* That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works.

SEC. 2. That in carrying out the provisions of said reclamation act and acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users' associations, corporations, entymen or water users for impounding, delivering and carrying water for irrigation purposes: *Provided,* That the title to and management of the works so constructed shall be subject to the provisions of section six of said act: *Provided further,* That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: *Provided,* That nothing contained in this act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State.

SEC. 3. That the moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms of the reclamation act and the acts amendatory thereof or supplementary thereto.

Approved, February 21, 1911 (36 Stat., 925).

An Act To amend an act entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," approved April sixteenth, nineteen hundred and six.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section five of an act entitled "An act providing for the withdrawal from public

entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and "for other purposes," approved April sixteenth, nineteen hundred and six, be amended so as to read as follows:

"SEC. 5. That whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the money derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: *Provided*, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project: *Provided further*, That the Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande project in Texas and New Mexico for a longer period not exceeding fifty years, with the approval of the water users' association or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of section six of the reclamation act approved June seventeenth, nineteen hundred and two."

Approved, February 24, 1911 (36 Stat., 931).

#### SPECIAL ACTS.

The act of April 23, 1904 (33 Stat., 302), as amended by section 15 of the act of May 29, 1908 (35 Stat., 448), provides for the disposition and irrigation of lands within the limits of the Flathead Indian Reservation, Mont.

Section 25 of the act approved April 21, 1904 (33 Stat., 224), provides for the reclamation, allotment, and disposal of surplus irrigable lands in the Yuma and Colorado River Indian Reservations in California and Arizona.

Section 26 of the act of April 21, 1904, *supra*, provides for the reclamation, allotment, and disposal of surplus irrigable lands in the Pyramid Lake Indian Reservation, Nev.

The act of March 27, 1904 (33 Stat., 357), authorizes the reclamation and disposition of irrigable lands in the ceded Crow Indian Reservation, in Montana.

Section 12 of the act of March 22, 1906 (34 Stat., 80), provides for the disposition, under the reclamation act, of lands in the diminished Colville Indian Reservation, Wash.

The act of June 9, 1906 (34 Stat., 228), authorizes the disposition of lands in the abandoned Fort Shaw Military Reservation, Mont., under the reclamation act.

The act of March 6, 1906 (34 Stat., 53), authorizes the reclamation and disposal of surplus irrigable lands in the Yakima Indian Reservation, Wash.

The act of June 21, 1906 (34 Stat., 327), authorizes the sale of allotted Indian lands on reclamation projects, and the act of March 3, 1909 (35 Stat., 782), authorizes the Secretary of the Interior to make allotments of such lands in such areas as he may deem proper, not exceeding the amount therein named.

The act of March 1, 1907 (34 Stat., 1037), provides for the disposition of irrigable lands in the Blackfeet Indian Reservation, Mont.

The act of April 30, 1908 (35 Stat., 85), provides for the irrigation of Indian lands.

Sections 1 and 10 of the act of Congress approved May 30, 1908, provide for the reclamation of lands on the Fort Peck Indian Reservation, Mont.

Section 1 of the act of June 22, 1910 (36 Stat., 583), authorizes the withdrawal and reclamation of classified coal land, patents for such lands to reserve to the United States the coal deposits therein.

#### REGULATIONS.

##### GENERAL INFORMATION.

1. Section 3 of the act of June 17, 1902 (32 Stat., 388), provides for the withdrawal of lands from all disposition other than that provided for by said act. Lands withdrawn as susceptible of irrigation (usually referred to as withdrawn under the second form) are subject to entry under the provisions of the homestead law only, and since the passage of the act of June 25, 1910 (36 Stat., 835), are open to settlement or entry only when approved farm unit plats have been filed and public notice has been issued in connection therewith, fixing the water charges and the date when water can be applied, except as provided by the act of February 18, 1911 (36 Stat., 917). Where settlements had been effected in good faith prior to June 25, 1910, on lands embraced within second form withdrawals, persons showing such settlement are entitled to complete entry in the manner and within the time provided by law.

2. Under the provisions of the act of February 18, 1911 (36 Stat., 917), the prohibition contained in section 5 of the act of Congress approved June 25, 1910, forbidding settlement on or entry of lands reserved for irrigation purposes prior to the approval of farm unit plats and the issuance of public notice fixing the water charges and the date when water can be applied, is withdrawn and set aside as to lands included in entries made prior to June 25, 1910, where such entries have been or may be relinquished in whole or in part.

3. Settlement and entry on such lands will be allowed subject to the provisions of the homestead law and the reclamation act of June 17, 1902, supra, in the same manner as for other lands subject to entry within reclamation projects. The lands must have been covered by a valid entry prior to June 25, 1910, and shall only be subject to entry under the provisions of the present act in cases where a relinquishment of the former entry has been or shall be filed. Registers and receivers in their action on applications to make homestead entry under the provisions of this act will be governed by the records of their office, and will note on all entries allowed hereunder the homestead number and date of the relinquished entry, and the fact that the new entry is allowed subject to the provisions of the act of February 18, 1911.

4. Entry under this act is permitted only after relinquishment of an entry made prior to June 25, 1910, and therefore the relinquishment of an entry made under this act, even though it covers lands which were the subject of another entry made prior to June 25, 1910,

would not permit a third entry to be made. Lands entered under this act will be held subject to the prohibition contained in section 5 of the act of June 25, 1910, upon the relinquishment of an entry made under the act of February 18, 1911.

5. Homestead entries of lands shown on the farm unit plats are made in practically the same manner as the usual homestead entry, but they are subject to all the provisions, limitations, charges, terms, and conditions of the reclamation act.

6. Registers and receivers will indorse across the face of each homestead application, when allowed under the reclamation act, the following: "This entry allowed subject to the provisions of the act of June 17, 1902 (32 Stat., 388)"; and will advise each entryman of the provisions of the act by furnishing him with a copy of this circular.

7. These entries are not subject to the commutation provisions of the homestead law, and on the determination by the Secretary of the Interior that the proposed irrigation project is practicable, the entries hitherto made and not conforming to an established farm unit may be reduced in area to the limit representing the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question, and the lands within a project are platted to farm units representing such areas. The farm units may be as small as 10 acres where the lands are suitable for fruit raising, etc., but on most projects, so far, they have been fixed at from 40 to 80 acres each. These areas are announced on farm unit plats, and public notice stating the amount of the charges and other details concerning payment, is issued by the Secretary of the Interior, shortly before the Government is ready to furnish water. Until this public notice is issued it will be impossible in most respects to give definite information as to any particular tract or as to the details intended to be covered by such notice; but registers and receivers will, upon inquiry, give all general information relative to the public lands included in reclamation projects, and will keep the engineers of the Reclamation Service fully informed, by correspondence, as to conditions affecting the same.

#### WITHDRAWALS AND RESTORATIONS.

8. The withdrawal of these lands at first is principally for the purpose of making surveys and irrigation investigations in order to determine the feasibility of the plans of irrigation and reclamation proposed. Only a portion of the lands will be irrigated even if the project is feasible, but it will be impossible to decide in advance of careful examination what lands may be watered, if any, and the mere fact that surveys are in progress is no indication whatever that the works will be built. It can not be determined how much water there may be available, or what lands can be covered, or whether the cost will be too great to justify the undertaking until the surveys and the irrigation investigations have been completed.

9. There are two classes of withdrawals authorized by the act: One commonly known as "Withdrawals under the first form," which embraces lands that may possibly be needed in the construction and maintenance of irrigation works, and the other commonly known as "Withdrawals under the second form," which embraces lands not supposed to be needed in the actual construction and main-

tenance of irrigation works, but which may possibly be irrigated from such works.

10. After lands have been withdrawn under the first form they can not be entered, selected, or located in any manner so long as they remain so withdrawn, and all applications for such entries, selections, or locations should be rejected and denied, regardless of whether they were presented before or after the date of such withdrawal. (See John J. Maney, 35 L. D., 250.)

11. Lands withdrawn under the second form and subject to entry can be entered only under the homestead laws and subject to the provisions, limitations, charges, terms, and conditions of the reclamation act, and all applications to make selections, locations, or entries of any other kind on such lands should be rejected, regardless of whether they are presented before or after the lands are withdrawn, except that where settlement rights were acquired prior to the withdrawal and have been diligently prosecuted and the homestead law fully complied with, the settler will be entitled to make and complete his entry as if it had been made before the withdrawal. (See Wm. Boyle, 38 L. D., 603.)

12. Withdrawals made under either of these forms do not defeat or adversely affect any valid entry, location, or selection which segregated and withheld the lands embraced therein from other forms of appropriation at the date of such withdrawal; and all entries, selections, or locations of that character should be permitted to proceed to patent or certification upon due proof of compliance with the law in the same manner and to the same extent to which they would have proceeded had such withdrawal not been made, except as to lands needed for construction purposes. All lands, however, taken up under any of the land laws of the United States subsequent to October 2, 1888, are subject to right of way for ditches or canals constructed by authority of the United States (act of August 30, 1890, 26 Stat., 391; circular approved by Department July 25, 1903). All entries made upon the lands referred to are subject to the following proviso of the act cited:

That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian it shall be expressed that there is reserved from lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

13. Should a homestead entry embrace land that is needed in whole or in part for purposes contemplated by said proviso the land would be taken for such purpose, and the entryman would have no claim against the United States for the same.

14. All withdrawals become effective on the date upon which they are ordered by the Secretary of the Interior, and all orders for restorations on the date they are received in the local land office unless otherwise specified in the order. (George B. Pratt et al., 38 L. D., 146.)

15. Upon the cancellation of a homestead entry covering lands embraced within a withdrawal under the reclamation act such withdrawal becomes effective as to such lands without further order. (See Cornelius J. MacNamara, 33 L. D., 520.)

16. Where the Secretary of the Interior by the approval of farm-unit plats has determined, or may determine, that the lands desig-

nated thereon are irrigable, the filing of such plats in the General Land Office and in the local land offices is to be regarded as equivalent to an order withdrawing such lands under the second form, and as an order changing to the second form any withdrawals of the first form then effective as to any such tracts. This applies to all areas shown on the farm-unit plats as subject to entry under the provisions of the reclamation act or as subject to the filing of water-right applications. Upon receipt of such plats appropriate notations of the change of form of withdrawal are to be made in accordance therewith upon the records of the General Land Office and of the local land offices.

17. In the event any lands embraced in any entry on which final proof has not been offered, or in any unapproved or uncertified selection, are needed in the construction and maintenance of any irrigation works (other than for right of way for ditches or canals reserved under act of Aug. 30, 1890) under the reclamation act, the Government may cancel such entry or selection and appropriate the lands embraced therein to such use, after paying the value of the improvements thereon and the enhanced value of such lands caused by such improvements.

18. Uncompleted claims to lands withdrawn under the provisions of the reclamation act and determined to be needed for construction of irrigation works in connection with a project that has been found practicable should not be allowed to be perfected, but should remain in the same status as existed at the time the determination was made, and the rights of the claimants adjusted upon the basis of that status. (Opinion of Asst. Atty. General, 34 L. D., 421.)

19. Where the owners of the improvements mentioned in paragraph 17 shall fail to agree with the representative of the Government as to the amount to be paid therefor, the same shall be acquired by condemnation proceedings under judicial process, as provided by section 7 of the reclamation act.

20. Inasmuch as every entry within the limits of a withdrawal under the reclamation act is subject to conformation to an established farm unit, improvements placed upon the different subdivisions by the entryman prior to such conformation are at his risk. (Jerome M. Higman, 37 L. D., 718.) They should be confined to one legal subdivision until the entry is conformed. In readjusting such an entry the Secretary is not required to confine the farm unit to the limits of the entry, but may combine any legal subdivision thereof with a contiguous tract lying outside of the entry so as to equalize in value the several farm units. (Idem.) The act of June 27, 1906, supra, authorizes the Secretary of the Interior to fix a lesser area than 40 acres as a farm unit when, "by reason of market conditions and special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family" or when necessary "in order to provide for practical and economical irrigation."

#### ADDITIONAL ENTRIES.

21. A person who has entered a farm unit within a project can not make an additional homestead entry. One who has made homestead entry for less than 160 acres outside of a reclamation project is dis-

qualified from making an additional entry of a farm unit within a reclamation project, which farm unit is the equivalent of a homestead entry of 160 acres of land outside of the reclamation project.

22. Where, however, the first or original homestead entry was made subject to the restrictions and conditions of the reclamation act, any entry additional thereto would be likewise subject to the same restrictions and conditions, and in such cases additional entries may be allowed within reclamation projects under acts authorizing additional entries, except where farm units have been established, prior to the filing of the applications. Both entries so allowed are subject to the same adjustment to one farm unit as if the entire tract had been included in the first entry. (Henry W. Williamson, 38 L. D., 233.)

#### CONTESTS.

23. No private contest will be allowed against any entry embracing land included within the area of any first form withdrawal or land reserved for irrigation purposes, commonly known as land under the second form of withdrawal, until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges, and the date when the water can be applied and made public announcement of the same. In cases where contest has been allowed as to entries on second form lands, the act of Congress approved June 25, 1910 (36 Stat., 835), precludes entry by successful contestants until the lands are restored to the public domain or platted to farm units and covered by public notice under section 4 of the reclamation act. In all cases where a contest has been allowed prior to the withdrawal of the lands, or in the case of entries on second form lands, prior to the approval of the act of June 25, 1910, the withdrawal attaches to the lands involved immediately on cancellation of the entry and no rights can be obtained by the contestant in the event that the entry is canceled under the contest proceedings prior to the vacation of the order of withdrawal and opening of the lands to entry. In all cases where a preference right has been gained by virtue of a successful contest, terminated before the withdrawal of the land or the passage of the said act, the successful contestant may exercise his right and make entry at any time within thirty days from notice that the lands involved have been restored to the public domain or covered by public notice and made subject to entry, but, in the latter event, his entry must be made subject to the limitations, charges, and conditions imposed by the reclamation act.

24. Any entry of land embraced within the area of a second form withdrawal may be contested after farm units have been established covering such entry and public notice has issued in connection with the same, fixing the water charges and the date when water can be applied, and if at the date of entry by the successful contestant the lands have not been released from the withdrawal under the provisions of the reclamation act, his entry will be subject to the limitations, charges, and conditions imposed by that act.

#### LEAVE OF ABSENCE.

25. When homestead entrymen within irrigation projects file in the local land office applications for leave of absence under the provisions of the act of June 25, 1910, the register and receiver will make

proper notation of the same on their records and, at once, by special letter, forward the application, together with their recommendation thereon, to the General Land Office for action.

26. These applications for leave of absence should be in the form of an affidavit, duly corroborated by two witnesses, contain a specific description of the land, show the good faith of the applicant, and set forth in detail the character, the extent, and the approximate value of the improvements placed on the lands, which must be such as to satisfy the requirement of the law that the entryman has made substantial improvements, and the applicant must show, as a matter of fact, that water is not available for the irrigation thereof.

27. When sufficient showing is made in cases coming within the provisions of the law, leave of absence will be granted until such time as water for irrigation is turned into the main irrigation canals from which the land is to be irrigated or, in the event that the project is abandoned by the Government, until the date of notice of such abandonment and the restoration to the public domain of the lands embraced in the entry.

28. Attention is directed to the provision that "the period of actual absence shall not be deducted from the full time of residence required by law." The effect of the granting of leave of absence under this act is to protect the entry from contest for abandonment and, by the necessary implication of the act, the period of seven years within which the entryman is required to submit final five year proof will be extended and the entry will not be subject to cancellation for failure to submit proof until seven years from the date of entry, exclusive of the period for which leave of absence may be granted.

#### ASSIGNMENTS.

29. Under the provisions of the act of June 23, 1910 (36 Stat., 592) persons who have made or may make homestead entries subject to the reclamation act may assign their entries in their entirety at any time after filing in this office satisfactory proof of residence, improvements, and cultivation for the five years required by the ordinary provisions of the homestead law. The act also provides for the assignment of homestead entries in part, but such assignments, if made prior to the establishment of farm units, must be made in strict accordance with the legal subdivisions of the public survey, and if made after such units are established must conform thereto, except as hereinafter provided.

30. In cases where the entry involves two or more farm units, the entryman may file an election as to which farm unit he will retain, and he may assign and transfer to a qualified assignee any farm unit or farm units entirely embraced within the original entry. He may also assign parts of farm units included in his entry, provided the assignee has an entry covering or obtains an assignment of the remainder of such unit. If an election by the entryman to conform to a farm unit be filed and no assignment made of the remainder of the entry, the entry will be conformed to the farm unit selected for retention and canceled as to the remainder.

31. Where it is desired to assign a part of an established farm unit, an application for the amendment and subdivision of such unit should be filed with the project engineer, and the assignment, with



accompanying affidavit and supplemental water right application, should be filed in the local land office.

32. If a survey shall be found necessary to determine the boundaries of the subdivision of any such farm unit, or the division of the irrigable area, a deposit equal to the estimated cost of such survey must be made with the special fiscal agent, Reclamation Service, on the project by or on behalf of the parties concerned. Any excess over the actual cost will be returned to the depositor or depositors after completion of the survey and they will also be required to make good any deficiency in their deposit.

33. When the plats describing the amended farm units are approved by the engineer in charge of the project he will forward a copy of the amended plat to the local land office where the same will be treated as an official amendment of the farm unit plat, which will thereafter be formally approved in the usual manner by authority of the Secretary.

34. No assignment of any portion of any farm unit will be accepted by the Commissioner of the General Land Office or recognized as modifying any approved water right application or releasing any part of the farm unit as originally established from any portion of the charges announced against it until after the filing in the local land office of evidence of the qualifications of the assignee, and a proper water right application with payment of all amounts due upon the land included in the assignment.

35. Assignments under this act must be made expressly subject to the limitations, charges, terms, and conditions of the reclamation act, and, inasmuch as that act limits the right of entry to one farm unit, the assignee must present a showing in the form of an affidavit duly corroborated, that he has not acquired title to and is not claiming any other farm unit or entry under the reclamation act, and has no other existing water right applications covering an area of land which added to that taken by assignment will exceed one hundred and sixty acres, or the maximum limit of area fixed by the Secretary.

36. Assignments made and filed in accordance with these regulations must be noted on the local office record and at once forwarded to the General Land Office for immediate consideration, and, if approved, the assignees in each case will be required to make payment of the water right charges and submit proof of reclamation as would the original entryman, and, after proof of full compliance with the law, may receive a patent for the land.

#### MORTGAGES.

37. Mortgages of lands embraced in homestead entries within reclamation projects may file in the local land office for the district within which the land is located a notice of such mortgage, and shall become entitled to receive and be given the same notice of any contest or other proceedings thereafter had affecting the land as is required to be given the entryman in connection with such proceeding. Every such notice of a mortgage received must be forthwith noted upon the records of the local land office and be promptly reported to the General Land Office, where like notation will be made. Relinquishment of a homestead entry within a reclamation project upon which final proof has been submitted, where the records show the land to have

been mortgaged, will not be accepted or noted, unless the mortgagee joins therein, nor will an assignment of such an entry or part thereof under the act of June 23, 1910 (36 Stat., 592), be recognized or permitted unless the assignment specifically refers to such mortgage and is made and accepted subject thereto.

#### CANCELLATION.

38. All persons holding land under homestead entries made under the reclamation act must, in addition to paying the water right charges, reclaim at least one-half of the total irrigable area of their entries as finally adjusted for agricultural purposes, and reside upon, cultivate, and improve the lands embraced in their entries for not less than the period required by the homestead laws. Any failure to make any two payments when due or to reclaim the lands as above indicated, or any failure to comply with the requirements of the homestead laws and the reclamation act as to residence, cultivation, and improvement, will render their entries subject to cancellation and the money already paid by them subject to forfeiture, whether they have filed water right application or not.

#### WIDOWS AND HEIRS OF ENTRYMEN.

39. The widows or heirs of persons who make entries under the reclamation act will not be required both to reside upon and cultivate the lands covered by the entry of the person from whom they inherit, but they must reclaim at least one-half of the total irrigable area of the entry for agricultural purposes as required by the reclamation act and make payment of all unpaid charges when due and before either final certificate or patent can be issued.

40. Upon the death of a homesteader having an entry within an irrigation project, leaving no widow and only minor heirs, his right may, under section 2292, Revised Statutes, be sold for the benefit of such heirs. (See heirs of Frederick C. De Long, 36 L. D., 332.) If in such case the land has been divided into farm units the purchaser takes title to the particular unit to which the entry has been limited, but if subdivision has not been made he will acquire an interest only in the land which would have been allotted to the entryman as his farm unit, in either case taking subject to the payment of the charges authorized by the reclamation act and regulations thereunder and free from all requirements as to residence and cultivation (*idem*).

#### FINAL PROOF.

#### GENERAL INFORMATION.

41. All persons who apply to make entry of lands within the irrigable area of any project commenced or contemplated under the reclamation act will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the land, and the failure to supply water from such works in time for use upon the land entered will not justify a failure to comply with the law and to make proof thereof within the time required by the statutes, except in cases where leave of absence is granted under the act of June 25, 1910 (*supra*).

42. Persons who have resided upon, cultivated and improved their lands for the length of time prescribed by the homestead laws will not thereafter be required to continue such residence and cultivation, and they may make final proof of reclamation at any time when they can also make proof of the necessary residence, cultivation, and improvement for five years, but no final certificate or patent will issue until all fees, commissions, and construction charges, including operation and maintenance charges due at the time of payment, have been paid in full. The entire building charge and such installments of the operation and maintenance charges as are then due may be paid at any time after the entry has been conformed to a farm unit, and prior to the time on which they otherwise fall due under the terms of the public notice.

43. Soldiers and sailors of the war of the rebellion, the Spanish-American War, or the Philippine insurrection, and their widows and minor orphan children who are entitled to claim credit for the period of the soldier's service under the homestead laws, will be allowed to claim credit in connection with entries made under the reclamation act, but will not be entitled to receive final certificate or patent until all the water-right charges have been paid in full and the requirements as to reclamation have been met.

44. Upon the tendering to registers and receivers of homestead proofs in entries subject to the reclamation act, they will accept only the testimony fees for "reducing testimony to writing and examining and approving testimony," and will not accept final commissions payable under such entries until proof is submitted showing full compliance with all requirements of the act of June 17, 1902, including the payment of all reclamation charges.

45. On September 9, 1910, the Acting Secretary of the Interior approved a form of water-right certificate to be signed by the Commissioner of the General Land Office and given to water-right applicants upon submission of satisfactory proof of full compliance with the requirements of the reclamation act, and two forms of final affidavit, corroborated, to be submitted, the first by the owner of private land reclaimed under the act of June 17, 1902 (32 Stat., 388), and the second by the homestead entrymen under the provisions of said act (39 L. D., 197). These forms have been printed as forms 4-193, 4-068, and 4-073, respectively, and a supply of the last two forms has been furnished registers and receivers, who will require all water users desiring to make final proof of compliance with the requirements of the reclamation act as to reclamation of one-half of the irrigable lands in their entries or water rights and the payment of the estimated building charges and assessed operation and maintenance charges, to submit affidavit, duly corroborated by two witnesses, on the appropriate form.

46. To establish compliance with the clause of the reclamation act that requires reclamation of at least one-half of the irrigable area of an entry made subject to the provisions of the act, entrymen will be required to make proof showing that the land has been cleared of sagebrush or other incumbrance and leveled, that sufficient laterals have been constructed to provide for the irrigation of the required area, that the land has been put in proper condition and has been watered and cultivated, and that the growth of at least one satisfactory crop has been secured thereon, but the securing of an actual and satisfac-

tory growth of orchard trees shall likewise be regarded as satisfactory reclamation. When proof of reclamation of one-half the irrigable area is made in advance of full payment of the charges, evidence of satisfactory proof thereof will be issued by the General Land Office.

47. Upon the filing of affidavit on form 4-068 or 4-073 as proof of compliance with the requirements of the reclamation act the register and receiver will forward copy thereof to the engineer in charge of the project who will make prompt report thereon. Upon receipt of such report in case of homestead entries upon which final proof has been accepted by this office, the register and receiver will issue final certificate of compliance with the homestead laws and forward the same with the affidavit and engineer's report to this office with such recommendation as they deem proper. When such affidavit appears sufficient, and the case is otherwise regular, final water-right certificate (Form 4-193) will issue and the case will be approved for patent. In the case of water-right contracts for lands in private ownership, final water-right certificate will be issued by this office where the final affidavit is found to be sufficient, and the certificate so issued will constitute full evidence of the water user's right to the use of water appurtenant to the lands covered by his contract.

#### REPORTS ON FINAL PROOF NOTICES.

48. Registers and receivers are directed to furnish chiefs of field divisions with copies of notices of application to make proof, noting on each application the particular project wherein the land lies. When the notice involves any lands withdrawn under the first form withdrawal authorized by the reclamation act, they will indorse on the back of the notice mailed to the chief of field division: "For report by indorsement hereon as to whether the described lands, or any of them, are needed for construction purposes." In all cases as soon as such notice is received by the chief of field division, he will refer the same to the project engineer, who will make report by indorsement on the notice as to whether the lands are needed for construction purposes and as to any other matters as he may be instructed to report on by special instructions. This notice should be returned by the engineer to the chief of field division in sufficient time to enable that officer to return the same to the local land officers prior to the date fixed for proof.

49. If the lands covered by the final proof notice were entered prior to withdrawal for reclamation purposes, and the project engineer reports that they are not needed for construction purposes, final certificate will be issued upon submission of final proof as on entries not subject to the reclamation act. In all cases where the lands are entered prior to reclamation withdrawal and the project engineer reports that they are needed for construction purposes, and in all cases where the entry was made after withdrawal of the lands for reclamation purposes, whether or not they are needed for construction purposes, the register and receiver will forward the proof, if found to be regular, to the General Land Office without issuance of final certificate.

50. If any final proof offered under this act be irregular or insufficient, the register and receiver will reject it and allow the entryman the usual right of appeal; and if the General Land Office finds any

proof forwarded to be insufficient or defective in any respect, it may be rejected and the entryman will be notified of that fact, or he may be given an opportunity to cure the defect or to present acceptable proof.

#### NOTICE TO CONFORM.

51. The registers and receivers are directed to notify, in writing, every person who makes final proof on a homestead entry which is subject to the limitations and conditions of the act of June 17, 1902, embracing land included in an approved farm-unit plat, where the entry does not conform to an established farm unit, and conformation notice has not already been issued, that thirty days from notice is allowed such entryman to elect the farm unit he desires to retain, in default of which the entry will be conformed by the General Land Office.

#### ACTION ON PROOFS.

52. Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead laws, and have submitted proof which has been found satisfactory thereunder by the General Land Office, but who are unable to furnish proof of reclamation because water has not been furnished to the lands or farm units not established, will be excused from further residence on their lands and will be given a notice reciting that further residence is not required, but that final certificate and patent will not issue until proof of reclamation of one-half of the irrigable area of the entry as finally adjusted and payment of all charges imposed by the public notice issued in pursuance of section 4 of the reclamation act.

#### CONTROL OF SUBLATERALS.

53. The control of operation of all sublaterals constructed or acquired in connection with projects under the reclamation act is retained by the Secretary of the Interior to such extent as may be necessary or reasonable to assure to the water users served therefrom the full use of the water to which they are entitled. (See 37 L. D., 468.)

#### WATER RIGHTS.

##### WATER RIGHTS FOR LANDS IN PRIVATE OWNERSHIP.

54. Lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the reclamation act, but water-right contracts may not be held for more than 160 acres by any one landowner, and such landowner must be an actual bona fide resident on such land or occupant thereof residing in the neighborhood. The Secretary of the Interior has fixed the limit of residence in the neighborhood at a maximum of 50 miles. This limit of distance may be varied, depending on local conditions. A landowner may, however, be the purchaser of the use of water for more than one tract in the prescribed neighborhood at one time, provided that the aggregate area of all the tracts involved does not exceed the maximum limit established by the Secretary of the Interior nor the limit of 160 acres fixed by the reclamation act; and a landowner who has made contract for the use of water in connection with 160 acres of irrigable land and sold the same together with the water right, can

make other and successive contracts for other irrigable lands owned or acquired by him. Holders of more than 160 acres of irrigable land within a reclamation project must sell or dispose of all in excess of that area before they can receive water. If the holder of a greater area desires, he can subscribe for stock in the local water users' association (if there be one) for his entire holding, executing a trust deed, giving the association power to ultimately sell the excess area to actual settlers who are qualified to comply with the reclamation act, unless the land has been sold by the owner when the Government is ready to furnish water thereon.

55. The purpose of the reclamation act is to secure the reclamation of arid or semiarid lands and to render them productive, and section 8 declares that the right to the use of water acquired under this act shall be appurtenant to the land irrigated and that "beneficial use shall be the basis, the measure, and the limit of the right." There can be no beneficial use of water for irrigation until it is actually applied to reclamation of the land. The final and only conclusive test of reclamation is production. This does not necessarily mean the maturing of a crop, but does mean the securing of actual growth of a crop. The requirement as to reclamation imposed upon lands under homestead entries shall therefore be imposed likewise upon lands in private ownership and land entered prior to the withdrawal—namely, that the landowner shall reclaim at least one-half of the total irrigable area of his land for agricultural purposes, and no right to the use of water will permanently attach until such reclamation has been shown. (See 37 L. D., 468.)

56. The provisions of section 5 of the reclamation act relative to cancellation of entries with forfeiture of rights for failure to make any two payments when due evidently states the rule to govern all who receive water under any project, and accordingly a failure on the part of any water-right applicant to make any two payments when due shall render his water-right application subject to cancellation with the forfeiture of all rights under the reclamation act as well as of any moneys already paid to or for the use of the United States upon any water right sought to be acquired under said act. (37 L. D., 468.)

#### VESTED WATER RIGHTS.

57. The provision of section 5 of the reclamation act limiting the area for which the use of water may be sold does not prevent the recognition of a vested right for a larger area and protection of the same by allowing the continued flowing of the water covered by the right through the works constructed by the Government under appropriate regulations and charges.

#### CORPORATION LANDS.

58. Under dates of February 2, 1909 (37 L. D., 428), and March 3, 1909, the department held that under section 5, act of June 17, 1902, a corporation, otherwise competent, is entitled to take water under the statute, provided its home office is on or in the neighborhood of the land for which it seeks water service.

59. Further, that the corporation must show its stockholders, and that as individuals they have not in the aggregate taken water rights

that, with that claimed by the corporation, will amount to more than 160 acres or the maximum limit of area established by the Secretary of the Interior. Registers and receivers are accordingly instructed to be guided by the rulings of the department, as set forth above, in their action on water-right applications by corporations when presented.

#### TOWNSITE SUBDIVISIONS.

60. Where water-right application has been made and accepted for land in private ownership, no new water-right application by any purchaser of part of the irrigable area of such private land will be accepted for land so purchased, if the same is subdivided into lots of such form and area as to indicate a use thereof for townsite rather than for agricultural or horticultural purposes. In such case, no notation shall be made of such transfer on the original water-right application, but water will be furnished such land on the original application, and the water-right charges collected thereunder, as if no such sale or sales had been made.

61. Water for land subdivided into such form and areas as to indicate a use thereof for townsite rather than for agricultural or horticultural purposes may be procured for the entire areas so subdivided, by contract with the Reclamation Service through the proper representatives of the landowners, as authorized by the Secretary of the Interior under the acts of April 16 and June 27, 1906 (34 Stat., 116 and 519).

62. Where separate water-right applications, otherwise valid, have been accepted for lands subdivided into such form and areas as indicate a use thereof for townsite rather than for agricultural and horticultural purposes, such water-right applications and the corresponding subscriptions to the stock of the water users' association may be surrendered and canceled, and water supplied to such lands under the provisions of the said acts of April 16 and June 27, 1906, upon such terms and conditions as will return to the Reclamation Service an amount not less than the charges due under such water-right applications. Similar adjustment by cancellation and new contract may be made where water-right application has been accepted and the land has been subsequently subdivided into tracts of form and area as above.

#### WATER-RIGHT APPLICATION.

63. The department has adopted three forms of applications for water rights, viz, Form A (4-021) for homesteaders who have made entries of lands withdrawn under the second form of withdrawal; Form B (4-020) for private owners of lands embraced within said project; and Form C (4-019) for Indian allottees. Copies of these forms have been furnished registers and receivers, and they will be used in all applications for water rights in any of the reclamation projects.

64. Upon notice issued by the Secretary of the Interior that the Government is ready to receive applications for water right for described lands under a particular project, all persons who have made entries of lands under the provisions of the act of June 17, 1902 (32

Stat., 388), will be required to file application for water rights on Form A for the number of acres of irrigable land in the farm unit entered, as shown by the plats of farm units approved by the Secretary of the Interior.

65. Upon the issuance of such notice private landowners and entrymen whose entries were made prior to withdrawal may, in like manner, apply on forms B or C for water rights for tracts not containing more than 160 acres of irrigable land, according to the approved plats, unless a smaller limit has been fixed as to lands in private ownership by the Secretary of the Interior.

66. Each application on Form B or Form C must contain a statement as to the distance of the applicant's residence from the land for which a water right is desired.

67. If a greater distance than that fixed for the project is shown in any application, the case should be reported to the Commissioner of the General Land Office for special consideration upon the facts shown. If the applicant is an actual bona fide resident on the land for which water-right application is made, the clause in parentheses of Form B or Form C, regarding residence elsewhere, must be stricken out.

68. The applicant on Form B or Form C must state accurately the nature of his interest in the land. If this interest is such that it can not ripen into a fee-simple title at or before the time when the last annual installment for water right is due, the register and receiver must reject the application.

69. Form B (4-020) is intended for use by owners of private land and entrymen whose entries were made prior to the withdrawal of the land within reclamation projects in entering into contracts with the United States for the purchase of a water right, and must be signed and sealed in duplicate and acknowledged before a duly authorized officer in the manner provided by local law. A space is provided on the blank for evidence of the acknowledgment, which should be in exact conformity to that required by the statutes of the State in which the lands covered by the contract lie for the execution of mortgages or deeds of trust. When so executed both originals must be filed in the local land office together with three complete copies, either in person or by mail. If the application is regular and sufficient in all respects, duly approved by the project engineer, and bears the certificate of the secretary of the local water users' association, if there be one, and is accompanied by the proper payments required by the provisions of the public notices issued in connection with the local reclamation project, the register will accept the same by filling out the blank provided at the bottom of the third page and attach his signature and seal by placing a scroll around the word "Seal."

70. Attention is especially called to sections 3743 to 3747, inclusive, of the Revised Statutes, relative to the deposit and execution of public contracts. The register will immediately after execution of the contract, execute the oath of disinterestedness required by section 3745, Revised Statutes, before a duly authorized officer on the blank form provided on the last page of the water-right contract.

No funds are available for the payment by the Government of any fees in connection with this oath, and the register should therefore take such oath before the receiver of public moneys, who is precluded by section 2246, Revised Statutes, from charging or receiving directly



or indirectly any compensation for the administering of such oath. In the event that it becomes necessary to take this oath before any other authorized officer, the fee due such officer must be paid to him by the water-right applicant, and registers are authorized to refuse to accept the water-right application on failure of the applicant to make such payment.

71. Section 3744, Revised Statutes, makes it the duty of a public officer executing a contract on behalf of the United States to file a copy of the same in the returns office of this department as soon as possible and within thirty days after the making of the contract, and registers will therefore forward to that office one of the original copies of each contract as soon as possible after the execution of the same. The provision of said section requiring that all papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return, does not apply to the contracts for the purchase of water rights, because of the fact that only one paper is used.

72. As stated in the instructions for the execution of the blank upon the third page thereof, the contract must be duly recorded in the records of the county in which the lands are situated, and therefore immediately upon execution of the contract the second original copy will be returned to the applicant, and he will be required to have the contract duly recorded by the proper recording officer, at his own expense, and return the contract to the local land office within thirty days, in default of which the register and receiver will make report to the General Land Office and the contract will be canceled without further notice for failure to comply with the regulations.

73. Upon return of the original copy of the contract to the local land office bearing certificate at the bottom of the last page, executed by the recording officer showing the recordation of the instrument, the register will fill out the same blank on the three copies held in his office, signing the name of the recording officer with the word "signed" in parentheses, preceding such name. The second original copy, when thus completed, is to be forwarded to the Auditor of the Treasury Department for the Interior Department, and one of the other copies will be forwarded to the applicant, one to the project engineer and the last copy must be forwarded to this office with the regular monthly returns.

74. No new forms of water-right application carrying assignments of credit (4-020a and 4-021a) have been prepared, and the use of the old forms bearing these numbers has been abandoned, and where application is filed by an assignee either of an entryman under the reclamation act or a private landowner, the new forms 4-020 or 4-021 should be used, and at the bottom of the last page, without the use of any additional papers, the prior applicant should execute the following form, either written in ink or typewritten:

I, \_\_\_\_\_, for value received, hereby sell and assign to \_\_\_\_\_ all my right, title and interest in and to any credits heretofore paid on water-right application No. \_\_\_\_\_ for the above-described land, together with all interests possessed by me under said application.

\_\_\_\_\_  
Assignor.

\_\_\_\_\_  
Witness.

75. Action on cases bearing such assignment will be the same as on other cases, except that the assignment must be permissible under the provisions of existing public notices and departmental regulations.

76. In order to avoid discrepancies in areas and resulting payments and the acceptance of applications for tracts not designated as lands for which water can be furnished, the following instructions are issued:

I. When practicable, all applications for water rights, both by homesteaders who have made entries of lands withdrawn and by private owners of lands embraced within a reclamation project, should be submitted by the applicants to the project engineer, United States Reclamation Service, for his examination and approval, before the applications are filed in the local land offices. In such cases the project engineers will indorse their approval upon the application forms if found correct, or point out defects and suggest corrections if any are required.

II. Where, because of lack of time, distance, or necessity of submitting the water-right applications with applications to make original homestead entries, etc., it is not practicable to have the water-right applications examined and approved by the project engineer prior to the filing in the local land office, the water-right applications must be filled out and filed in the local land office accompanied by an extra copy. Registers and receivers will suspend action in such cases and daily forward to the proper project engineer one copy of each of such water-right applications for examination and return by the engineer within fifteen days, approved by him, or with defects indicated and corrections suggested if not in form for approval. In the latter case the applicant should be promptly advised and allowed thirty days to make the necessary amendments, in default of which the application will be rejected.

III. The Reclamation Service will advise its project engineers that their approval will be regarded as certifying to the correctness of the following matters: (a) That the land described is subject to water-right application under the project; (b) that the irrigable acreage shown is correct in accordance with the public notices, the official plats, and instructions approved by the Secretary of the Interior; (c) that the number of acre-feet per annum to be furnished is correctly stated; (d) that the amount of the building charge is correctly stated; (e) that the number of annual installments is correctly stated. Before certifying any water-right application for private lands the local engineer of the Reclamation Service shall see that it includes all the land owned by the applicant within the subdivision in addition to the other irrigable lands owned by him on the project and open to application for a water right, not exceeding the limit of area fixed by the reclamation act and the public notice in pursuance of which the application is presented.

IV. These regulations are designed to aid the applicants in presenting water-right applications which will be correct in form, and which contain matters essential to the approval of their applications; also, to aid the registers and receivers of local land offices in the consideration of such application; and registers and receivers are, therefore, enjoined to use both care and diligence in enforcing the above requirements.

V. If the Secretary of the Interior has made a contract with a water users' association organized under the project, due notice thereof will be given to the registers and receivers, and applications for water rights should not be accepted in such cases unless the certificate at the end thereof has been duly executed by the said association.

77. The following rules are laid down with reference to water-right applications for land in private ownership, including entries not subject to the reclamation act:

I. Where water-right application is presented covering only part of the irrigable area of a subdivision in private ownership, not subdivided into lots and blocks for townsite purposes, the register and receiver will accept it, provided it bears the usual certificates of the project engineer and the local water users' association (where such association has been formed and contract entered into with the Secretary of the Interior).

II. In case of sale by a private owner of part of the irrigable land covered by a subsisting water-right application, the vendor, in order to have his water-right charges adjusted to the reduced acreage retained by him, will be required to present the following evidence:

(a) Certificate of the proper officer having charge of the county records, showing record of a subscription for stock in the local water users' association covering the land in question and that the land has been duly conveyed by the subscriber at a time subsequent to the recording of the stock subscription.

(b) The certificate of the local water users' association, if one has been organized on the project, under corporate seal, to the effect that proof has been presented to the association of the transfer of the land to the person named and that appropriate transfer has been made on its books of the shares of stock appurtenant to said land.

(c) The vendor should also so arrange that his vendee shall promptly make a water-right application for the irrigable land within the tract conveyed to him, and upon presentation and acceptance of such application appropriate notation of such transfer, with a reference to the new water-right application, will be made on the original or prior water-right application.

III. In case of relinquishment by an entryman, whose entry is not subject to the reclamation act, of a part of the land included in his entry, appropriate notation will be made on his water-right application, showing such relinquishment, and his charges will be reduced accordingly.

IV. Where an entryman relinquishes a part of his entry under conditions described in Rule III hereof, and the next person who enters the land so relinquished claims credit for installments paid by the first entryman, he must at the time of such entry file with his application to enter an assignment in writing of the water-right credits of the prior entryman; also a water-right application covering the land entered.

78. In order that there may be no unnecessary delay in the obtaining of water by entrymen and landowners in reclamation projects, after they have filed water-right applications and made the required preliminary payment, the register and receiver are directed to issue in triplicate certificates of water-right applications accepted in connection with homestead entries made subject to the reclamation act. Certificate of filing water-right application will not be issued here-

after in connection with the new Form B (4-020), inasmuch as the acceptance of the contract is equivalent to such certificate. One copy of each certificate of filing water-right application issued and of each water-right contract for lands in private ownership executed will be forwarded to the applicant and one copy to the engineer in charge of the project. At the end of each month the register and receiver are to prepare a schedule, Form 4-115b, of certificates issued upon water-right applications accepted during the month, showing also contracts executed, and an abstract, Form 4-105b, of collections of charges made during the month, forwarding the original in triplicate to this office and furnishing the Director of the Reclamation Service and the project engineer with copies of each monthly schedule of certificates and abstract of collections made. Receipts made from the sale of townsite lots should be reported separately on Form 4-105 for payment into the reclamation fund as original receipts on account thereof.

79. The copies of certificates of water-right applications and contracts must be forwarded, on the day issued, to the engineer in charge of the reclamation project wherein the lands are situated, and the monthly abstract of collections must be prepared and copy forwarded to him immediately after the close of the month during which the collections were made.

80. As above indicated, prompt action is essential in these matters in order that the applicants who are entitled to water may receive same at the earliest possible moment; and any dereliction in furnishing the copies of certificates and abstracts above indicated will be considered a failure of satisfactory performance of duty.

#### WATER-RIGHT CHARGES.

81. The Secretary of the Interior will at the proper time, as provided in section 4 of the reclamation act, fix and announce the area of lands which may be embraced in any entry thereafter made or which may be retained in any entry theretofore made under the reclamation act; the amount of water to be furnished per annum per acre of irrigable land and the charges which shall be made per acre for the irrigable lands embraced in such entries and lands in private ownership, for the estimated cost of building the works and for operation and maintenance, and prescribe the number and amount and the dates of payment of the annual installments thereof.

82. Under the act of February 13, 1911 (36 Stat., 902), the Secretary is authorized in his discretion to withdraw any public notice issued prior to the passage of the act.

83. If any entry subject to the reclamation act of June 17, 1902 (32 Stat., 388), is canceled or relinquished, the payment for water-right charges already made and not assigned in writing to a prospective or succeeding entryman under the provisions of paragraph 85 hereof are forfeited. All water-right charges which remain unpaid are canceled by the relinquishment or cancellation of the entry, except as provided by the specific provisions of public notices applicable to particular projects.

84. Any person who thereafter enters the same land must, in the absence of an assignment in writing or public notice to the contrary, pay the water-right charges as if the land had never been previously

entered. No credit will be allowed in such cases for the payment made by the prior entryman, and the new entryman must pay at the time of filing his homestead application and water-right application, such charges for building and operation and maintenance as are required by the public notice in force at the time on the particular project.

85. A person who has entered lands under the reclamation act, and against whose entry there is no pending charge of noncompliance with the law or regulations, or whose entry is not subject to cancellation under this act, may relinquish his entry to the United States and assign to a prospective or succeeding entryman any credit he may have for payments already made under this act on account of said entry, and the party taking such assignment may, upon making proper entry of the land and proving the good faith of the prior entryman to the satisfaction of the Commissioner of the General Land Office, receive full credit for all payments thus assigned to him, but must otherwise comply in every respect with the homestead law and the reclamation act.

86. The transfer of lands in private ownership covered by water-right contract before cancellation of the contract carries with it the burden of water-right charges and credit for the payments made by the prior owner. (See Dept. decision Mar. 20, 1911, in case of Fleming McLean and Thomas Dolf, 39 L. D., 580.)

87. All charges due for operation and maintenance of the irrigation system for all the irrigable land included in any water-right application must be paid on or before April 1 of each year, except where a different date is specified in the orders relating to the particular project, and in default of such payment no water will be furnished for the irrigation of such lands.

REGULATIONS AS TO THE COLLECTION OF RECLAMATION WATER-RIGHT CHARGES BY RECEIVERS OF PUBLIC MONEYS.

88. In accordance with the provisions of section 5 of the reclamation act, all payments of the annual installments of reclamation water-right charges, including the portions for building charges and operation and maintenance charges on reclamation water-right applications, shall be made to the receivers of public moneys of the respective local land districts, but, for the convenience of the water-right applicants, the charges provided may be tendered to and received by the designated special fiscal agents for the several irrigation projects for transmission by them to the proper receivers of public moneys. The acceptance of these water-right charges by the fiscal agents of the Reclamation Service can not be held to be a payment to the United States in accordance with the requirements of section 5 of the reclamation act until the moneys are actually in the hands of the proper receivers of public moneys. The permission granted above is only for the convenience of water-right applicants, but care will be taken to properly safeguard the handling of such funds until their receipt by the respective receivers of public moneys. Notice of overdue water-right charges will be sent to water users by the registers and receivers whenever directed by the General Land Office and a press copy of every such notice must be sent to the project engineer in charge of the project on the same day without waiting for the end of the month.

89. Where payment is tendered for a part only of either an annual installment of water-right building charges or an annual operation and maintenance charge, receivers may hereafter accept the same if the insufficient tender is, in the opinion of the receiver, caused by misunderstanding as to the amount due and approximates the same.

90. In all cases of insufficient payment accepted in accordance with the provisions of the foregoing paragraph, receipts must issue for the amount paid and the money be deposited to the credit of the "Reclamation Fund," and the water user shall be immediately notified by registered letter that the payment is insufficient and allowed a period of thirty days to make payment of the balance due to complete the charge on which a part payment has been made. If the balance is paid within this period additional receipt must issue therefor, but if not paid within the thirty days, report shall be made to the Commissioner of the General Land Office.

91. In all other cases where insufficient tenders are made receivers will issue receipts therefor and return the money by their official check, with notice to the water user as to the reason for its return and properly report the transaction in their accounts.

92. When full payment is tendered direct to the receiver of public moneys, and upon examination is found to be correct, the receiver will issue the usual receipt, and send a press copy to the project engineer on the day issued.

93. Where payment is tendered through special fiscal agents of the Reclamation Service, and, upon examination, the amounts so transmitted by the special fiscal agent are found to be correct, the receiver will then issue the usual receipt and transmit the same to the water-right applicant at his record post-office address. The receiver will receipt to such special fiscal agent upon one copy (and retain the other copy) of the "Abstract of receipts of reclamation water-right charges (R. S., Form 7-406)" received from the special fiscal agent at the end of each month. See section 8 of instructions of May 27, 1908, to special fiscal agents, by the United States Reclamation Service.

94. Attention is invited to paragraph 4 of "Circular of instructions to special fiscal agents by the United States Reclamation Service," dated May 27, 1908, and in accordance therewith receivers of public moneys will require payment direct to themselves in all matters involving tenders for fees on homestead entries; tenders for first installments on water-right applications, including both the portion for building and the portion for operation, and maintenance charges where the public notices require the first installment to be paid at the time of filing homestead entries, and tenders upon water-right applications where a notice of contest against the entry upon which the water-right application rests, has been reported by the register of the land office. In all such cases payments must be made direct to the receiver of public moneys.

95. All moneys collected in connection with water-right applications, both those received direct from water-right applicants and through special fiscal agents, must be deposited in receivers' designated depositories to the credit of the Treasurer of the United States "on account of reclamation fund, water-right charges."

## DESERT-LAND ENTRIES WITHIN A RECLAMATION PROJECT.

96. By section 5 of the act of June 27, 1906 (34 Stat., 519), it is provided that any desert-land entryman who has been or may be directly or indirectly hindered or prevented from making improvements on or from reclaiming the lands embraced in his entry, by reason of the fact that such lands have been embraced within the exterior limits of any withdrawal under the reclamation act of June 17, 1902, will be excused during the continuance of such hindrance from complying with the provisions of the desert-land laws.

97. This act applies only to persons who have been, directly or indirectly, delayed or prevented, by the creation of any reclamation project or by any withdrawal of public lands under the reclamation act, from improving or reclaiming the lands covered by their entries.

98. No entryman will be excused under this act from a compliance with all of the requirements of the desert-land law until he has filed in the local land office for the district in which his lands are situated an affidavit showing in detail all of the facts upon which he claims the right to be excused. This affidavit must show when the hindrance began, the nature, character, and extent of the same, and it must be corroborated by two disinterested persons, who can testify from their own personal knowledge.

99. The register and receiver will at once forward the application to the engineer in charge of the reclamation project under which the lands involved are located and request a report and recommendation thereon. Upon the receipt of this report the register and receiver will forward it, together with the applicant's affidavit and their recommendation, to the General Land Office, where it will receive appropriate consideration and be allowed or denied, as the circumstances may justify.

100. Inasmuch as entrymen are allowed one year after entry in which to submit the first annual proof of expenditures for the purpose of improving and reclaiming the land entered by them, the privileges of this act are not necessary in connection with annual proofs until the expiration of the years in which such proofs are due. Therefore, if at the time that annual proof is due it can not be made, on account of hindrance or delay occasioned by a withdrawal of the land for the purpose indicated in the act, the applicant will file his affidavit explaining the delay. As a rule, however, annual proofs may be made, notwithstanding the withdrawal of the land, because expenditures for various kinds of improvements are allowed as satisfactory annual proofs. Therefore an extension of time for making annual proof will not be granted unless it is made clearly to appear that the entryman has been delayed or prevented by the withdrawal from making the required improvements; and, unless he has been so hindered or prevented from making the required improvements, no application for extension of time for making final proof will be granted until after all the yearly proofs have been made.

101. An entryman will not need to invoke the privileges of this act in connection with final proof until such final proof is due, and if at that time he is unable to make the final proof of reclamation and cultivation, as required by law, and such inability is due, directly or indirectly, to the withdrawal of the land on account of a reclamation

project, the affidavit explaining the hindrance and delay should be filed in order that the entryman may be excused for such failure.

102. When the time for submitting final proof has arrived, and the entryman is unable, by reason of the withdrawal of the land, to make such proof, upon proper showing, as indicated herein, he will be excused, and the time during which it is shown that he has been hindered or delayed on account of the withdrawal of the land will not be computed in determining the time within which final proof must be made.

103. If after investigation the irrigation project has been or may be abandoned by the Government, the time for compliance with the law by the entryman will begin to run from the date of notice of such abandonment of the project and of the restoration to the public domain of the lands which had been withdrawn in connection with the project. If, however, the reclamation project is carried to completion by the Government and a water supply has been made available for the land embraced in such desert-land entry, the entryman must comply with all the provisions of the act of June 17, 1902, and must relinquish all the land embraced in his entry in excess of 160 acres; and upon making final proof and complying with the terms of payment prescribed in said act of June 17, 1902, he shall be entitled to patent. The area of the entry in excess of 160 acres must be relinquished to the United States and entrymen will not be permitted to assign such excess. See departmental decision of January 20, 1912 (40 L. D., 386).

104. Special attention is called to the fact that nothing contained in the act of June 27, 1906, shall be construed to mean that a desert-land entryman who owns a water right and reclaims the land embraced in his entry must accept the conditions of the reclamation act of June 17, 1902, but he may proceed independently of the Government's plan of irrigation and acquire title to the land embraced in his desert-land entry by means of his own system of irrigation.

105. Desert-land entrymen within exterior boundaries of a reclamation project who expect to secure water from the Government must relinquish to the Government all of the lands embraced in their entries in excess of 160 acres whenever they are required to do so through the local land office, and must reclaim one-half of the irrigable area covered by their water right in the same manner as private owners of land irrigated under a reclamation project.

#### TOWNSITES IN RECLAMATION PROJECTS.

106. *Withdrawal, survey, appraisalment, and sale.*—Townsites in connection with irrigation projects may be withdrawn and reserved by the Secretary of the Interior under the acts approved April 16 and June 27, 1906 (34 Stat., 116 (secs. 1, 2, and 3), and 519, (sec. 4)), respectively, and thereafter will be surveyed into town lots with appropriate reservations for public purposes, and will be appraised and sold from time to time in accordance with special regulations provided under section 2381, United States Revised Statutes, governing reclamation townsites.

107. *Survey and appraisal.*—Townsites under any law directing their disposition under section 2381, will be surveyed, when ordered by the department, under the supervision of this office, into urban, or



urban and suburban, lots and blocks, and thereafter the lots and blocks will be appraised by such disinterested person or persons as may be appointed by the Secretary of the Interior. Each appraiser must take his oath of office and transmit the same to this office before proceeding with his work. This office must be notified by wire of the time when such appraiser or appraisers enter on duty. They will examine each lot to be appraised and determine the fair and just cash value thereof. Improvements on such lots, if any, must not be considered in fixing such value. Lots or blocks reserved for public purposes will not be appraised.

108. *The schedule of appraisement* must be prepared in duplicate on forms furnished by this office, and the certificates at the end thereof must be signed by each appraiser, and on being so completed they must be immediately transmitted to this office, and when approved by the Secretary of the Interior one copy will be sent to the local officers.

109. *Notices of sale* will be published for thirty days (unless a shorter time be fixed in a special case) by advertisement in such newspapers as the department may select and by posting a copy of the notice in a conspicuous place in the register's office.

110. *How sold.*—Beginning on the day fixed in the notice and continuing thereafter from day to day (Sundays and legal holidays excepted) as long as may be necessary, each appraised lot will be offered for sale at public outcry to the highest bidder for cash, at not less than its appraised value.

111. *Qualifications and restrictions.*—No restriction is made as to the number of lots one person may purchase. Bids and payments may be made through agents, but not by mail or at any time or place other than that fixed in the notice of sale.

112. *Combinations in restraint of the sale are forbidden* by section 2373 of the Revised Statutes of the United States, which reads as follows:

Every person who, before or at the time of the public sale of any of the lands of the United States, bargains, contracts, or agrees, or attempts to bargain, contract, or agree with any other person, that the last-named person shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or who by intimidation, combination, or unfair management, hinders or prevents, or attempts to hinder or prevent any person from bidding upon or purchasing any tract of land so offered for sale, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both.

113. *Suspension or postponement* of the sale may be made for the time being, to a further day, or indefinitely, in case of any combination which effectually suppresses competition or prevents the sale of any lot at its reasonable value, or in case of any disturbance which interrupts the orderly progress of the sale.

114. *Payments and forfeitures.*—If any bidder to whom a lot has been awarded fails to make the required payment therefor to the receiver, before the close of the office on the day the bid was accepted, the right thereafter to make such payment will be deemed forfeited, and the lot will be again offered for sale on the following day, or if the sale has been closed, then such lot will be considered as offered and unsold, and all bids thereafter by the defaulting bidder may, in the discretion of the local officers, be rejected.

115. *Lots offered and unsold.*—Each lot offered and remaining unsold at the close of the sale will thereafter be and remain subject to private sale and entry, for cash, at the appraised value of such lot.

116. *Certificates.*—All lots purchased at the same time, in the same manner, in the same townsite, and by the same person should be included in one certificate, in order to prevent unnecessary multiplicity of patents. Lots sold at private sale should be accompanied by an application therefor, signed by the applicant. Certificates will be issued upon payment of the purchase price, as in other cases.

117. In all cases where the Secretary of the Interior shall direct the reappraisal of unsold lots under the first section of the act of June 11, 1910 (36 Stat., 465), the reappraisal will be conducted under the regulations provided for under the original appraisal of lots in townsites created under the laws in said act mentioned. The lots to be reappraised will not, from the date of the order therefor, be subject to disposal until offered at public sale at the reappraised value, which offering will be conducted under the regulations providing for the public sale of lots in such townsites. The lots so offered at public sale will then become subject to private sale at the reappraised price.

118. Whenever the Secretary of the Interior, in the exercise of the discretion conferred upon him by section 2 of said act, shall order the payment of the purchase price of lots, sold in townsites created under the laws in said act mentioned, to be made in annual installments, the same will be done under such regulations as may be issued in each particular instance. Transfers of lots will not be recognized, but entries and patents must be issued in the name of original purchasers.

FRED DENNETT,  
*Commissioner.*

Approved, April 29, 1912.

SAMUEL ADAMS,  
*First Assistant Secretary of the Interior.*

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**Confirmation.**

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Where a desert land entryman submits first year proof prior to the expiration of one year from the date of the entry, and contest is thereafter and within such period initiated against the entry, charging failure of the entryman to make the required first year expenditure as set forth in the proof, he is not thereby precluded from thereafter submitting further first year proof showing expenditures made upon the land at any time within the first year period..... 452

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existed, will not lie where it appears that, aside from such question, the land was not subject to the entry made, and that therefore the plaintiff had acquired no right thereunder from the assignor..... 294

The possession and improvement contemplated by the act of March 28, 1908, according a preference right to make desert land entry to one who has "taken possession of a tract of unsurveyed desert land . . . and has reclaimed or has in good faith commenced the work of reclaiming the same," are not such as required of a settler under the homestead law, but it is sufficient under that act if the possession and improvement conform to the requirements of the desert land law and evidence the party's good faith under that law..... 264

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By final decree of cancellation of a patent, by a court of competent jurisdiction, the land embraced in the patent becomes part of the public domain, subject to settlement, if unappropriated, but does not become subject to entry until opened to entry by proper order of the General Land Office... 630

The act of February 24, 1909, making it mandatory upon the land department to allow amendments of entries in certain cases, does not limit or take away from the Commissioner of the General Land Office or the Secretary of the Interior the discretionary power theretofore vested in and exercised by them to permit amendment of entries in other proper cases..... 434

The act of February 24, 1909, with respect to amendment of entries, is limited to cases of mistake in description at the time of making an entry whereby the entryman's intent was defeated, but is mandatory and obligates the land department to allow change of entry in such cases..... 434

Where at the time of making a homestead entry the entryman was prevented from taking the technical quarter-section desired by him because of an existing entry covering part thereof, but made entry of the remainder of such quarter-section together with sufficient adjoining land to make up 160 acres, he may, upon removal of the obstructing entry, be permitted to adjust his entry to the technical quarter-section in accordance with his original desire, provided his application to so amend is filed within one year from the date of his original entry..... 434

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Where an entry or selection is erroneously allowed for land embraced in an entry of record, the lifetime of which has expired, such erroneously-allowed entry or selection should not, for that reason, be canceled, but the entryman under the earlier entry should be called upon to show cause why his entry should not be canceled, with a view to permitting the later entry or selection to stand. 594

**Equity.**

A court of equity will not exercise its discretion and lend its aid in a case where it is clear no equity exists. 294

**Evidence.**

Instructions of August 19, 1911, respecting preparation of transcripts of testimony. . . . 230

A report by the Director of the Geological Survey, based upon an examination by a field agent, concerning an application for reservoir site, may serve as a basis for a charge and order against the applicant to show cause why his application should not be rejected, but is not evidence upon which final action adverse to applicant may be taken without notice to him and opportunity to be heard. 484

Where an entryman is shown, in a contest proceeding against his entry, to have been in default as to residence prior and up to the filing of the contest affidavit based upon such default, and to have thereafter resumed residence prior to service of notice of such contest, the burden is upon the contestee to show that such resumption of residence by him was not induced by such contest and was in good faith. 274

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The cost of republication of notice of intention to submit final proof must be paid by the register where the defect necessitating republication might have been avoided by proper diligence on his part. 459

Where the notice of intention to submit proof upon a homestead entry stated that commutation proof would be offered and the entryman submitted final five-year proof thereunder, republication of notice will be required. 282

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**Homestead.****GENERALLY.**

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The last clause of the first paragraph of section 52 of the circular of September 24, 1910, 39 L. D., 232, 251, abolished. 143

The object of the homestead laws is the donation of public lands to persons seeking to establish and maintain agricultural homes thereon, conditioned upon actual occupancy of the same as a home, and cultivation and improvement of the land; and mere occasional visits to the claim do not meet the requirements of the law. 206

An absolute conveyance of property, although made to defraud creditors, is, as between the parties to the deed, a valid conveyance of the title, and not merely a conveyance in trust; and one vested with title under such conveyance, to more than 160 acres, is disqualified to make homestead entry. 209

Section 2289 of the Revised Statutes specifically declares one who is the proprietor of more than 160 acres of land disqualified to make homestead entry; and the land department is therefore without power, by invoking the maxim *de minimis non curat lex*, to hold so qualified one who owns more than 160 acres, notwithstanding the excess may be less than one acre. 259

**ENTRY.****Original.**

Under the act of March 14, 1880, a homestead entry based upon settlement prior to survey relates back to the date of settlement. 355

A homestead entryman does not have the right to remove sand and gravel from the land embraced in his unperfected entry for the purpose of sale; but the fact that he may have trespassed in that respect does not of itself necessarily invalidate the entry. 467

Where at the time of making a homestead entry the entryman was prevented from taking the technical quarter-section desired by him because of an existing entry covering part thereof, but made entry of the remainder of such quarter-section together with sufficient adjoining land to make up 160 acres, he may, upon removal of the obstructing entry, be permitted to adjust his entry to the technical quarter-section in accordance with his original desire, provided his application to so amend is filed within one year from the date of his original entry. 434

The initial homestead entry is merely a declaration of intention to acquire title to the land by performing the conditions required by the homestead laws, and protects the entryman as against the intrusion of other settlers, but as against the government his right is only conditional and inchoate; and until proof that he has fulfilled the conditions required by the homestead laws, and is entitled to patent, has been submitted, and final certificate issued, no right



**Homestead—Continued.**

**ENTRY—Continued.**

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vests in claimant as against the government; and prior to the vesting of such right the rule that a forfeiture of title should not be declared except upon clear, positive, and convincing proof, has no application..... 206

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The right of second homestead entry accorded by the act of February 3, 1911, is not limited to instances where the original entry was lost, forfeited, or abandoned prior to the act, but is equally applicable where the original entry, made prior to the date of the act, was lost, forfeited, or abandoned subsequent to that date..... 613

An application to make second homestead entry under the act of February 3, 1911, based upon settlement, can not be allowed where the settler was disqualified to make a valid settlement and the lands were withdrawn under the act of June 25, 1910, before he became qualified by virtue of said act of February 3, 1911; but if the settler is entitled to amend his original homestead to cover the land settled upon, the withdrawal will not bar his right of amendment merely because he filed application for second entry instead of for amendment..... 571

The act of February 8, 1908, providing for second homestead entries, can not be given a retroactive effect to protect the prior settlement claim of one disqualified to initiate a valid settlement, to the prejudice of a valid intervening adverse settlement claim..... 453

A homestead entry completed under section 2 of the act of June 15, 1880, by payment of the Government price for the land, is not "commuted" within the meaning of section 2 of the act of June 5, 1900, and the entryman is not entitled to the right of second entry accorded by the latter act..... 351

**WIDOW; HEIRS; DEVISEE.**

Where a homestead entryman dies leaving a widow and children surviving, and the widow renounces her right to complete the entry under section 2291, Revised Statutes, in favor of the heirs, the children are entitled to perfect the entry and take title to the land just as though the widow were dead..... 625

Upon the death of a homesteader leaving no widow and no heirs qualified to take, a devisee to whom he has bequeathed all his right and interest in the land thereby becomes his representative entitled under the express terms of section 2291, Revised Statutes, to complete the entry as the next beneficiary in the order of succession named therein..... 69

Section 2292, Revised Statutes, is applicable only in case both parents are dead and only minor heirs survive; and where a homesteader dies leaving surviving a

**Homestead—Continued.**

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former wife, from whom he was divorced, and their minor child, his only heir, the rights and obligations of the minor under the homestead law are governed by the provisions of section 2291, Revised Statutes, and not by section 2292..... 638

Upon the death intestate of a homestead entrywoman, leaving surviving a husband and a minor child, the latter does not have the sole right of succession to the entry, under section 2292, Revised Statutes, where under the statutes of the State the husband is an heir of his wife, but, in such case, the right of succession is to the heirs generally, under section 2291, Revised Statutes, and upon completion of the entry patent will so issue, leaving it to the local courts to determine who such heirs are and what their interests may be..... 489

**SOLDIERS' ADDITIONAL.**

The right of an enlisted man who was honorably discharged to an additional entry under section 2306 of the Revised Statutes is not affected by the fact that he deserted from a prior enlistment..... 461

An enlisted man who deserted from the service of the United States, but subsequently enlisted again and served for a term of 90 days or more and received an honorable discharge from such enlistment, is deemed to be honorably discharged within the meaning of section 2304 of the Revised Statutes..... 225

The death of a soldier who while in the military service executed an affidavit under the provisions of the act of March 21, 1864, authorizing another as his representative to make homestead entry for his benefit, operates to revoke the authority, and an entry thereafter allowed upon such authorization is null and void and does not constitute a basis for an additional right under section 2307 of the Revised Statutes..... 62

Lands in the former Rosebud Indian Reservation opened by proclamation of August 24, 1908, under the act of March 2, 1907, to disposal under the general provisions of the homestead and townsite laws, are not subject to appropriation by location of soldiers' additional rights..... 54

Lands in the Southern Ute Indian reservation opened by proclamation of April 13, 1899, to occupancy and settlement and to entry under the desert, homestead, and townsite laws and the laws governing the disposal of coal, mineral, stone and timber lands, are not subject to appropriation by location of soldiers' additional rights..... 550

Lands within the former Nez Perce Indian reservation, opened under section 5 of the act of February 8, 1887, to "actual settlers," and under the act of August 15, 1894, to settlement and disposal under the homestead, townsite, timber and stone, and mining laws only, are not subject to appropriation by location of soldiers' additional rights.... 413

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Mere paper locations, under the placer laws, of lands alleged to contain oil, upon which no discovery of oil has been made and upon which the mineral claimants are not prosecuting with diligence the work for making a discovery of oil, do not prevent appropriation of the land by location of soldiers' additional rights..... 112

Equitable title under soldiers' additional applications made for lands covered by such paper locations vests when the applicants have done all that they are required to do, unless the lands are at that time known to be oil lands..... 112

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No such right is acquired by a mere application to locate a soldiers' additional right pending at the date of a power-site withdrawal as entitles the applicant to a hearing to determine whether or not the land is valuable for power-site purposes or is in fact a power site..... 553

An application to make soldiers' additional entry, pending at the date of an executive order, under the act of June 25, 1910, reserving lands for power-site purposes, is not a homestead entry within the meaning of the excepting clause of that act and therefore is not effective to except the land from the operation of the executive order..... 235

The provision in section 1 of the act of June 22, 1910, that lands withdrawn or classified as coal shall be subject to entry under the homestead laws by actual settlers only, the desert land law, to selection under the Carey Act, and to withdrawal under the Reclamation Act, with reservation to the United States of the coal therein, does not include soldiers' additional rights, and soldiers' additional entry of lands withdrawn or classified as coal can not be allowed under that act..... 408

In case of the substitution of a soldiers' additional right in lieu of a similar right held invalid, the application under the substitute right does not relate back to the date of the original application, but runs only from the date of the substitution; and where at such date the land was embraced in a coal land withdrawal under the act of June 25, 1910, the applicant has no rights entitled to protection under the proviso to section 1 of the act of June 22, 1910..... 408

Where the land embraced in an application to make soldiers' additional entry is subsequently included in a withdrawal for phosphate reserve, the application will be held in suspension pending final determina-

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**SOLDIERS' ADDITIONAL—Continued.**

tion as to the character of the land; and, if it be found to contain phosphate, the application, although otherwise valid, will thereupon be rejected, but, if found to be non-phosphate and restored to entry, the application will then be allowed, unless other reason exists for its rejection..... 410

Where a soldier entitled to an additional right of entry under section 2306, Revised Statutes, disappeared from his place of residence and has been continuously absent, without having been heard from, for a period of seven years, it will be presumed that he is dead, and an assignment of the additional right by his heirs will be recognized, upon proof that there has been no administration of his estate..... 72

The fact that one who has made a soldiers' additional entry was erroneously required to reside upon and cultivate the land, in accordance with the practice of the land department at that time, exacting residence and cultivation upon soldiers' additional entries in instances where the original entry had been abandoned, will not, upon voluntary relinquishment of such additional entry, entitle him or his successors in interest to again exercise the right, unless it be clearly shown that he was prejudiced by the erroneous requirement under the former additional entry..... 188

An application to locate a soldiers' additional right by one claiming to be assignee thereof will not be allowed in the face of a certificate covering the same right known by the land department to be in existence and held and claimed adversely to the applicant; nor may the holder of such certificate be required by the land department to show how he came into possession of and by what authority he is claiming the same or to defend his title thereto, until such time as he may apply to locate the right..... 52

The issuance of a certificate of soldiers' additional right will not prevent the sale of the right upon satisfactory showing of the loss or destruction of the certificate; and where every reasonable means to prove nonexistence of the certificate has been exhausted, sufficient to show that it in all probability has been lost or destroyed, one holding under valid assignments from the only persons to whom such previous ownership has been traced, may be recognized as entitled to the right..... 33

Where an assignment of a soldiers' additional right expressly limits location of the right upon a certain designated tract of public land, such assignment is special and does not give the assignee the right to locate other public land than the tract so designated; and where, under an erroneous ruling of the land department then in force, he is denied the right to enter the land so designated and acquiesces in such action, and

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**SOLDIERS' ADDITIONAL—Continued.**  
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 within the Kinkaid area, acquired by purchase, has therefore no other or greater right, by virtue of the Kinkaid Act, to make adjoining farm entry of contiguous land and acquire title thereto by continuing residence upon the original tract and cultivating and improving the adjoining tract, than is recorded generally by said section 2289. . . . . 420  
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Lands in the former Rosebud Indian reservation opened by proclamation of August 24, 1908, under the act of March 2, 1907, to disposal under the general provisions of the homestead and townsite laws, are not subject to appropriation by location of soldiers' additional rights..... 54

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Section 4 of the act of February 8, 1887, authorizes allotment of public lands on behalf of minor children of an Indian only where the parent has settled and made his home upon the public domain..... 148

The various act of Congress authorizing allotments of Sioux Indian lands contemplate allotments only to living persons; and where one entitled to allotment dies without allotment having been made or selection therefor filed by him or in his behalf, the right perishes with him and his heirs are not entitled to allotment based upon his right..

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The act of June 25, 1910, taken in connection with the act of May 29, 1908, includes within its operation the States of Minnesota and South Dakota, and excepts therefrom only the State of Oklahoma; and, as to the States first named, said act supersedes or operates as a repeal by implication of the act of May 27, 1902, as to the sales of the interests of minor allottees and heirs..... 179

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Heirs of an allottee under the agreement of July 7, 1883, between the United States and Chief Moses and other Indians of the Columbia and Colville Indian reservations, ratified and confirmed by the act of July 4, 1884, may not under the general act of June 25, 1910, sell all the land embraced in the allotment, but must retain eighty acres as required by the special act of March 3, 1906. 212

Upon the death of an Indian allottee before the expiration of the trust period and before issuance of a fee simple patent, without having made a will, the Secretary of the Interior is authorized by the act of June 25, 1910, to ascertain his heirs and, if competent to manage their own affairs, to issue to them a patent in fee; but, if one or more of the heirs are incompetent, the land may be sold and the proceeds paid to such as are competent and held in trust for the use and benefit of such as may be incompetent, according to

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Under section 6895, Wilson's Statutes of Oklahoma (1903), governing descent, succession is cast directly upon the lineal descendants, and where decedent left surviving no children, but grandchildren, and great-grandchildren issue of deceased grandchildren, the right of representation begins with the rank of the nearest living descendants—that is, the grandchildren—the great-grandchildren taking, by representation, the shares of their deceased parents..... 102

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While a check can not be accepted by the receiver in payment for an isolated tract, yet, where the highest bidder for a tract is surprised by having the check tendered by him refused for the mere technical reason that it is not cash, he should be allowed a reasonable time to convert the same into money which the receiver is authorized to accept..... 146

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While an order of the Commissioner of the General Land Office authorizing the sale of an isolated tract, noted upon the records of the local office, segregates the land from other entry or disposition under the public land laws, it will not prevent withdrawal of the land by competent authority from all forms of entry or disposal; and where the local officers, notwithstanding such withdrawal, proceed to offer and sell the land in pursuance of the original order, such sale is unauthorized and of no effect in face of the withdrawal..... 105

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A protest against a nonmineral selection, charging that the lands are mineral in character, on which a hearing was held prior to any withdrawal or classification of the land as oil, should be disposed of on the proof submitted at such hearing, and a subsequent withdrawal or classification of the lands as oil may not properly be considered in passing upon that protest..... 321

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Where a number of valid lode locations, forming upon the ground a contiguous group, are embraced in a single application for patent, upon which due publication and posting of notice has been had, and the application is rejected as to one of the claims because of insufficient patent improvements, the remainder of the claims, although not in themselves contiguous, may be retained, and embraced in a single entry and patent..... 17

Even if it be conceded that the act of June 29, 1906, amending section 558 of the Code of the District of Columbia, and declaring "that no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent or in which he may be in any way interested before any of the Departments aforesaid," is applicable outside of the District of Columbia, the mere fact that an application for patent to a mining claim, and the affidavit of posting of notice on the land, were verified before a notary public who was one of the attorneys for the claimant in prosecuting the patent proceedings, does not render them absolutely null and void, but voidable only, and, where there is no question as to the fact of notice, they are subject to amendment; and, when amended to conform to the requirements of the law and regulations, entry allowed upon the voidable affidavits may be permitted to stand..... 198

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After patent has issued the land department has no jurisdiction to inquire into and determine the rights of one claiming adversely to the patentee, any proceeding instituted by it after patent being for its own information to determine whether



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proper ground exists for suit to cancel the patent; and one claiming adversely to the patentee is not entitled to be heard in any such proceeding. . . . . 623

Where a railroad company applied to select a certain described quarter-section of land, but prior to approval of the selection the township was resurveyed, and the latter survey approved and plat thereof filed in the local office, the subsequent approval of the selection and issuance of patent thereon carries title to the designated quarter-section as fixed by the survey in force at the time the patent was issued. . . . . 528

Upon the death of a homestead entryman prior to the submission of final proof, leaving no widow, or minor children entitled to claim under section 2292, R. S., patent upon proof subsequently submitted will issue to his heirs generally, unless it appear from the record, prior to the issuance of patent, that the entryman made a will purporting to devise his interest in the entry, in which event patent will issue to his heirs or devisees, leaving it to the local courts to determine who the heirs are and what their interests may be. . . . . 628

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A settlement upon part of a school section existing at the date of the township survey subjects the land to homestead entry by that settler as public land of the United States, but does not except the land absolutely from the grant to the State, the State's right being held in abeyance while the right of the settler is *in fieri*, unless in the meantime it elects to avail itself of the privilege of selecting lands in lieu thereof; and while so held in abeyance the fee remains in the United States and the land retains its character as public land and comes under the operation of a withdrawal for its reclamation as any other tract of public land. . . . . 586

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Where land embraced in a homestead entry was withdrawn for use in connection with a reclamation project pending a contest which resulted in cancellation of the entry, the successful contestant, upon restoration of the land, is entitled to a period of thirty days from the date of such restoration within which to exercise his preference right of entry. . . . . 607

Where a homestead entry within a reclamation project was conformed to a farm unit and canceled as to the remainder, at a time when the entryman could not have made five-year proof, the entry will not thereafter be reinstated as to the canceled portion for the purpose of permitting the entryman to submit final five-year proof thereon with a view to assigning such portion under the provisions of the act of June 23, 1910. . . . . 322

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Water in irrigation canals constructed and operated under the reclamation act, which has not become appurtenant to any land and is not needed for irrigation, may be temporarily disposed of by lease, in the discretion of the Secretary of the Interior, the proceeds to become a part of the reclamation fund. . . . . 573

A successful contestant of an entry within a reclamation project will be required, in making entry in exercise of his preference right, to pay the building charge obtaining at the time his application is filed, and is not entitled to the rate in effect when the former entry was made nor to credit for the payments made by the former entryman. . . . . 458

Persons holding contracts to purchase lands from a State, on deferred payments; no conveyance of title to be made to the purchasers until full payment, are entitled, if not in default and their contracts are in good standing, to subscribe for and purchase water rights under the reclamation act for irrigation of such lands, subject to the provisions and limitations of that act. . . . . 270

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