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DECISIONS
RELATING TO
THE PUBLIC LANDS.

JOHN W. BROWNING.

Decided March 17, 1913.

ISOLATED TRACT—PAYMENT.

Where at the sale of an isolated tract the amount bid goes above the sum a *bona fide* bidder has in hand, and he desires to continue bidding, he may deposit the amount he has in hand, as an evidence of his good faith, and be permitted to participate further in the bidding, on condition that, if the tract be awarded to him, he make his bid good during the business hours of the day, the sum deposited by him to be, in such event, credited upon his bid.

AUTHORITY OF LAND DEPARTMENT TO AUTHORIZE RESALE OF TRACT.

The fact that an applicant for the sale of an isolated tract has accepted from the successful bidder the amount paid by him as fee for publication of notice of the sale, will not prevent the land department, in case of error in the proceedings, from setting aside the sale and authorizing a resale of the tract upon application therefor by the former applicant.

LAYLIN, *Assistant Secretary*:

John W. Browning appealed from decision of the Commissioner of the General Land Office of March 16, 1912, setting aside public sale of isolated tract, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 31, T. 16 N., R. 4 W., Sacramento, California.

The sale having been duly advertised, on application of Herman Dunlap, Sr., he appeared at the local office at 10.30 a. m., and bid \$1.40 per acre. After the hour had nearly expired, Swezy, as attorney for John W. Browning, appeared, and when the register was about to close the sale, and asked "Do I hear any other bid," Swezy raised Dunlap's bid, and the sale proceeded until Dunlap bid \$2.50 per acre; whereupon Swezy raised the price to \$2.55 per acre. Dunlap then stated that he had not sufficient money with him to raise the bid beyond that price. He offered a check and stated that if allowed to bid he would deposit the price within a reasonable time

during the day. Swezy objected, holding that this action was violation of paragraph 12, circular No. 71. The local office sustained that objection and held that the successful bidder would be required to deposit the money in cash at close of the bidding. The sale was then closed and the local office reported the matter asking instructions. The Commissioner set aside the sale upon authority of Rosa Alheit (40 L. D., 145) and allowed Dunlap thirty days from notice within which to begin republication, if he still desired to purchase the land, and held the sale would be closed without further notice if he failed to request republication.

Browning's appeal alleges error in such order of the Commissioner and asserts that his bid should be received as the highest qualified bidder. A second assignment of error is that Dunlap accepted from Browning his publication fee since the sale.

There is no merit in the second error assigned. The United States is an interested party at the sale of isolated tracts, and combination of bidders or transactions of bidders among themselves do not waive errors in the proceedings, if any occurred, to the prejudice of the United States.

There being a *bona fide* applicant present who was unable with money in hand to pursue the sale further, the local office should have directed him as evidence of his good faith to deposit the sum he had in hand, which appears to have been \$400, and proceed with his bidding, advising him that should he make his bid good during the business hours of the day, in case he was a successful bidder, the sum deposited would be credited upon his bid.

As against Dunlap, Browning's conduct did not entitle him to consideration. He waited until the sale was about to expire and then proceeded with small bids, apparently seeking to weary out his adversary, and when he found he had finally outbid the sum of money in his hands, insisted upon closing the sale, though his adversary was willing to bid a larger price. The object of a public sale on competitive bids is to obtain the largest price obtainable for the property of the United States that is offered for sale. The tactics employed by Browning were dilatory and unconscionable, such as tends to forestall a sale and defeat its very object. It is obviously against the interests of the United States to close a sale arbitrarily under such conditions.

The decision is affirmed.

JOHN W. BROWNING.

Motion for rehearing of departmental decision of March 17, 1913, 42 L. D., 1, denied by Assistant Secretary Laylin, May 31, 1913.

**TIMBER LAKE AND DUPREE TOWNSITES, SOUTH DAKOTA—
PUBLIC RESERVE.**

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 17, 1913.

The act of January 28, 1913 (37 Stat., 653), authorizes the reservation for school, park, and other public purposes of not more than five acres of the undisposed of lands within the townsites of Timber Lake and Dupree, in the Cheyenne River Indian Reservation, South Dakota, and the patenting of said reserves in each townsite to the respective municipalities.

Reservations of several blocks, in one townsite of about ten acres, in the other of about twenty acres, were made at the time of the surveying and platting of the townsites, and each such tract was designated on the plats as "Public Reserve."

The corporate authorities of each townsite should apply to the local officers for patent under said act to such "Public Reserves," or portions thereof, as they may desire, not exceeding five acres in each townsite, and must file therewith record evidence of the incorporation of their respective towns and of the authority of the officers filing the application to apply for the patent, such authority to be shown by resolution of the common council in each case, or other governing body.

Upon the filing of such application and proof, if found satisfactory, patent will issue to the town so applying in its corporate name for the tract or tracts covered by its application and for the public uses expressed in said act.

The act further authorizes the purchase price on the sale of lots in said townsites, hereafter made, to be paid in installments, and directs the setting apart of 20 per centum of the net proceeds of such sales to be expended "in the construction of schoolhouses or other public buildings or improvements in the respective townsites in which lots are sold." The proceeds derived from lot sales hereafter made in either of said two townsites will be deposited to the credit of the Treasurer of the United States as "Sales of town lots—Act of January 28, 1913 (Public—353)." In the settlement of the quarterly

accounts of the receiver 20 per centum of such proceeds will be certified to the Auditor for the Interior Department, to be set aside as a separate fund under the terms of the act mentioned.

Instructions relative to the terms of sale and payments of the purchase price for lots will be given in each case when sales are ordered.

S. V. PROUDFIT,
Assistant Commissioner.

Approved, April 3, 1913:

LEWIS C. LAYLIN,
Assistant Secretary.

GREAT WESTERN POWER CO.

Decided March 17, 1913.

POWER AND RESERVOIR SITES WITHIN INDIAN RESERVATIONS.

Sections 13 and 14 of the act of June 25, 1910, authorizing the Secretary of the Interior to reserve power and reservoir sites within Indian reservations, has no application to lands outside of Indian reservations.

ALLOTMENTS WITHIN POWER OR RESERVOIR SITES—CANCELLATION OF TRUST PATENTS.

Section 14 of the act of June 25, 1910, authorizing the Secretary of the Interior to cancel Indian trust patents issued on allotments within power or reservoir sites within Indian reservations, contemplates that such patents shall be canceled only in instances where the lands are required or reserved for irrigation purposes authorized under act of Congress.

LAYLIN, *Assistant Secretary:*

Under date of April 22, 1912, the Commissioner of the General Land Office transmitted reports of special agents and other papers relating to lands in Tps. 27, 28 and 29 N., Rs. 7 and 8 E., M. D. M., California, involved in what is described as the big Meadows scheme of the Great Western Power Company.

November 1, 1912, the Director of the Geological Survey, in response to reference from the Department, submitted his report and recommendation in the premises, and on December 31, 1912, a report and recommendation was filed by the Acting Commissioner of the Indian Office.

It appears from the papers submitted and from the records of the Department that the Great Western Power Company, a corporation organized under the laws of the State of California, has, by purchase, acquired a considerable area of privately owned lands along the north fork of Feather River, California. Through condemnation proceedings instituted and prosecuted in the California courts under the provisions of the act of March 3, 1901 (31 Stat., 1083), it has acquired title to a considerable area of lands allotted to Indians. A con-

firmatory act passed by Congress May 5, 1908 (35 Stat., 100), quit-claimed, so far as the United States is concerned, the title to certain lands therein described and confirmed same to the Western Power Company, predecessor of the Great Western Power Company.

It is alleged that the Great Western Power Company and its predecessors have, in accordance with the laws of the State of California, appropriated certain waters for the generation of hydro-electric power and for irrigation and other purposes and have already expended approximately \$300,000 in the construction of improvements at a proposed dam site in Sec. 28, T. 27 N., R. 8 E., M. D. M. The proposed power development having attracted the attention of the Geological Survey, an investigation was initiated with the object of retaining the control of the power site in the United States and permitting development, if at all, under the provisions of the act of February 15, 1901. Withdrawals were made November 23, 1911, and February 15, 1912, under the provisions of the act of June 25, 1910 (36 Stat., 847), (power site reserves Nos. 234 and 245).

According to the report of the Geological Survey there are two possible utilizations of the reservoir site. The first, which seems more feasible, and which it is understood the company hopes to have completed in 1913, involves the construction of a dam 63 feet in height, the flowage of which would cover approximately 12,500 acres. Of this area the Survey states 140 acres are vacant public lands. The alternative proposed development contemplates the construction of a 110-foot dam, which would flood 23,250 acres, of which area about 3,000 acres are said to be still under Government control. The so-called power-site withdrawals embrace also about 2,250 acres of lands covered by Indian allotments, as well as about 1,080 acres in unapproved State and lieu selections, and 80 acres in homestead entries.

The Survey, in its recommendation of November 1, 1912, suggests the possibility that the lands included in the Indian allotments may be acquired by the power company through condemnation proceedings, and that if it be desired to retain control of these lands and the power possibilities thereof, the lands be withdrawn and acquired under the provisions of section 14 of the act of June 25, 1910 (36 Stat., 855-8); or, if that be deemed impossible, to create an Indian reservation including the lands.

The Indian Office, in its report of December 31, 1912, commenting upon the recommendation of the Survey, expresses the opinion that the interest of the Indians will be best subserved by offering for sale the lands of the Indians within the area involved at an appraised price which shall include their value for agriculture, timber, and power purposes.

Section 14 of the act of June 25, 1910, *supra*, as well as the preceding section 13, is by its express terms applicable only to lands

in Indian reservations, and section 14 imposes the further condition that where it is proposed to cancel trust patents issued on allotments within such power or reservoir sites, the lands must be required or reserved for irrigation purposes authorized under authority of Congress. That it has in contemplation only sites reserved in connection with irrigation projects is further shown by the concluding clause of section 14, which provides that the Indian whose allotment is canceled shall be allotted land of equal value "subject to irrigation by the project." It seems, therefore, that the lands within the Indian allotments here involved can not be withheld under said section 14.

With respect to the suggestion that the lands be included in an Indian reservation, the Department is aware of no circumstances which would warrant such action. These Indians are not concentrated upon a given area of public land and are not maintaining tribal relations, but are and have been for a number of years occupying these individual and scattered allotments made to them upon the public domain. The Department is not convinced that the best interests of the Indians would be subserved, even were it possible to make the withdrawals suggested by the Geological Survey. The Indian Office seems to be of the opinion that they would not.

While the power-site withdrawals heretofore made under the act of June 25, 1910 (36 Stat., 847), for vacant public lands, might be maintained, there are, according to the Survey's statement, but 140 acres within the flow line of the 63-foot dam site still under Government control. This is such an infinitesimal portion of the proposed reservoir, the remainder being in private ownership, that the Department does not feel warranted in interposing this as an obstacle to the development of the power company's power and irrigation projects. The 110-foot dam, if constructed, would include a somewhat larger area of public lands, but even in that case not exceeding one-eighth of the area involved.

Upon full consideration of the matter the Department concurs in the recommendation of the Commissioner of Indian Affairs that better returns for the Indians will be secured through the sale of lands needed by the power company, upon an appraised value. The Commissioner of Indian Affairs is accordingly hereby authorized and directed to proceed with the sale of the lands of Indian allottees involved in this matter, upon the express condition that the lands be first appraised on the basis of their value for agriculture, timber, and power-site purposes, and disposed of for not less than that valuation.

As to the public lands within the limits of the company's proposed reservoir, the Commissioner of the General Land Office is authorized and directed, upon receipt of an application by the company for the

right to use the lands under the act of February 15, 1901 (31 Stat., 790), to forward such application, together with his recommendation, to the Department, whereupon the advisability of recommending to the President that power-site withdrawals Nos. 234 and 245 be modified to the extent of lands applied for, will be given consideration by the Department. The papers submitted by the Commissioner of the General Land Office will be returned to the files of that office.

ETHEL M. CATRON.

Decided March 17, 1913.

RELINQUISHMENT OF RECLAMATION ENTRIES.

The provision in the act of February 18, 1911, that where entries made prior to June 25, 1910, embracing lands within a reclamation project, 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 modified by the reclamation act, is applicable only to entries under the reclamation act, and can not be invoked as to entries canceled prior to the reclamation act or made before and afterwards canceled for fraud.

LAYLIN, Assistant Secretary:

Ethel M. Catron appealed from decision of the Commissioner of the General Land Office of May 2, 1912, denying her homestead application for SE. $\frac{1}{4}$, Sec. 25, T. 20 N., R. 50 W., 6th P. M., Alliance, Nebraska.

May 13, 1911, Catron applied for homestead entry which the local office rejected because the land applied for is not subject to entry under act of June 25, 1910. She appealed and the Commissioner affirmed that action.

The former history of this land is, that it was entered October 17, 1891, by Ellen Hearson, who relinquished August 31, 1899, on which date Mary E. Ryan made homestead entry therefor, submitted final proof, and patent issued to her October 10, 1907. On charges of fraud made by a special agent suit was begun to set aside the patent, and the entry was canceled October 10, 1910.

The township including this land was withdrawn from entry by the Secretary of the Interior February 11, 1903, for reclamation under act of June 17, 1902 (32 Stat., 388). It has not been restored to entry. The act of June 25, 1910 (36 Stat., 836), provided that entry of lands so withdrawn should not be permitted "until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges when the water can be applied and made public announcement of the same." The act of February 18, 1911, amended this section by a proviso that where entries made before June 25, 1910, 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 provided by the Reclamation Act of June 17, 1902, *supra*.

The appeal contends that inasmuch as this land had been entered prior to June 25, 1910, it was by act of February 18, 1911 (36 Stat., 917), made subject to entry. The Commissioner held otherwise, and this ruling is assigned for error. It is contended that the construction is arbitrary and without reason to sustain it; that no reason exists why land entered prior to the Reclamation Act should not be admitted to entry under the act of 1911, *supra*, if one made afterward may be.

The construction given is not arbitrary. The former entries made by Hearson and by Ryan had been canceled—Hearson's by relinquishment in 1899 and Ryan's by judicial cancellation of her patent in 1910. Neither of these entries was made under the Reclamation Act. The act of February 18, 1911, *supra*, was intended for relief of those who had made entry under the Reclamation Act, and by act of June 25, 1910, were prevented from realizing the value of their improvements by assigning their entries or by relinquishing them, so that the vendee of their improvements might make an entry. Congress had no motive or concern to relieve entries canceled before the Reclamation Act, or those made before and afterwards canceled for fraud. The act of 1911 must be construed according to its purpose and intent, rather than its letter.

The decision is affirmed.

LEWIS WILSON.

Decided March 18, 1913.

RECLAMATION ENTRY—FINAL CERTIFICATE.

The fact that remunerative crops may be raised without irrigation upon land lying within a reclamation project is not sufficient ground for exclusion of such land from the project; and final certificate should not issue upon an entry embracing such land until all the sums due the United States under the reclamation act, on account of land or water right at the time of issuance of the certificate, shall have been paid.

EXAMINATION OF RECLAMATION LANDS.

The Reclamation Service can not, while construction of a project is in progress, and prior to the laying out of its canals, undertake to reexamine, at the instance of individual claimants, particular tracts falling within the project, to ascertain whether or not such tracts are capable of service from its projected canals.

LAYLIN, *Assistant Secretary:*

Lewis Wilson appealed from decision of the Commissioner of the General Land Office of November 29, 1910, canceling his homestead

final certificate for lot 1, Sec. 2, T. 32 N., SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 34, T. 33 N., R. 19 E., M. M., Glasgow, Montana.

January 12, 1904, Wilson made entry, and April 16, 1909, offered final proof. February 23, 1910, the General Land Office found the proof as to residence, improvement, and cultivation sufficient under general provisions of the homestead law, and final certificate issued.

The land office records show the land in sections 34 and 35 was withdrawn for reclamation February 9, 1903, in St. Marys Canal Project, under the Reclamation Act. Lot 1, Sec. 2, was withdrawn for use in the project, November 21, 1904, but was changed to withdrawal for reclamation August 6, 1908, and July 9, 1909, was restored to the public domain. In view of these facts, the Commissioner held that as to the 120 acres in sections 34 and 35, the entry was subject to the Reclamation Act, and final certificate and patent can not lawfully issue until proof that half the irrigable area has been reclaimed and all reclamation charges paid; that final certificate was not lawfully issued, and it was held for cancellation.

The appeal alleges error, because (1) good paying crops can be and have been raised on the land without irrigation; (2) that the land "can not be successfully used" under the Reclamation Act; and (3) the entry should be reexamined before the decision is made final.

That remunerative crops may be raised without irrigation is no ground for exclusion of land from an irrigation project found to be feasible, and on due consideration entered upon. The Reclamation Act provides that cost of the project must be repaid to the United States by equitable contribution assessed against the land benefited. This can not be done if land included in a project be released from it and relieved from its fair share of expense. Reimbursement of the expense could only be effected by inequitable and excessive assessment on other land.

Nothing in the record shows that the land can not be successfully irrigated or "used" under the Reclamation Act. That can only be told by laying out of distributing canals. If the water conduits across or adjacent to the land show water can not be served to the land, such fact will show it is not benefited, and no assessment for benefits or reclamation charges will be made. So much of the area as is in such condition will be exempted from reclamation charges.

The Reclamation Service can not, while construction is in progress, and prior to laying out of its canals, go into reexamination of each tract within a project to ascertain whether particular lands within lines of the project are incapable of service from the projected canals.

The act of August 9, 1912 (37 Stat., 266), provides that:

no such patent or [final] certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid.

The final certificate in the present case was a full and free certificate without payment of any water charges, or reservation of lien, and without proof of reclamation of the area required by the Reclamation Act, and was unauthorized. It must necessarily be canceled. Should Wilson submit proof entitling him to benefits of the act of August 9, 1912, *supra*, he will then be entitled to such certificate as is by that act provided.

The decision is affirmed.

FERCH v. SWARTS.

Decided March 19, 1913.

PRACTICE—QUALIFICATIONS OF CONTESTANT—BURDEN OF PROOF.

Where contestant at the time of filing contest affidavit makes the showing as to qualifications required by Rule 2 of Practice, the burden rests upon contestee, where he charges contestant's disqualification to make entry, to prove such allegation.

CONTEST—PREFERENCE RIGHT—CANCELLATION OF ENTRY.

Where a showing requiring cancellation of an entry is made in a contest proceeding, the mere fact that contestant is disqualified to make entry in exercise of the preference right does not cure the existing default of the entryman or entitle him to have the entry remain intact.

LAYLIN, *Assistant Secretary*:

Benjamin Swarts has filed a petition requesting that the Commissioner of the General Land Office be directed to certify the record in the above entitled case for departmental consideration.

It appears that Swarts made homestead entry May 23, 1909, for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 23, W. $\frac{1}{2}$, Sec. 26, E. $\frac{1}{2}$ E. $\frac{1}{2}$, Sec. 27, T. 26 N., R. 37 W., 6th P. M., Broken Bow, Nebraska, land district, which was contested by Mary L. Ferch, April 23, 1912, upon allegations of failure of residence, cultivation and improvements.

Upon the testimony submitted at the hearing, the local officers recommended cancellation of the entry, and upon appeal the Commissioner, by decision of December 9, 1912, affirmed the action of the local officers, and held the entry for cancellation. Appeal was filed by Swarts, which the Commissioner by decision of February 7, 1913, refused to transmit to the Department for the assigned reason that it was not filed within thirty days from notice of his former decision.

It is urged in support of the petition that the failure to file appeal within thirty days of notice should be excused upon the allegation that the notice was sent direct to Swarts instead of his attorney, which action caused delay in filing the appeal. This allegation is

not in harmony with the statement contained in the decision of the Commissioner, which states that service of notice of said decision was made by registered letter, which was receipted for by attorney for defendant on December 23, 1912, and that appeal was not filed until January 28, 1913. Whatever the facts may be as to this contention, it cannot be seen that any substantial right has been denied the contestee. From full consideration of the petition and exhibits in support thereof, the case of Swarts appears to be utterly without merit.

In his appeal, which it is insisted should receive consideration, it is stated that the evidence shows good faith on the part of the claimant, which evidence was ignored by the Commissioner, but the main contention seems to be that the case of the contestant was left incomplete, for the reason that she offered no testimony at the hearing in support of her allegations contained in the contest affidavit, regarding her qualifications to make entry. It is stated that inasmuch as the contestee denied that the plaintiff was a qualified entrywoman, it was necessary for the contestant to offer proof showing such alleged qualifications.

The Commissioner in his decision of December 9, 1912, upon the latter contention of the contestee, held that it was not incumbent upon the contestant at the hearing in the contest to offer proof to show her qualifications to make entry; that as she at time of filing contest affidavit complied with Rule 2 of Practice by showing her qualifications, it devolved upon the contestee to disprove this assertion by the introduction of evidence or by cross-examination, if he desired to show that the contestant was not qualified and not entitled to an award of preference right. The Department fully concurs in this view. Furthermore, even if it were shown that the contestant is not qualified to exercise preference right of entry this would afford no reason for withholding cancellation of an entry where the showing calls for the cancellation. While a contestee may by sufficient evidence defeat award of preference right to the contestant, yet such proof will not prevent cancellation of an entry if the proof against it shows that it should be canceled.

For good reason the Department may permit an entry to stand even though a default thereunder may have occurred, especially where the contestant cannot or does not avail himself of the fruits of his contest, but the mere fact that the contestant is disqualified from making entry does not cure an existing default by the entryman.

No reason is seen for disturbing the action taken, and therefore the petition is denied.

IRA B. JONES.

Decided March 20, 1913.

SPOKANE INDIAN LANDS—ISOLATED TRACT.

The provision in section 3 of the act of May 29, 1908, that the surplus unallotted agricultural lands in the former Spokane Indian reservation remaining undisposed of at the expiration of four years from the opening of said lands to entry shall be appraised and sold at public auction under sealed bids to the highest bidder for cash at not less than their appraised value, is mandatory; and there is no authority of law for disposing of any of said lands as isolated tracts under the act of June 27, 1906.

LAYLIN, Assistant Secretary:

Appeal has been filed by Ira B. Jones from the decision of the General Land Office, rendered May 17, 1912, holding for cancellation cash entry issued to him for lot 5, Sec. 23, T. 29 N., R. 40 E., Willamette Meridian, Spokane, Washington, land district. The lot contains 18.70 acres, and was sold to Jones as an isolated tract under the terms of the act of June 27, 1906 (34 Stat., 517), at \$11.25 per acre, on February 17, 1912.

The tract involved is a part of the surplus unallotted agricultural lands of the Spokane Indian reservation, Washington, provision for the opening of which to settlement and entry is made by the terms of section 2 of the act of May 29, 1908 (35 Stat., 458, 460). Regulations providing for the opening and sale of the lands were approved by the Secretary of the Interior May 24, 1909 (37 L. D., 700).

Jones made application to purchase said lot 5, and, through inadvertence, the local land officers were authorized to offer the same for sale as an isolated tract under the terms of the act of June 27, 1906, above cited. Jones was the successful bidder, and cash certificate issued to him. The General Land Office, by decision rendered May 17, 1912, held the entry for cancellation upon the ground that there was no authority of law for the allowance of the sale.

From this decision Jones has appealed to the Department, alleging in such appeal that after making the purchase of the land he had most of it fenced and had put a portion under cultivation.

In section 3 of the act of May 29, 1908, above cited, it is provided:

That all lands classified as agricultural remaining undisposed of at the expiration of four years from the opening of said lands to entry shall be appraised by the Secretary of the Interior from time to time and sold at public auction or under sealed bids to the highest bidder for cash at not less than the said appraised value, under such regulations as the Secretary of the Interior may prescribe.

It will be observed that the language here quoted is mandatory and specific as to the manner in which these lands shall be disposed of, one of the requirements being that sale of undisposed lands shall not

be made until four years from the time of opening to entry. While it is much to be regretted that Jones was permitted to make entry of this tract, and has incurred expense in connection therewith, the Department is without authority to dispose of the lands in any other manner than as provided by the act above quoted, and the decision of the General Land Office so holding must be affirmed.

RECLAMATION—TIETON UNIT, YAKIMA PROJECT—PAYMENT.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, March 21, 1913.

Whereas, under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), works have been constructed for the irrigation and reclamation of the lands under the Tieton unit, Yakima project, Washington, and the estimated cost thereof must be paid by the water users, as required by said act, in not exceeding ten annual instalments; and

Whereas, public notices of the charges payable, and the time and manner of payment, have been given for the said Tieton unit, 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, certain water users have not made the payments as required by the said public notices, for reasons which in many cases have been unavoidable on their part, and it has accordingly been decided to offer opportunity 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 said estimated cost of the building, operation and maintenance of the irrigation works on said unit:

Now, therefore, the following public notice is issued under the terms of section 4 of the Reclamation Act and acts amendatory thereof or supplementary thereto and especially of the said act of February 13, 1911:

1. Owners of and entrymen upon lands for which acceptable water-right applications have heretofore been filed in accordance with the terms of any public notice now in effect for the said Tieton unit, may continue to make payments under the terms thereof.

2. Such owners and entrymen may, after qualifying under the provisions of this notice, make the payments of the portions of instal-

ments for building charge under such applications in accordance with the following graduated schedule, to wit:

First instalment	\$9. 30
Second instalment.....	1. 50
Third instalment.....	3. 00
Fourth instalment.....	4. 00
Fifth instalment.....	5. 20
Sixth instalment.....	10. 00
Seventh instalment.....	15. 00
Eighth instalment.....	15. 00
Ninth instalment.....	15. 00
Tenth instalment.....	15. 00

Provided, however, that no person shall be entitled to make payments in accordance with said schedule until he shall have first reclaimed and cultivated 50 per centum of the total irrigable area covered by his said application.

3. In order to receive the benefit of the graduated payments as outlined, an owner or entryman shall file with the Supervising Engineer of the United States Reclamation Service in North Yakima, a certificate in the following form, to-wit:

I, _____, hereby certify that I am the owner (or homestead entryman) of the _____ of Section _____, Township _____ North, Range _____ East, W. M., and that said land is covered by water-right application No. _____, dated _____, covering _____ irrigable acres, and that I have reclaimed and cultivated _____ acres of said land; that I desire to receive the benefits afforded by public notice dated March 21, 1913, and that if the benefits of the schedule of graduated payments therein are afforded me, I hereby agree to accept the provisions of said public notice and to make all payments promptly in accordance therewith.

Signed _____

Dated _____

Approved on the part of the United States by _____

Supervising Engineer.

4. All entries of lands not heretofore entered and of lands which have heretofore been entered and relinquished to the United States and which are not accompanied by written assignment of credit for payments theretofore made, shall be subject to the provisions of the public notices and orders heretofore issued, and shall be accompanied by the amount of the first instalment of the charges under the provisions thereof. If at the time the second instalment becomes due such entryman shall have reclaimed and cultivated not less than 25 per cent of the irrigable area of his entry and certificate to that effect on the form set forth herein is approved, his second instalment on account of the building charge shall be reduced to \$1.50 per acre and the balance added to the tenth annual instalment; and if, when the third payment becomes due, 50 per cent of the irrigable area covered

by such entry shall have been reclaimed and cultivated as herein provided for, and appropriate certificate executed therefor, and approved, the third and subsequent instalments shall be graduated in accordance with the schedule of graduated payments herein provided for.

5. Water users who qualify under the provisions of this notice may have any payments heretofore made by them on account of the building charge portion of the second or later instalments credited to the payments of the building charge portion of the second and subsequent instalments of the schedule in paragraph 2 hereof.

6. Until further notice the portions of instalments for operation and maintenance shall be as announced in public notices heretofore issued for the said unit, and shall be due and payable as specified therein, and all the terms of the public notices heretofore issued or water-right applications made and accepted thereunder shall be and remain in full force and effect except as herein specifically modified.

LEWIS C. LAYLIN,

Assistant Secretary of the Interior.

THORPE ET AL. v. STATE OF IDAHO.

Decided March 22, 1913.

SCHOOL INDEMNITY SELECTIONS—BASE IN INDIAN RESERVATIONS.

Whatever doubt and uncertainty existed concerning departmental decisions in *Thorpe et al. v. State of Idaho* (35 L. D., 640; 36 L. D., 479) and *Williams v. State of Idaho* (36 L. D., 20, 481), respecting the right of the State of Idaho to select indemnity in lieu of school sections within the Coeur d'Alene Indian reservation, because of the decision of the supreme court of that State in *Balderson v. Brady et al.* (107 Pac. Rep., 493), holding that school sections falling within Indian and other reservations were not a valid basis for indemnity, having been removed by enactments of the State legislature of February 8, and March 4, 1911 (Laws of Idaho, 1911, pages 16, 85), and the later decision of the supreme court of the State in *Rogers v. Hawley et al.* (115 Pac. Rep., 687, 692), said departmental decisions are relieved from suspension and will be carried into effect.

LAYLIN, *Assistant Secretary:*

This case is presented for consideration upon answer of the State of Idaho to a rule issued by the Secretary of the Interior, March 2, 1910, inviting the State of Idaho to show cause why certain school indemnity selections proffered under sections 2275 and 2276 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), in lieu of parts of sections 16 and 36 within the Coeur d'Alene Indian Reservation, in the exercise of a preference right claimed by virtue of the act of August 18, 1894 (28 Stat., 372, 394),

should not be rejected for invalidity of bases assigned in support of such selections. In this case the selected lands lie in T. 44 N., R. 2 E., Coeur d'Alene land district, but the same status exists as to selections in T. 44 N., R. 3 E., in the same land district, and the rule to show cause and answer have the same application in either case.

This case was first brought to the consideration of the Department upon appeal of Stephen A. Thorpe *et al.* from a decision of the Commissioner of the General Land Office, March 27, 1906, holding for cancellation their homestead entries for lands in conflict with selections in the township first above named, and the issue then presented was the subject of departmental decision of June 27, 1907, whereby said decision of the Commissioner of the General Land Office was affirmed and the preference right claimed by the State sustained. Thorpe *et al. v. State of Idaho* (35 L. D., 640). See also *Williams v. State of Idaho* (36 L. D., 20), involving lands in said township 44 N., R. 3 E. Motions for review of these decisions were denied by the Department June 4, 1908 (36 L. D., 479; *Ib.*, 481). The departmental decisions above referred to definitely decided three propositions: (1) that upon the State's application for survey and the publication of notice of such application all lands not theretofore appropriated in that township were reserved from appropriation adverse to the State by operation of law from the date of such application until the expiration of sixty days from the filing of the township plat of survey, notwithstanding the Commissioner of the General Land Office had failed to cause notice of such application to be noted on the records of the local land office; (2) that the reservation was not limited to the area of the then unsatisfied portion of the State's grants; and (3) that lands so reserved were available for selection by the State in lieu of sections 16 and 36 within the Coeur d'Alene Indian Reservation and *ex necessitate* held that such sections constitute proper bases for selection.

Unrest and clamor by settlers upon and applicants to enter these selected lands, however, caused a request to be made to this Department on behalf of the State government for the suspension of said decisions pending a proposed adjustment of the claims of certain settlers, who, it was thought, had been misled by the failure of the Commissioner of the General Land Office to cause notation of the withdrawal of said lands upon the records of the local land office, and responsive thereto an order of suspension was made. Thereafter certain legislation was enacted by the State intended to effectuate this object, House Joint Resolution No. 10, which passed the Senate March 2, 1906, and a suit was brought to restrain the board of land commissioners from relinquishing these selected lands. That suit was successful. The supreme court of the State in the course of

its decision therein took occasion to observe that sections 16 and 36 in that State, whether surveyed or unsurveyed, within Indian or other reservations, were not available as bases for school indemnity selections. *Balderston v. Brady et al.* (107 Pac. Rep., 493). This declaration went to the very heart of the matter, for if such sections 16 and 36 were not valid bases for the exchange then the selections must fail. This Department was therefore constrained to cease making exchanges of that character.

The attorney general of the State, in view of the attitude of the Department, moved the court for a review and modification of its said decision, which was denied (108 Pac. Rep., 742, 743), and the rule against the board issued as above stated. Thereafter the legislature of the State undertook, by appropriate legislation, February 8, 1911 (Laws of Idaho, 1911, page 16), and March 4, 1911 (*Ib.*, 85), to correct the situation, and the supreme court, considering these legislative enactments, May 10, 1911, declared in the case of *C. B. Rogers v. James H. Hawley et al.* (115 Pac. Rep., 687, 692), that all objections to making these exchanges had been removed, and the State in its answer to the rule is relying upon such legislation, and later judicial expression, as sufficient authorization to the land department to carry said departmental decisions into effect.

As the case now stands the proceedings in the State courts of Idaho are as though they had never been. This Department has never had any doubt as to the validity of these selections. Its concern was because of the seeming declaration of invalidity pronounced by the court. The Department did not feel warranted in patenting lands to the State of Idaho in exchange for lands which the court of highest resort in that State had apparently declared could not be relinquished by the State land board. This difficulty has now been removed and it is not material whether the court changed its mind upon the question or whether the invalidity suggested by the court in the first instance has been cured by legislation. In either case no good reason remains why said departmental decisions should not be carried into effect. They are therefore hereby reaffirmed and the necessary steps will be taken to carry them into effect. In the adjustment of the State's grant, however, under those decisions, due regard will be had for the State's wishes in the matter of the protection of such equitable claims as may be, or have been, preferred by settlers who were misled by the failure of the Commissioner of the General Land Office to cause to be noted said withdrawals upon the records of the local land office.

PHOSPHATE AND OIL LANDS—SELECTIONS BY STATE OF IDAHO.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, March 22, 1913.

REGISTERS AND RECEIVERS,

United States Land Offices in Idaho.

SIRS: Your attention is called to the attached copy of an act of Congress approved February 27, 1913 (37 Stat., 687), entitled "An act to provide for selection by the State of Idaho of phosphate and oil lands."

This act permits, under certain restrictions, the selection by the State of Idaho, under its various grants, of lands which have been withdrawn or classified as phosphate or oil lands, or are valuable for phosphate or oil, if otherwise available.

Selections under the provisions of this act must have noted across the face of the application the following:

Application made in accordance with and subject to the provisions and reservations of the act of February 27, 1913 (Public—393).

You will, upon the notation on your records of the filing of such a selection, stamp on the tract book, on the same line with the entry, and as near the descriptions as practicable, "Phosphate and oil reserved to the United States, act of February 27, 1913," and on the margin of the plat, under the heading "Phosphate and oil reserved to the United States, act of February 27, 1913," you will write the description of the land in which the phosphate or oil deposit has been reserved to the United States.

If the State desires to dispute the classification, in any case, of lands classified as oil or phosphate, it may submit evidence, preferably the sworn statements of experts, that the land does not, in fact, contain oil or phosphates, together with an application for reclassification, in which event, you will transmit the application and evidence to this office. If reclassification be denied, the State may, within thirty days, apply for a hearing, at which it will be afforded an opportunity to show that the classification is improper, in which event it must assume the burden of proof. If the State should fail to apply for a hearing within the time allowed, the application to enter will be finally rejected, but this will not preclude the filing of a new application for the surface rights.

The proceedings on the hearing will be conducted in accordance with the rules of practice.

Very respectfully,

FRED DENNETT,

Commissioner.

Approved:

LEWIS C. LAYLIN,

Assistant Secretary.

[PUBLIC—No. 393.]

AN ACT To provide for selection by the State of Idaho of phosphate and oil lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act unreserved public lands of the United States in the State of Idaho which have been withdrawn or classified as phosphate or oil lands, or are valuable for phosphates or oil, shall, if otherwise available under existing law, be subject to selection by the State of Idaho under indemnity and other land grants made to it by Congress whenever such selections shall be made with a view of obtaining or passing title, with a reservation to the United States of the phosphates and oil in such lands, and of the right to prospect for, mine, and remove the same.

SEC. 2. That the State of Idaho, when applying to select lands classified as phosphate or oil lands, or valuable for phosphates or oil, with a view to securing or passing title to the same in accordance with the provisions of the indemnity and other granting acts, shall state in the application for selection that same is made in accordance with and subject to the provisions and reservations of this act.

SEC. 3. That upon satisfactory proof of full compliance with the provisions of the laws under which selection is made and this act, the State shall, upon approval of the selection by the Secretary of the Interior, be entitled to have the lands certified to it, with a reservation to the United States of all the phosphates and oil in the land so certified, together with the right in the United States, or persons authorized by it, to prospect for, mine, and remove the same; but before any person not acting for the United States shall be entitled to enter upon the lands certified for the purpose of prospecting for phosphates or oil he shall furnish, subject to approval by the Secretary of the Interior, a bond or undertaking as security for the payment of all damages to the crops and improvements on said lands by reason of such prospecting for phosphates or oil. Any person who has acquired from the United States the oil or phosphate deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the oil or phosphate therefrom and mine and remove the oil or phosphate upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: *Provided*, That nothing herein contained shall be held to deny or abridge the right of the State of Idaho to present and have prompt consideration of applications to select lands, which have been classified as oil or phosphate lands, with a view to disproving such classification and securing a certificate without reservation: *And provided further*, That the reserved phosphate and oil deposits in approved selections under this act shall not be subject to exploration or entry, other than by the United States, except as hereinafter authorized by Congress.

Approved, February 27, 1913.

INSTRUCTIONS.

FOREST RESERVE HOMESTEADS—SURVEY—AREA AND LENGTH.

Any forest reserve homestead listed under the act of June 11, 1906, which does not exceed 160 acres in area and which may be contained in a square mile the sides of which extend in cardinal directions, will be regarded as within the provisions of said act limiting such homestead entries to "not exceeding 160 acres in area and not exceeding one mile in length."

Assistant Secretary Laylin to the Commissioner of the General Land Office, March 24, 1913.

The act of June 11, 1906 (34 Stat., 233), provides that the Secretary of Agriculture may, in his discretion, list and describe, by metes and bounds, lands within national forests determined by him to be chiefly valuable for agriculture, and file such lists and descriptions with the Secretary of the Interior, to the end that the lands may be opened to entry under the provisions of the homestead laws "and this act." The act further requires that upon the filing of any such list or description—

the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length.

Regulations approved under said act October 16, 1909 (38 L. D., 278), give directions to United States surveyors-general as to procedure in the making and filing of surveys of such claims listed by metes and bounds descriptions, but contain no instructions as to the method of determining or limiting the extreme length of claims so listed and surveyed.

In the Forest Service field programme for September, 1908, the Department of Agriculture advised its officers that the following instructions of the act of June 11, 1906, as to length of homesteads under said act had been adopted:

Any tract not exceeding one hundred and sixty acres in area which may be contained in a square mile, the sides of which extend in cardinal directions, is understood to be within the meaning of the law. As shown in the accompanying illustrations of tracts which might properly be recommended for listing this makes it possible in many cases to allow an applicant a much greater amount of strictly agricultural land lying along creeks and narrow valleys than would be possible under a narrower interpretation of the term "one mile in length." These illustrations represent sections or approximate sections. Care should be exercised, however, to deny or limit applications which may involve water monopoly.

In February, 1911, there was returned to your office the survey of a homestead claim in Colorado (No. 42) in the shape of an irregular parallelogram, with one line 85 chains long. The claim would be, however, contained within an area one mile square and therefore in

conformity with the Forest Service instructions above quoted. Your office, however, on August 15, 1911, held that the claim was within the meaning of the act of June 11, 1906, more than one mile in length, and instructed the surveyor-general in future cases to see that no such surveys were made or approved.

The Associate Forester took the matter up with your office, with the idea of obtaining, if possible, a modification of said letter and the return to the former practice.

You now submit to the Department a lengthy and carefully prepared draft of letter, addressed to the Secretary of Agriculture, which proposes that in such cases a rule of measurement along some medial line of the claim be adopted, and the following is suggested:

The distance between extreme end lines of a claim will not exceed 80 chains, to be measured from the mid-point of one of the end lines to the mid-point of the end line farthest distant from said line, following, as near as may be, the center line of the claim, and not crossing any of its intervening boundaries. Any laterals or spurs may be included which do not make the limit of distance between farthest points over 80 chains, or increase the aggregate area beyond 160 acres.

It is also suggested in said letter that entries of long narrow strips of land are not in general consistent with public interests, and that when it can be done the width of such claims should not be less than 10 chains.

The purpose of the legislation creating and maintaining national forests was to reserve lands valuable for their timber or for the production of timber for the public use and benefit, leaving, however, agricultural areas of the public domain, so far as possible, unreserved and subject to homestead entry. In the very nature of things, however, small areas of lands chiefly valuable for agriculture were necessarily included within the outboundaries of national forests. To permit the disposition of these areas to homesteaders where such disposal would not interfere with the proper maintenance and use of national forests, the legislation of June 11, 1906, was had, and in providing that the Secretary of Agriculture might list such lands, whether upon surveyed or unsurveyed areas, by metes and bounds, Congress recognized the fact that many of these small agricultural areas would lie in irregular form and should be disposed of in that manner. As a matter of fact, it frequently happens that such areas are in long narrow strips along the banks of streams or in coves or irregularly shaped depressions among the hills. To arbitrarily require that homesteads listed and surveyed under the provisions of this act should be in the form of squares or parallelograms, or should have parallel end lines, as is the case with mining claims, would partially defeat the purpose of the law and render it necessary, in many cases, to exclude agricultural lands and to include lands not valuable

therefor. The statute does not prescribe the method of measurement to be followed in ascertaining the length, simply requiring that the claims shall not exceed "one mile in length." Any method of measurement adopted where the claims are irregular in form must necessarily be arbitrary, and it is believed that the Department has, under the law, ample discretion to adopt such a method as will best subserve the purpose and intent of the statute and the interests of the homestead claimants and the national forests in which the claims are situated. The so-called mile-square control method of determination is simple and affords ample discretion to the Secretary of Agriculture and his subordinates in selecting and listing for entry such agricultural lands, while at the same time preventing an unreasonable extension of long and narrow claims over the lands reserved. Measuring due north and south or due east and west across claims listed and surveyed within a square mile, the claims will in no instance exceed one mile in length, and this is believed to conform to the intent and requirement of the statute.

You are accordingly directed in future to recognize and approve surveys of forest homesteads listed under the act of June 11, 1906, which conform to the construction given the act by the Department of Agriculture in September, 1908, and to recall any contrary instructions given by you to surveyors-general.

FREE USE OF TIMBER ON NONMINERAL PUBLIC LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 25, 1913.

To settlers and residents of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, Nevada, Utah, Arizona, New Mexico, California, Oregon, and Washington, and to Chiefs of Field Divisions and Special Agents of the General Land Office:

By the act of March 3, 1891 (26 Stat., 1093), as extended by the acts of February 13, 1893 (27 Stat., 444), July 1, 1898 (30 Stat., 618), and March 3, 1901 (31 Stat., 1436), it is provided that in the States of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, Nevada, Utah, Arizona, New Mexico, California, Oregon, and Washington:

In any criminal prosecution or civil action by the United States for a trespass on such public timberlands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timberland for use in such State or Territory by a resident

thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain: *Provided*, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

The act of March 3, 1891, *supra*, originally extended to the District of Alaska, but it has been superseded in that respect by section 11 of the act of May 14, 1898 (30 Stat., 414), under which separate regulations are prescribed for that district.

The act of March 3, 1891, *supra*, does not confer upon anyone the right to cut and remove timber from nonmineral public lands, but, on the contrary, merely provides that such timber may be cut and removed for agricultural, mining, manufacturing, or domestic purposes as the Secretary of the Interior may permit and from such lands as he shall designate in accordance with suitable rules and regulations which he may from time to time promulgate. The aforesaid act did not intend to provide a defense to anyone who cuts and removes timber on nonmineral public lands unless the cutting and removal was in accordance with prescribed rules and regulations, otherwise the cutting must be considered a trespass.

In accordance with the authority expressly conferred upon the Secretary of the Interior by the terms of the act of March 3, 1891, *supra*, settlers upon public lands and other residents of the States above named are hereby granted the privilege of cutting and removing, free of charge, timber from unoccupied, unreserved, nonmineral public lands within said States, strictly for their own use when actually needed for firewood, fencing, building, or other agricultural, mining, manufacturing, and domestic purposes, under the following conditions:

1. Timber not to exceed \$50 in stumpage value in any one continuous period of 12 months may be cut and removed without the previous filing of an application therefor, provided that the person desiring the timber shall first notify the proper chief of field division of the General Land Office by registered letter that he intends to cut timber on vacant, unreserved, nonmineral public lands, and shall set forth therein the kind and quantity of timber to be cut and a description of the land on which the cutting is to be done, by township and range and by section and sectional subdivision thereof, if it be surveyed, or by natural objects sufficient to identify the land, if it be unsurveyed.

2. Where a greater quantity of timber than that specified in the preceding paragraph is desired during any one continuous period of 12 months, an application must first be filed with the chief of field division on a form to be furnished by him on request, and permission to cut the timber applied for may be granted by him, subject to revocation or revision by the Commissioner of the General Land Office, if in his opinion the applicant is a qualified beneficiary under the act of March 3, 1891, and actually needs the timber applied for; provided, however, that a license shall not be granted by a chief of field division permitting the cutting of timber exceeding \$200 in stumpage value during any one continuous period of 12 months.

3. Permission to cut an amount of timber exceeding \$200 in stumpage value during any one continuous period of 12 months shall be granted only upon showing of special necessity therefor, and upon direct approval by the Secretary of the Interior.

4. Where one or more persons, desiring timber under the provisions of the act of March 3, 1891, are not in a position to procure the same for themselves, an agent or agents may be appointed for that purpose. Such agent or agents shall not be paid more than a fair recompense for the time, labor, and money expended in procuring the timber and manufacturing the same into lumber, and no charge shall be made for the timber itself, and, where the aggregate amount of timber to be cut during any one continuous period of 12 months exceeds \$50 in stumpage value, said compensation must be set forth in a written contract to be entered into by the parties, and a copy thereof must be filed with the application.

5. Where a number of qualified persons combine and employ the same agent or agents to cut or manufacture the timber applied for, an application must be filed if the aggregate amount of timber to be cut in any one continuous period of 12 months together with all amounts previously cut by or for any one or more of the said applicants during the same period exceeds \$50 in stumpage value. This rule shall also be applicable where the agent or agents cut for a number of persons but under individual contracts with them.

6. The proper protection of the timber and undergrowth necessarily varies with the nature of topography, soil, and forests. No timber not matured may be cut, and each tree taken must be utilized for some beneficial domestic purpose. Persons taking timber for specific purposes will be required to take only such matured trees as will work up to such purpose without unreasonable waste. All brush, tops, lops, and other forest débris made in felling and removing timber under these rules and regulations shall be disposed of as best adapted to the protection of the remaining growth and in such manner as shall be prescribed by the chief of field division, and failure on the part of an applicant, or an agent cutting for an applicant, to comply with this

requirement will render him liable for all expenses incurred by the chief of field division in putting this regulation into effect.

7. In every case where timber is to be procured through the medium of an agent, and said agent is a sawmill operator, and the amount of timber applied for exceeds \$50 in stumpage value a bond equal to three times the amount of the stumpage value of the timber applied for will be required, conditioned on the faithful performance of the requirements contained in these rules and regulations and of the above-referred-to agreement entered into between the special agent and the beneficiary or beneficiaries of the cutting relative to the disposal of the refuse.

8. Permits granted under these instructions shall limit the area of the cutting so as to embrace only as much land as is necessary to produce the quantity of timber applied for, and the lands to be cut over shall be so described in the application that they may be identified from the description set forth. Waste of timber will be discountenanced. Stumps will be cut so as to cause the least possible waste, and all trees will be utilized to as low a diameter in the tops as possible.

9. Applications filed under the above act shall set forth the names and legal residences of persons applying to fell and remove timber thereunder and the names and legal residences of persons who are to use the same. If the applicant be a corporation, the application shall set forth the State in which the corporation was incorporated. It shall also contain the amount of timber required by each applicant, the use to be made thereof, a description of the land from which the timber is to be cut, and the date it is desired to begin cutting. The application must be verified by an applicant.

10. The application when executed is to be filed with the chief of field division for the division in which the land on which the cutting is to be done is situated. He shall note upon the application the date when said application was filed in his office and immediately cause an investigation to be made in compliance with the instructions contained in circular of August 21, 1907 (86 L. D., 73). He shall also set forth in his report the stumpage value of the timber applied for. If the cutting is to be done by a sawmill operator he shall require a bond to be filed with him as above set forth. Upon the completion of an investigation the chief of field division shall note upon the application the action taken by him and shall then transmit the application and bond, if a bond be required, together with a report thereupon, and a copy of the license, if one be granted, to the Commissioner of the General Land Office. The report shall contain the agreement relative to the disposition of the tops, lops, and other débris, and when a bond is required said agreement shall be incorporated into the bond.

11. A permit granted by a chief of field division shall be subject to annulment or revision by the Commissioner of the General Land Office, and all rights and privileges thereunder shall terminate at the expiration of the period of one year from the date of the granting of the permit by the chief of field division. Persons who commence cutting upon receipt of a permit from a chief of field division before final approval by the Commissioner of the General Land Office will be liable to the Government for a reasonable stumpage value for timber so taken in the event that the permit is not finally approved because improperly granted. Where permits are secured by fraud, or immature trees are taken, or timber is not taken or used in accordance with the terms of the law or these rules and regulations, the Government will enforce the same civil and criminal liabilities as in other cases of timber trespass upon public lands.

12. Timber cut under these rules and regulations is not to be exported from the State in which it is cut, except as authorized by the act of July 1, 1898 (30 Stat., 618), providing for the export of timber from a specified area in the State of Wyoming into the State of Idaho, and by the act of March 3, 1901 (31 Stat., 1439), providing for the export of timber from a specified area in the State of Montana into the State of Wyoming.

13. The cutting of timber for sale and speculation or for use by others than those who apply for the same is strictly prohibited by these rules and regulations.

14. These rules and regulations shall be in force from and after March 25, 1913, and supersede the rules and regulations contained in circular of February 10, 1900. (29 L. D., 572.)

Respectfully,

FRED DENNETT,
Commissioner.

Approved:

LEWIS C. LAYLIN,
Assistant Secretary.

APPENDIX.

AN ACT Prohibiting timber deprecations 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 the timber from any public lands. (Sec. 49 of the Penal Code, approved March 4, 1909, 35 Stat., 1088, ch. 321.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, as amended by an act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page one thousand and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended as follows: After the word "Wyoming" in said amended act insert the words "New Mexico and Arizona." Approved February 13, 1893 (27 Stat., 444).

That section eight of an act entitled "An act to repeal the timber-culture laws, and for other purposes, approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended as follows: That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of the eighth section of the act of March third, eighteen hundred and ninety-one, to citizens of Idaho and Wyoming to cut timber in the State of Wyoming, west of the Continental Divide, on the Snake River and its tributaries to the boundary line of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho. (30 Stat., 618.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of chapter five hundred and fifty-nine of the Revised Statutes of the United States, approved March third, eighteen hundred and ninety-one, limiting the use of timber taken from public lands to residents of the State in which such timber is found, for use within said State, shall not apply to the south slope of Pryor Mountains, in the State of Montana, lying south of the Crow Reservation, west of the Big Horn River, and east of Sage Creek; but within the above-described boundaries the provisions of said chapter shall apply equally to the residents of the States of Wyoming and Montana, and to the use of timber taken from the above-described tract in either of the above-named States.

Approved March 3, 1901 (31 Stat., 1439).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, as amended by an act approved March third, eighteen hundred and ninety-one, chapter five hundred and fifty-nine, page one thousand and ninety-three, volume twenty-six, United States Statutes at Large, be, and the same is hereby, amended as follows: After the word "Nevada" in said amended act insert the words "California, Oregon, and Washington."

Approved March 3, 1901 (31 Stat., 1436).

For law and rules and regulations governing free use of timber upon vacant, public, mineral lands, see act of June 3, 1878, chapter

150 (20 Stat., 88), and circular No. 222 dated March 25, 1913 (42 L. D., 30).

The right to cut timber on the public domain is exceptional and the statutes must be strictly construed. See *Northern Pacific Railway Co. v. Lewis* (162 U. S., 366).

THOMAS J. KEOGH.

Decided March 25, 1913.

REPAYMENT—TIMBER AND STONE APPLICATION—RELINQUISHMENT.

Where the record in a government proceeding against a timber and stone sworn statement fairly shows fraud or attempted fraud in connection with the application for entry, and the applicant files his relinquishment and makes application for repayment, without any attempt to disprove or overcome the charges and showing against him, such action on his part is held to be an admission of the matters charged and shown by the record, and his application for repayment will be rejected, without prejudice to his right to file application for a hearing, if he so desires, supported by a showing upon the matter of fraud or attempted fraud in connection with his sworn statement.

LAYLIN, *Assistant Secretary*:

Appeal is filed by Thomas J. Keogh from decision of May 15, 1912, of the Commissioner of the General Land Office denying the application for repayment filed by said Keogh of the moneys paid by him on his timber and stone sworn statement filed August 10, 1908, on which proof was submitted October 12, 1908, receipt issuing November 6, 1908, for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 15, T. 9 S., R. 35 E., B. M., Blackfoot, Idaho, land district, relinquished January 12, 1912.

This application was denied for the stated reason that fraud or attempted fraud by Keogh was involved in this case.

No certificate issued herein, protest being made against the proof, and adverse proceedings were directed November 20, 1909, upon the charge that the land is not chiefly valuable for its timber and stone. Keogh was notified and answered denying the truth of said charge and asking a hearing, which was ordered but no hearing was had, and after several continuances Keogh relinquished following a talk with a Government timber cruiser who had again examined the land and found the timber thereon to be worth but \$53.60 and the land itself \$58.

The proof shows that this land is wholly unfit for cultivation because of its uneven and stony character, and has value only for its timber, which the entryman stated amounted to 100,000 feet valued at \$250.

No showing was made in support of this application for repayment. The Commissioner's finding was based in part upon the proof submitted and in part upon reports by special agents tending to show that Keogh, who is engaged in the stock business, applied for entry for grazing purposes, to which only the land appears to be adapted, and that he is involved also in six other similar cases wherein the lands have been relinquished and applications for repayment filed, and in which also the charge was made that the entries were for Keogh's benefit.

The reports made show that all these lands are good grazing lands, with timber insignificant in amount or value.

Repayment could only be allowed in this case under the act of March 26, 1908 (35 Stat., 48), providing for repayment in cases of rejected applications, entries, or proofs where there was no fraud or attempted fraud in connection with such application. By relinquishing in the face of the charge made, this applicant impliedly admitted the truth of said charge, and in legal effect the application and proof herein were rejected within the purview of said act.

Keogh is accordingly entitled to repayment in the absence of fraud or attempted fraud in connection with his application. From the reports made on his case, it appears he grossly overvalued, in his proof, the timber on this land and that the land is not chiefly valuable for its timber, as stated in the application and proof, also that he applied for the land not because and for the use particularly of the timber thereon, as also stated in the proof, but because of the grazing value and for the grazing use of the land. He appears, therefore, to have misrepresented, in his proof, material facts as to the character, value, usefulness, and intended use of the land. Repayment is not warranted on such showing of fraud or attempted fraud in connection with an application and proof.

It is earnestly urged in this appeal that Keogh has been adjudged guilty of fraud or attempted fraud wholly upon *ex parte* showing and without opportunity to him to be heard and that such procedure is unwarranted. The Department cannot concur in this conclusion. While fraud was not directly involved in the charge upon which the adverse proceedings, pending which Keogh relinquished, were based, and his relinquishment, therefore, cannot be taken as an admission that there was fraud or attempted fraud in his case, the question of fraud or attempted fraud is directly involved in an application for repayment under said act of March 26, 1908. That act allows repayment only upon the specific condition that there was no fraud or attempted fraud in the case, and an applicant for its benefits must affirmatively appear to have been free from such fraud or attempted fraud before repayment is warranted. While such applicant is entitled to a presumption of his good faith in the premises, where he

applies for repayment, after relinquishing while adverse proceedings were pending against his application and proof, and, as in this case, makes no showing whatever as to the absence of fraud or attempted fraud in connection with such application for entry, and the reports upon which said adverse proceedings were based, considered with said application for entry and proof, fairly show such fraud or attempted fraud, repayment would not be warranted, nor would the rejection, without a hearing, of an application for repayment upon such a record presented, no hearing being asked or showing made by the applicant as to the matter of fraud or attempted fraud in the case of his application for entry, be the denial of any legal right. Hearing might be ordered by the land Department on its own motion, in the exercise of its judgment and discretion, in such cases; but under the circumstances presented in this case, Keogh not having applied for any hearing or made any showing as to the matter of fraud in connection with his application for entry, and the record presented as to such application clearly showing such fraud or attempted fraud in connection therewith, his application for repayment was properly rejected.

The decision appealed from is accordingly affirmed, without prejudice to Keogh filing, should he desire, request for a hearing supported by showing upon the matter of fraud or attempted fraud in connection with his sworn statement; whereupon, should he make such request and showing, hearing will be ordered and the case be thereafter further adjudicated.

THOMAS J. KEOGH.

Motion for rehearing of departmental decision of March 25, 1913, 42 L. D., 28, denied by Assistant Secretary Laylin, May 17, 1913.

FREE USE OF TIMBER ON MINERAL PUBLIC LANDS.

REGULATIONS.

**DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,**

Washington, D. C., March 25, 1913.

To settlers and residents of Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, North Dakota, South Dakota, Idaho, and Montana, and the Chiefs of Field Divisions and Special Agents of the General Land Office:

By the act of June 3, 1878, chapter 150 (20 Stat., 88), it is provided:

That all citizens of the United States and other persons, bona fide residents of the State of Colorado or Nevada, or either of the Territories of New Mexico,

Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide citizens, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

The act of June 3, 1878, *supra*, expressly declares that the Secretary of the Interior may prescribe rules and regulations for the protection of the timber upon the land of the character referred to in the act and an implied power is, therefore, conferred upon him to designate the sections or tracts of land where timber may be cut.

The following instructions shall govern with reference to timber cutting on vacant mineral public lands in the States named above.

1. Qualified persons, that is, *bona fide* residents of the States above named, may cut and remove timber free of charge from unoccupied, unreserved, mineral public lands within said States strictly for their own use for building, agricultural, mining, or other domestic purposes, but not for sale or disposal, nor for use by other persons, nor for export from the State in which the timber is situated and where the cutting or removal of timber or lumber does not exceed in stumpage value the amount of \$50 in any one continuous period of 12 months, the person desiring to cut and remove the timber may do so without making any previous application therefor: *Provided, however*, That he shall first notify the proper chief of field division by registered letter, in which he shall set forth the kind and quantity of timber which he intends to cut, and the use for which cut; and he shall also describe the land on which said cutting is to be done by township and range and by section and sectional subdivision thereof, if it be surveyed, or by natural objects sufficient to identify the land if it be unsurveyed.

2. Where a greater quantity of timber than that specified in the preceding paragraph is desired by any one person, or, where an agent, appointed for such purpose by one or a number of persons, desires to cut or remove more than \$50 worth of timber in any one continuous period of 12 months, application must first be made to the Commissioner of the General Land Office for the purpose of determining whether or not the cutting of the timber should be confined to any particular sections or tracts of land, and further for the purpose of according the Commissioner of the General Land Office in the event he should so desire an opportunity of directing how the tops and other refuse may be disposed of for the protection of the timber remaining and the prevention of forest fires. This regulation must

be observed in every case wherein the amount of timber to be cut in any one continuous period of 12 months exceeds \$50 in stumpage value, whether the person doing the cutting is acting for himself or as an agent for another or others. Whether or not an application must be filed is to be determined by the fact as to whether or not the aggregate amount of timber to be cut in any one continuous period of 12 months, together with all amounts previously cut by or for the said person or persons during the same period exceeds \$50 in stumpage value. This rule shall be applicable where the agent cuts for a number of persons under individual contracts entered into between him and them.

3. Where one or more persons desire to procure timber under this act through the services of an agent appointed for that purpose and the quantity to be procured in any one continuous period of 12 months exceeds \$50 in stumpage value, the amount to be paid the agent for his services shall not exceed a fair recompense for the time, labor, and money expended by him in the undertaking, and said compensation must be determined at the time of the appointment and must be set forth in the contract between the parties, a copy of which must be presented with the application.

4. The proper protection of the timber and undergrowth necessarily varies with the nature of the topography, soil, and forests. No timber not matured may be cut and each tree must be utilized for some beneficial purpose. Persons taking timber for specific purposes will be required to take only such matured trees as will work up to such purpose without unreasonable waste. All brush, tops, lops, and other forest débris made in felling and removing timber under these rules and regulations shall be disposed of as best adapted to the protection of the remaining growth and in such manner as shall be prescribed by the Chief of Field Division, and failure on the part of an applicant or an agent cutting for an applicant to comply with this requirement will render him liable for all expenses incurred by the Chief of Field Division in putting this regulation into effect.

5. Permits granted under these instructions shall limit the area of the cutting so as to embrace only as much land as is necessary to produce the quantity of timber applied for and the lands to be cut over shall be so described in the application that they may be identified from the description set forth. Waste of timber will be discounted. Stumps will be cut so as to cause the least possible waste, and all trees will be utilized to as low a diameter in the tops as possible.

6. In every case where timber is to be procured through the medium of an agent and said agent is a sawmill operator and the amount of timber applied for exceeds \$50 in stumpage value, a bond equal to the amount of the triple stumpage value of the timber applied for

will be required conditioned to the faithful performance of the requirements contained in these rules and regulations and of the above referred to agreement entered into between the special agent and the beneficiary or beneficiaries of the cutting relative to the disposal of the refuse.

7. Applications filed under the above act shall set forth the names and legal residence of persons applying to fell and remove timber thereunder and the names and legal residence of persons who are to use the same. If the applicant be a corporation, the application shall set forth the State in which the corporation was incorporated. It shall also contain the amount of timber required by each applicant; the use to be made thereof; a description of the land from which the timber is to be cut; the date it is desired to begin cutting; and, where the cutting is to be done through the medium of an agent, the contract price to be paid to said agent. The application must be verified by an applicant.

8. Blank forms for making applications may be procured from the chief of field division for the division in which the land on which the cutting is to be done is situated. The application when executed is to be filed with that chief of field division. Immediately upon receipt of said application the chief of field division shall cause an investigation to be made of the lands and of material statements in the application. With this respect he shall be guided by the instructions contained in circular of August 21, 1907 (36 L. D., 73). Said instructions as promulgated were intended to be applicable to investigations upon applications for the free use of timber on vacant, unreserved, nonmineral, public lands. They are hereby declared to be also applicable to investigations relative to the application for free use of timber upon vacant, unreserved, mineral, public lands. Whenever they are to be applied to the latter mentioned class of applications the term mineral will be used instead of the term nonmineral.

9. Upon completion of an investigation the chief of field division may, if he considers the facts warrant it, grant a license, subject to revocation or revision by the Commissioner of the General Land Office, and he shall transmit the application, together with a report thereupon, and a copy of the license if one be granted. The report shall show:

- (1) The description of the land to be cut over.
- (2) Whether the lands are mineral.
- (3) Whether the applicants are: (a) Qualified to fell and remove, and (b) authorized to use the timber applied for.
- (4) What percentage of the matured timber may be taken consistent with proper protection of the remaining timber and undergrowth.

(5) The method prescribed for the disposition of the tops, lops, and other débris.

10. The above-referred-to act and the rules and regulations contained herein authorize the cutting of timber from vacant, unreserved lands subject to mineral entry only. Lands subject to mineral entry are such lands as are known to contain such deposits of mineral as warrant a prudent person in expending his time or money in the reasonable expectation of developing a mine thereon, but where cutting is done in good faith by a qualified person supposedly in compliance with these instructions and it is subsequently determined that the land on which the cutting is done is nonmineral in character he may set up as a defense the act of March 3, 1891 (26 Stat., 1093), in such States as are covered by that act.

11. A permit granted by a chief of field division under these instructions shall be subject to annulment or revision by the Commissioner of the General Land Office, and all rights and privileges thereunder shall terminate at the expiration of the period of one year from the date of the granting of the permit by the chief of field division. Persons who commence cutting upon receipt of a permit from a chief of field division before final approval by the Commissioner of the General Land Office will be liable to the Government for a reasonable stumpage value for timber so taken in the event that the permit is not finally approved by the commissioner because improperly granted. Where permits are secured by fraud, or immature trees are taken, or timber is not taken or used in accordance with the terms of the law or these rules and regulations, the Government will enforce the same civil and criminal liabilities as in other cases of timber trespass upon public lands.

12. These rules and regulations shall be in force from and after March 25, 1913, and supersede the rules and regulations contained in circular of March 16, 1909 (37 L. D., 492).

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

LEWIS C. LAYLIN,
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 one thousand dollars, or imprisoned not more than one year, or both. Nothing in this section shall prevent any miner or agriculturalist 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. (Sec. 49 of the Penal Code, approved Mar. 4, 1909, 35 Stat., 1088, ch. 321.)

With reference to the act of June 3, 1878 (20 Stat., 88), the United States Supreme Court has said:

The instructions appear to us to have paid too little regard to the words of the act, defining the land on which it permits timber to be cut as "mineral, and not subject to entry under existing laws of the United States, except for mineral entry." As was said in *Northern Pacific R. R. Co. v. Lewis* (162 U. S., 366, 376), "The right to cut is exceptional and quite narrow," and the party claiming the right must prove it. The only lands excluded in 1878 or now from any but mineral entry are lands "valuable for minerals" or containing "valuable mineral deposits." (Rev. Stats., secs. 2318, 2319, 2302. See sec. 2320.) The matter was much discussed in *Davis v. Weibbold* (139 U. S., 507), and there it was said that the exceptions of mineral land from preemption and settlement, etc., "are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant." (p. 519.) A Land Department rule is quoted, with seeming approval, that "if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver" (pp. 521, 522), citing *United States v. Reed* (12 Sawy., 99, 104). Again it was said, "the exception of mineral lands from grant in the acts of Congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction" (p. 524). These are the tests to which the act of 1878 must be taken to refer, since it refers to and rests upon the statutes construed to adopt these tests. (*United States v. Plowman*, 216 U. S., 372.)

SUGGESTIONS TO HOMESTEADERS AND PERSONS DESIRING TO MAKE HOMESTEAD ENTRIES.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 26, 1913.

1. Persons desiring to make homestead entries should first fully inform themselves as to the character and quality of the lands they desire to enter, and should in no case apply to enter until they have visited and fully examined each legal subdivision for which they

make application, as satisfactory information as to the character and occupancy of public lands can not be obtained in any other way.

As each applicant is required to swear that he is well acquainted with the character of the land described in his application, and as all entries are made subject to the rights of prior settlers, the applicant can not make the affidavit that he is acquainted with the character of the land, or be sure that the land is not already appropriated by a settler, until after he has actually inspected it.

Information as to whether a particular tract of land is subject to entry may be obtained from the register or receiver of the land district in which the tract is located, either through verbal or written inquiry, but these officers must not be expected to give information as to the character and quality of unentered land or to furnish extended lists of lands subject to entry, except through plats and diagrams which they are authorized to make and sell as follows:

For a township diagram showing entered land only-----	\$1.00
For a township plat showing form of entries, names of claimants, and character of entries-----	2.00
For a township plat showing form of entries, names of claimants, character of entry, and number-----	3.00
For a township plat showing form of entries, names of claimants, character of entry, number, and date of filing or entry, together with topography, etc-----	4.00

Purchasers of township diagrams are entitled to definite information as to whether each smallest legal subdivision, or lot, is vacant public land. Registers and receivers are therefore required in case of an application for a township diagram showing vacant lands to plainly check off with a cross every lot or smallest legal subdivision in the township which is not vacant, leaving the vacant tracts unchecked. There is no authority for registers and receivers to charge and receive a fee of 25 cents for plats and diagrams of a section or part of a section of a township.

If because of the pressure of current business relating to the entry of lands registers and receivers are unable to make the plats or diagrams mentioned above, they may refuse to furnish the same and return the fee to the applicant, advising him of their reason for not furnishing the plats requested, that he may make the plats or diagrams himself, or have same made by his agent or attorney, and that he may have access to the plats and tract books of the local land office for this purpose, provided such use of the records will not interfere with the orderly dispatch of the public business.

A list showing the general character of all the public lands remaining unentered in the various counties of the public-land States on the 30th day of the preceding June may be obtained at any time by addressing "The Commissioner of the General Land Office, Washington, D. C."

All blank forms of affidavits and other papers needed in making application to enter or in making final proofs can be obtained by applicants and entrymen from the land office for the district in which the land lies.

2. *Kind of land subject to homestead entry.*—All unappropriated surveyed public lands adaptable to any agricultural use are subject to homestead entry if they are not mineral or saline in character and are not occupied for the purposes of trade or business and have not been embraced within the limits of any withdrawal, reservation, or incorporated town or city, but homestead entries on lands within certain areas (such as lands in Alaska, lands withdrawn under the reclamation act, certain ceded Indian lands, lands within abandoned military reservations, agricultural lands within national forests, lands in western and central Nebraska, and lands withdrawn, classified, or valuable for coal) are made subject to the particular requirements of the laws under which such lands are opened to entry. None of these particular requirements are set out in these suggestions, but information as to them may be obtained by either verbal or written inquiries addressed to the register and receiver of the land office of the district in which such lands are situated.

HOW CLAIMS UNDER THE HOMESTEAD LAW ORIGINATE.

3. Claims under homestead laws may be initiated either by settlement on surveyed or unsurveyed lands of the kind mentioned in the foregoing paragraph, or by the filing of a soldier's or sailor's declaratory statement, or by the presentation of an application to enter any surveyed lands of that kind.

4. Settlement is initiated through the personal act of the settler placing improvements upon the land or establishing residence thereon; he thus gains the right to make entry for the land as against other persons. A settlement on any part of a surveyed quarter section subject to homestead entry gives the right to enter all of that quarter section, but if a settler desires to initiate a claim to surveyed tracts which form a part of more than one technical quarter he should define his claim by placing some improvements on each of the smallest subdivisions claimed. When settlement is made on unsurveyed lands the settler must plainly mark the boundaries of all lands claimed. Within a reasonable time after settlement actual residence must be established on the land and continuously maintained. Entry should be made within three months after settlement upon surveyed lands or within that time after the filing in the local land office of the plat of survey of lands unsurveyed when settlement was made. Otherwise, the preference right of entry may be lost. Under the act of August 9, 1912 (37 Stat., 267), settlement right on not exceeding

320 acres of lands designated by the Secretary of the Interior as subject to entry under the enlarged-homestead law may be obtained by plainly marking the exterior boundaries of all lands claimed, whether surveyed or unsurveyed, followed by the establishment of residence, except as to lands designated under section 6 of said acts, where residence is not required, but where the settlement right is required to be initiated by plainly marking the exterior boundaries of the land claimed and the placing and maintenance of valuable improvements thereon.

5. Soldiers' and sailors' declaratory statements may be filed in the land office for the district in which the lands desired are located by any persons who have been honorably discharged after 90 days' service in the Army or Navy of the United States during the War of the Rebellion or during the Spanish-American War or the Philippine insurrection. Declaratory statements of this character may be filed either by the soldier or sailor in person or through his agent acting under a proper power of attorney, but the soldier or sailor must make entry of the land in person, and not through his agent, within six months from the filing of his declaratory statement, or he may make entry in person without first filing a declaratory statement if he so chooses. If a declaratory statement is filed by a soldier or sailor in person, it must be executed by him before one of the officers mentioned in paragraph 16, in the county or land district in which the land is situated; if filed through an agent, the affidavit of the agent must be executed before one of the officers above mentioned, but the soldier's affidavit may be executed before any officer using a seal and authorized to administer oaths and not necessarily within the county or land district in which the land is situated.

BY WHOM HOMESTEAD ENTRIES MAY BE MADE.

6. Homestead entries may be made by any person who does not come within either of the following classes:

- (a) Married women, except as hereinafter stated.
- (b) Persons who have already made homestead entry, except as hereinafter stated.
- (c) Foreign-born persons who have not declared their intention to become citizens of the United States.
- (d) Persons who are the owners of more than 160 acres of land in the United States.
- (e) Persons under the age of 21 years who are not the heads of families, except minors who make entry as heirs, as hereinafter mentioned, or who have served in the Army or Navy during the existence of an actual war for at least 14 days.

(f) Persons who have acquired title to or are claiming, under any of the agricultural public-land laws, through settlement or entry made since August 30, 1890, any other lands which, with the lands last applied for, would amount in the aggregate to more than 320 acres.

7. A married woman who has all of the other qualifications of a homesteader may make a homestead entry under any one of the following conditions:

(a) Where she has been actually deserted by her husband.

(b) Where her husband is incapacitated by disease or otherwise from earning a support for his family and the wife is really the head and main support of the family.

(c) Where the husband is confined in a penitentiary and she is actually the head of the family.

(d) Where the married woman is the heir of a settler or contestant who dies before making entry.

(e) Where a married woman made improvements and resided on the lands applied for before her marriage, she may enter them after marriage if her husband is not holding other lands under an unperfected homestead entry at the time she applies to make entry.

8. If an entryman deserts his wife and abandons the land covered by his entry, his wife then has the exclusive right to contest the entry if she has continued to reside on the land, and on securing its cancellation she may enter the land in her own right, or she may continue her residence and make proof in the name of and as the agent for her husband, and patent will issue to him.

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.

10. The marriage of the entrywoman after making entry will not defeat her right to acquire title if she continues to reside upon the land and otherwise comply with the law. A husband and wife can not, however, maintain separate residences on homestead entries held by each of them, and if, at the time of marriage, they are each holding an unperfected entry on which they must reside in order to acquire title, they can not hold both entries. In such case they may elect which entry they will retain and relinquish the other.

11. A widow, if otherwise qualified, may make a homestead entry notwithstanding the fact that her husband made an entry and notwithstanding she may be at the time claiming the unperfected entry of her deceased husband.

12. A person serving in the Army or Navy of the United States may make a homestead entry if some member of his family is residing on the lands applied for, and the application and accompanying affi-

davits may be executed before the officer commanding the branch of the service in which he is engaged.

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

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

(b) By a homestead entryman who, prior to May 17, 1900, paid the Indian price of lands to which he would have been afterwards entitled to receive patent without payment under the "free-homes act."

(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 received 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 otherwise qualified, who has made final proof for less than 160 acres under the homestead laws, may make an additional entry for such an amount of public lands as will, when added to the amount for which he has already made proof, not exceed in the aggregate 160 acres. Residence, cultivation, and improvement must be performed as in the case of an original entry.

(f) Each application for second or additional entry must give the date and number of the former entry and the land office at which it was made, or the section, township, and range in which the land entered was located. Any person coming within paragraphs (a), (b), or (c) must also give date when the former entry was perfected. Any person coming within paragraph (e) must show by the affidavit of himself and some other person or persons the date 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 coming within paragraph (d) must, in addition to the evidence above specified, show in his

corroborated affidavit the grounds on which he seeks relief, and that he used due diligence prior to entry to avoid mistake.

(g) A person who has made, lost, forfeited, or abandoned an entry of less than 160 acres is not entitled to 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.

14. An additional homestead entry may be made by a person for such an amount of public lands adjoining lands then held and resided upon by him under his original entry as will, when added to such adjoining lands, not exceed in the aggregate 160 acres. An entry of this kind may be made by any person who has not acquired title to and is not, at the date of his application, claiming under any of the agricultural public-land laws, through settlement or entry made since August 30, 1890, any other lands which, with the land then applied for, would exceed in the aggregate 320 acres, but the applicant will not be required to show any of the other qualifications of a homestead entryman. See, however, instructions under the enlarged homestead act (par. 47).

15. An adjoining farm entry may be made for such an amount of public lands lying contiguous to lands owned and resided upon by the applicant as will not, with the lands so owned and resided upon, exceed in the aggregate 160 acres; but no person will be entitled to make entry of this kind who is not qualified to make an original homestead entry. A person who has made one homestead entry, although for a less amount than 160 acres, and perfected title thereto, is not qualified to make an adjoining farm entry.

HOW HOMESTEAD ENTRIES ARE MADE.

16. A homestead entry may be made by the presentation to the land office of the district in which the desired lands are situated of an application properly prepared on blank forms prescribed for that purpose and sworn to before either the register or the receiver, or before a United States commissioner, or a judge, or a clerk of a court of record, in the county or parish in which the land lies, or before any officer of the classes named who resides in the land district and nearest or most accessible to the land, although he may reside outside of the county in which the land is situated.

17. Each application to enter and the affidavits accompanying it must recite all the facts necessary to show that the applicant is acquainted with the land; that the land is not, to the applicant's knowledge, either saline or mineral in character; that the applicant possesses all of the qualifications of a homestead entryman; 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, persons, or corporation; that the applicant will faithfully and honestly endeavor to comply with the requirements of the law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that the applicant is not acting as the agent of any person, persons, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered or any part thereof; that the application is not made for the purpose of speculation, but in good faith to obtain a home for the applicant, and that the applicant has not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person or persons, corporation, or syndicate whatsoever by which the title he may acquire from the Government to the lands applied for shall inure, in whole or in part, to the benefit of any person except himself.

18. All applications by persons claiming as settlers must, in addition to the facts required in paragraph 17, state the date and describe the acts of settlement under which they claim a preferred right of entry, and applications by the widows, devisees, or heirs of settlers must state facts showing the death of the settler and their right to make entry, that the settler was qualified to make entry at the time of his death, and that the heirs or devisees applying to enter are citizens of the United States or have declared their intentions to become such citizens, but they are not required to state facts showing any other qualifications of a homestead entryman, and the fact that they have made a former entry will not prevent them from making an entry as such heirs or devisees, nor will the fact that a person has made entry as the heir or devisee of the settler prevent him from making an entry in his own individual right if he is otherwise qualified to do so.

19. All applications by soldiers, sailors, or their widows, or the guardians of their minor children should be accompanied by proper evidence of the soldier's or sailor's service and discharge and of the fact that the soldier or sailor had not, prior to his death, made an entry in his own right. The application of the widow of the soldier or sailor must also show that she is unmarried and that the right has not been exercised by any other person. Applications for the children of soldiers or sailors must show that the father died without having made entry, that the mother died or remarried without making entry, and that the person applying to make entry for them is their legally appointed guardian.

20. Applications for entry must be accompanied by the proper fee and commissions. (See par. 41.) A receipt for the money is at once issued, but this is merely evidence that the money has been paid and as to the purpose thereof. If the application is allowed and the entry placed of record, formal notice of this fact is issued on the

prescribed form; if the application is rejected or suspended, notice of such action is forwarded to the applicant as soon as practicable.

RIGHTS OF WIDOWS, HEIRS, OR DEVISEES UNDER THE HOMESTEAD LAWS.

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 minors are domiciled.

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.

23. If a contestant dies after having secured the cancellation of an entry his right as a successful contestant to make entry passes to his heirs; and if the contestant dies before he has secured the cancellation of the entry he has contested, his heirs may continue the prosecution of his contest and make entry if they are successful in the contest. In either case to entitle the heirs to make entry they must show that the contestant was a qualified entryman at the date of his death; and in order to earn a patent the heirs must comply with all the requirements of the law under which the entry was made, to the same extent as would have been required of the contestant had he made entry.

24. The unmarried widow, or, in case of her death or remarriage, the minor children of soldiers and sailors who were honorably discharged after 90 days' actual service during the War of the Rebellion, the Spanish-American War, or the Philippine insurrection may make entry as such widow or minor children if the soldier or sailor died without making entry, or failed to perfect an entry and was, at the time of his death, qualified to make another. The minor children must make a joint entry through their duly appointed guardian.

RESIDENCE AND CULTIVATION REQUIRED UNDER THE HOMESTEAD LAWS.

25. A homestead entryman is required to establish residence upon the land within six months after date of entry unless an extension of time is allowed, as explained in paragraph 35, and is required to maintain residence there for a period of three years. He may absent himself, however, for a portion of each year succeeding establishment of residence, as more fully explained in paragraph 26. Residence and cultivation in the case of an adjoining farm homestead or of an additional homestead entry for a tract contiguous to an original homestead entry may be maintained either upon the original or additional farm.

26. During each year, beginning with the date of establishment of actual residence, the entryman may absent himself from the land for one period of not exceeding five months, but the law does not authorize a number of shorter absences aggregating this period. In order to be entitled to this absence the entryman need not file application therefor, but must at the time he leaves the land file, by mail or otherwise, at the proper local land office, notice of time of leaving, and upon returning to the land must notify said office of the date of his return. A second period of absence immediately following the first, though in different years of residence, is not permitted by the law; there must be some substantial term of actual continuous residence between the periods of absence.

27. (a) Cultivation of the land for a period of three years is required. During the second year not less than one-sixteenth of the area entered must be actually cultivated, and during the third year and until final proof cultivation of not less than one-eighth is required. There must be actual breaking of the soil followed by planting, sowing of seed, and tillage for a crop other than native grasses. Summer fallowing or grazing of cattle can not be accepted. These requirements are applicable to all homesteads on which residence is required whether made under the general or enlarged homestead laws, but do not apply to homesteads made under the reclamation act or the so-called Kinkaid Act, applicable to Nebraska. As to

amount of cultivation required under section 6 of the enlarged homestead acts, see paragraphs 48 and 49.

(b) Where the amount of cultivation above indicated is impossible or would be unreasonable, the Secretary of the Interior may, on satisfactory showing, reduce the required amount. Such reduction will not be granted an account of physical or financial disabilities or misfortunes of the entryman. Applications for reduction (Form 4-007a) must be filed in the proper local land office within one year after date of entry, setting forth all pertinent facts regarding the physical and climatic conditions appertaining to the land; as to entries made before June 6, 1912, such applications must be filed prior to June 6, 1913.

(c) The homestead entryman must have a habitable house upon the land entered at the time of submitting proof. Other improvements should be of such character and amount as are sufficient to show good faith.

(d) By paragraph 18 of the instructions of July 15, 1912, the Secretary of the Interior (under his statutory authority to reduce the requirements as to cultivation) prescribed the following rule to govern action on proofs submitted under the new law, where the homestead entry was made prior to June 6, 1912:

Respecting cultivation necessary to be shown upon such an entry, in all cases where, upon considering the whole record, the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one-sixteenth for one year and of at least one-eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed.

(e) Entries made prior to June 6, 1912, may be perfected either by showing compliance with the laws then in force or with the requirements of the act of June 6, 1912.

(f) Where a qualified person settled upon a tract of unsurveyed public land, subject to settlement, prior to the passage of the act of June 6, 1912, but made entry after its enactment or shall hereafter make entry, he may elect to submit proof under said act or under the law existing when he established his residence upon the land. The filing of a formal election is not required, but the designation of three-year or five-year proof, in the notice to submit same, may constitute such election.

28. A soldier or sailor of one of the classes mentioned in paragraph 5 who makes entry as such must begin his residence and cultivation of the land entered by him within six months from the date of filing his declaratory statement, but if he makes entry without filing a declaratory statement he must begin his residence within six months after the date of the entry. Thereafter he must continue both residence and cultivation for such period as will, when added to the time

of his military or naval service (under enlistment or enlistments covering war periods), amount to three years; but if he was discharged on account of wounds or disabilities incurred in the line of duty, credit for the whole term of his enlistment may be allowed; however, no patent will issue to such soldier or sailor until there has been residence and cultivation by him for at least one year, nor until at least one-eighth of the land has been actually cultivated and a habitable house has been placed on the entry.

No credit can be allowed for military service where commutation proof is offered.

29. A soldier or sailor making entry during his enlistment in time of peace is not required to reside personally on the land, but may receive patent if his family maintain the necessary residence and cultivation until the entry is three years old or until it has been commuted; but a soldier or sailor is not entitled to credit on account of his military service in time of peace. If such soldier has no family, there is no way by which he can make entry and acquire title during his enlistment in time of peace.

30. Widows and minor orphan children of soldiers and sailors who make entry based on the husband's or father's military or naval service must conform to the requirements specified for the soldier or sailor in paragraph 28.

31. Persons who make entry as the widow, heirs, or devisee of settlers are not required to reside upon the land entered by them, but they must improve and cultivate it for such period as, added to the time during which the settler resided on and cultivated the land, will make the required period of three years, and the cultivation must be to the extent required by the law under which the proof is offered. Commutation proof may, however, be made upon showing 14 months' actual residence and cultivation had either by the settler or the heirs, devisee, or widow, or in part by the settler and in part by the widow, heirs, or devisee.

32. Persons succeeding as widow, heirs, or devisees to the rights of a homestead entryman are not required to reside upon the land covered by the entry, but they must cultivate it as required by law for such period as will, added to the entryman's period of compliance with the law, aggregate the required term of three years. They are allowed a reasonable time after the entryman's death within which to begin cultivation, proper regard being had to the season of the year at which said death occurred. If they desire to commute the entry, they must show a 14 months' period of such residence and cultivation on the part of themselves or the entryman, or both, as would have been required of him had he survived.

33. Homestead entrymen who have been elected to Federal, State, or county offices *after making entry* and establishing their actual

residence on the land are not required to continue such residence during their term of office if the administration of their *bona fide* official duties necessarily requires them to reside elsewhere than on the land, but they must continue the improvement and cultivation of the land for the statutory period. Such officeholder can not commute his entry unless he can show at least 14 months' actual residence on the land preceding date of final proof. A person who makes entry or establishes residence *after* he has been elected to office is not excused from maintaining residence, but must comply with the law in the same manner as though he had not been elected. Persons holding appointive offices are not entitled to the foregoing privileges.

34. Neither residence nor cultivation by an insane homestead entryman is necessary after he becomes insane, if such entryman made entry and established residence before he became insane and complied with the requirements of the law up to the time his insanity began. Proof on the entry may be submitted by his duly appointed guardian or committee after the expiration of three years from its date. If the entryman is an alien and has not been fully naturalized, evidence of his declaration of intention to become a citizen is sufficient.

35. (a) A homestead entryman is allowed additional time, not exceeding six months, for establishment of residence upon his entry where climatic reasons, sickness, or other unavoidable cause prevents establishing residence within the first six months after entry. Such extension will not be granted in advance, and no application therefor should be filed; but in the event adverse proceedings are started against his entry the homesteader may set forth the facts causing the delay in the establishment of residence, and on proper showing secure the benefit of the provision of law granting the extension of time. The entryman, however, is not entitled to any additional time within which to establish residence after the hindering cause is removed, but must thereafter promptly proceed to establish his residence.

(b) Leave of absence for one year or less may be granted by the register and receiver of the local land office to entrymen who have established actual residence on the lands in 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 on him by cultivation of the land. Applications for such leave of absence must be sworn to by the applicant and corroborated by at least one witness in the land district or county within which the entered lands are located before an officer authorized to administer oaths and having a seal. Applications must describe the entry and show the date of establishing residence on the land and the extent and character of the improvements and cultivation performed by applicant. It must also set forth fully the facts on which the claimant bases his right to leave of absence, and where sickness is

given as the reason a certificate signed by a reputable physician should be furnished if practicable.

COMMUTATION OF HOMESTEAD ENTRIES.

36. 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.

The entryman or his statutory successor submitting such proof, must show substantially continuous residence upon the land, and cultivation thereof, for a period of at least 14 months immediately preceding submission of proof or filing of notice of intention to submit same, and the existence of a habitable house upon the claim. The area actually cultivated must equal at least one-sixteenth of the entire acreage.

A person submitting commutation proof must, in addition to certain fees, pay the price of the land; this is ordinarily \$1.25 per acre, but is \$2.50 per acre for lands within the limits of certain railroad grants. The price of certain ceded Indian lands varies according to their location, and inquiry should be made regarding each specific tract.

Where commutation of an entry is made, full citizenship on the part of the claimant must be shown, no distinction being made between persons submitting such proofs and those submitting three-year proofs.

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 acts (post, par. 43 et seq.); entries allowed on 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); second entries allowed under the act of June 5, 1900 (31 Stat., 267); or second entries allowed under the act of May 22, 1902 (32 Stat., 203), when the former entry was commuted.

FINAL PROOFS ON HOMESTEAD ENTRIES.

37. Either final or commutation proof may be made at any time when it can be shown that residence and cultivation have been maintained in good faith for the required length of time and to the required extent. Proof under the act of June 6, 1912, must be submitted within five years after the date of the entry, while proof submitted under the law in force before that date must be made within seven years after the date of the entry. Failure to submit proof

within the proper period is ground for cancellation of the entry unless good reason for the delay appears; satisfactory reasons being shown, final certificate may be issued, and the case referred to the board of equitable adjudication for confirmation. See also paragraph 27*e*.

38. (a) Final proof must be made by the entrymen personally or their widows, heirs, or devisees, and can not be made by agents, attorneys in fact, administrators, or executors, except as explained in paragraphs 8, 9, 22, and 34. Final proof can be made only by citizens of the United States.

(b) Where entries are made and proof offered for minor orphan children of soldiers or sailors the minors may be represented by their guardian.

39. *How proofs may be made.*—Final or commutation proofs may be made before any of the officers mentioned in paragraph 16 as being authorized to administer oaths to applicants.

Any person desiring to make homestead proof should first forward a written notice of his desire to the register and receiver of the land office, giving his post-office address, the number of his entry, the name and official title of the officer before whom he desires to make proof, the place at which the proof is to be made, and the name and post-office addresses of at least four of his neighbors who can testify from their own knowledge as to facts which will show that he has in good faith complied with all the requirements of the law.

40. The register will furnish a notice naming the time and place for submission of proof to the claimant, who must cause same to be published at his expense once a week for five consecutive weeks preceding submission of proof in the newspaper designated by the register.

This notice must be published once a week for five consecutive weeks preceding submission of proof, and a copy thereof must be posted in a conspicuous place in the office of the register. The homesteader must arrange with the publisher for publication of the notice of intention to make proof and make payment therefor directly to him. The register will be responsible for the correct preparation of the notice.

On the day named in the notice the entryman must appear before the officer designated to take proof with at least two of the witnesses named in the notice; but if for any reason the entryman and his witnesses are unable to appear on the date named, the officer should continue the case from day to day until the expiration of 10 days, and the proof may be taken on any day within that time when the entryman and his witnesses appear, but they should, if it is at all possible to do so, appear on the day mentioned in the notice. Entrymen are

advised that they should, whenever it is possible to do so, offer their proofs before the register or receiver, as it may be found necessary to refer all proofs made before other officers to a special agent for investigation and report before patent can issue, while, if the proofs are made before the register or receiver, there is less likelihood of this being done, and there is less probability of the proofs being incorrectly taken. By making proof before the register or receiver the entrymen will also save the fees which they are required to pay other officers, as they will be required under the law to pay the register and receiver the same amount of fees in each case, regardless of the fact that the proof may have been taken before some other officer.

Entrymen are cautioned against improvidently and improperly commuting their entries, and are warned that any false statement made in either their commutation or final proof may result in their indictment and punishment for the crime of perjury.

FEES ON ENTRIES AND FINAL PROOFS.

41. *Fees and commissions.*—When a homesteader applies to make entry he must pay in cash to the receiver a fee of \$5 if his entry is for 80 acres or less, or \$10 if he enters more than 80 acres. And in addition to this fee he must pay, both at the time he makes entry and final proof, a commission of \$1 for each 40-acre tract entered outside of the limits of a railroad grant and \$2 for each 40-acre tract entered within such limits. Fees under the enlarged-homestead act are the same as above, but the commissions are based upon the area of the land embraced in the entry. (See paragraph 43.) Where an entry is commuted no commissions are payable, except in connection with certain ceded Indian lands, as to which inquiry must be made specifically at the proper local land offices. On all final proofs made before either the register or receiver, or before any other officer authorized to take proofs, the register and receiver are entitled to receive 15 cents for each 100 words reduced to writing, and no proof can be accepted or approved until all fees have been paid.

In all cases where lands are entered under the homestead laws in Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming the commissions due to the register and receiver on entries and final proofs, and the testimony fees under final proofs, are 50 per cent more than those above specified, but the entry fee of \$5 or \$10, as the case may be, is the same in all the States.

Remittances of moneys to the local land offices must be made in cash or currency; but certified checks when drawn in favor of the receiver of public moneys on national and State banks and trust companies, which can be cashed without cost to the Government, can

be used. Likewise, United States post-office orders are acceptable when they are made payable to the receiver and are drawn on the post office at the place where the receiver is located.

ALIENATION OF LAND BY HOMESTEADER.

42. The alienation of all or any part of the land embraced in a homestead prior to making proof, except for the public purposes mentioned in section 2288, Revised Statutes, will prevent the entryman from making satisfactory proof, since he is required to swear that he has not alienated any part of the land except for the purposes mentioned in section 2288, Revised Statutes.

A mortgage by the entryman prior to final proof for the purpose of securing money for improvements, or for any other purpose not inconsistent with good faith, is not considered such an alienation of the land as will prevent him from submitting satisfactory proof. In such a case, however, should the entry be canceled for any reason prior to patent, the mortgagee would have no claim on the land or against the United States for the money loaned.

Alienation after proof and before patent.—The right of a homestead entryman to patent is not defeated by the alienation of all or a part of the land embraced in his entry after the submission of final proof and prior to patent, provided the proof submitted is satisfactory. Such an alienation is, however, at the risk of the entryman, for if the reviewing officers of the land department subsequently find the final proof so unsatisfactory that it must be wholly rejected and new proof required, the entryman can not then truthfully make the nonalienation affidavit required by section 2291, Revised Statutes, and his entry must in consequence be canceled. The purchaser takes no better title than the entryman had, and if the entry is canceled the purchaser's title must necessarily fail.

ENLARGED HOMESTEADS.

43. The acts of February 19, 1909, June 17, 1910, and June 13, 1912 (37 Stat., 132), extending the first-named act to North Dakota and California, provide for the making of homestead entries for areas of not exceeding 320 acres of public lands in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington, and Wyoming, designated by the Secretary of the Interior as nonmineral, nontimbered, nonirrigable. As to Idaho, the act of June 17, 1910, provides that the lands must be "arid."

The terms "arid" or "nonirrigable" land, as used in these acts, are construed to mean land which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to

unusual methods of cultivation, such as the system commonly known as "dry farming," and for which there is no known source of water supply from which such land may be successfully irrigated at a reasonable cost.

Therefore lands containing merchantable timber, mineral lands, and lands within a reclamation project, or lands which may be irrigated at a reasonable cost from any known source of water supply may not be entered under these acts. Minor portions of a legal subdivision susceptible of irrigation from natural sources, as, for instance, a spring, will not exclude such subdivision from entry under these acts, provided, however, that no one entry shall embrace in the aggregate more than 40 acres of such irrigable land.

44. *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.

45. *Compactness—Fees.*—Lands entered under the enlarged homestead acts must be in a reasonably compact form and in no event exceed $1\frac{1}{2}$ miles in length.

The acts provide that the fees shall be the same as those now required to be paid under the homestead laws; therefore, while the fees may not in any one case exceed the maximum fee of \$10 required under the general homestead law, the commissions will be determined by the area of the land embraced in the entry.

46. *Form of application.*—Applications to make entry under these acts must be submitted on forms prescribed by the General Land Office, and in case of an original entry on No. 4-003.

The affidavit of an applicant as to the character of the land must be corroborated by two witnesses. It is not necessary that such wit-

nesses be acquainted with the applicant, and if they are not so acquainted their affidavits should be modified accordingly.

47. (a) Under section 3 of the enlarged homestead acts persons who have entered 160 acres or less of lands of the character described in the act and designated by the Secretary of the Interior thereunder, and who have not made final proof on their original entries, may enter adjoining designated lands which will not, together with the tract first entered, exceed 320 acres, and residence upon and cultivation of the original entry may be accepted as equivalent to residence upon and cultivation of the additional.

(b) Where a person has, prior to June 6, 1912, made entry under the general provisions of the homestead laws, and subsequently an additional entry under said section 3, the following rules govern the requirements as to the cultivation and residence to be shown by him, on submission of proof:

(c) He may show compliance with the requirements of the law applicable to his original entry, and that, after the date of additional entry, he cultivated, in addition to such cultivation as was relied upon and used in perfecting title to the original entry, an amount equal to one-sixteenth of the area of the additional entry for one year, not later than the second year of such additional entry, and one-eighth the following year and each succeeding year until proof submitted; however, the rules explained in paragraph 27 (d) are applicable to such cases. The cultivation in support of the additional entry may be maintained upon either entry.

(d) When proof is submitted on both entries at the same time, he may show the cultivation of an amount equal to one-sixteenth of the combined area of the two entries for one year, increased to one-eighth the succeeding year, and that such latter amount of cultivation has continued until offer of proof. If cultivation in these amounts can be shown, proof may be submitted without regard to the date of the additional entry, i. e., the required amount of cultivation may have been performed in whole or in part on the original entry before the additional entry was made, and proof on the additional need be deferred only until the showing indicated can be made. Such combined proof may be submitted not later than seven years from the date of the original entry.

(e) In instances where proof is first made on the original entry meeting the requirement of the homestead law respecting residence, no further showing in this particular will be exacted in making proof upon the additional entry; neither will a period of residence be exacted in proof upon the combined entry in excess of that required under the original entry.

48. *Constructive residence on certain lands in Utah.*—The sixth section of the act of February 19, 1909 (35 Stat., 639), 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 No. 4-003a.

During the second year of the entry at least one-eighth of the area must be cultivated, and during the third, fourth, and fifth years, and until submission of final proof, one-fourth of the area entered must be cultivated. Proof may be submitted on entries of this class within seven years after their dates.

49. The sixth section of the act of June 17, 1910 (36 Stat., 531), provides for designation of 320,000 acres of land in the State of Idaho of the same character contemplated by section 6 of the act of February 19, 1909. The law as to entries for these lands and manner of perfecting title is the same, except in one respect, as that referring to the Utah lands, and the provisions of the last paragraph hereof apply to the Idaho act except on that point. The Idaho act provides that:

The entryman shall reside not more than twenty miles from (the) land, 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, however, by the act that:

Leave of absence from a residence established under this section may be granted upon the same terms and conditions as are required of other homestead entrymen.

50. *Officers before whom applications and proofs may be made.*—The acts provide that any person applying to enter land under the provisions thereof shall make and subscribe before the proper officer

an affidavit, etc. The term "proper officer," as used herein, is held to mean any officer authorized to take affidavits or proof in homestead cases.

FRED DENNETT,
Commissioner

Approved:

LEWIS C. LAYLIN,
Assistant Secretary.

STEWART CAMPBELL.

Decided March 26, 1913.

RULE 72 OF PRACTICE—RECONSIDERATION OF DECISION BY COMMISSIONER.

Rule 72 of Practice, providing that no motion for rehearing of decisions of the Commissioner of the General Land Office will be allowed, 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 omission, from reconsidering and correcting his decision in *ex parte* cases.

AMENDMENT OF ENTRY—TIME WITHIN WHICH ALLOWED.

Amendment of an entry may be allowed under paragraph 10 of the circular of April 22, 1909, if application therefore be filed within one year from discovery of the facts justifying such amendment.

LAYLIN, *Assistant Secretary:*

Stewart Campbell appealed from decision of the Commissioner of the General Land Office of January 27, 1912, denying amendment of his desert land entry so as to exclude the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 35, T. 2 N., R. 20 E., B. M., Hailey, Idaho, and to substitute therefor the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of same section.

May 20, 1909, Campbell made entry for this and other land, amounting to 320 acres—all in Sec. 25. August 5, 1911, he applied for amendment, above indicated, alleging the land sought to be taken by amendment to have been the tract originally selected with view to entry. He further states that at time of his entry he thought the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ (evidently meaning NE. $\frac{1}{4}$ SW. $\frac{1}{4}$) could be irrigated, but, after having the grade lines run for irrigation ditches, he found that the forty sought to be excluded from his entry was cut through by the river, with bluffs forty feet high on either side, the land east of the river being above grade of the ditches and practically covered with lava rock, making it too rough for cultivation, so that expense of watering it would be greater than its value. The local office recommended allowance of the application. The Commissioner held that the amendment desired should have been applied for within one year from date of the entry, citing rule 10, circular of April 22, 1909 (37 L. D., 655). Because it was not asked within one year from

date of the entry, the application was denied. Although a motion for reconsideration was filed, the Commissioner held that rule 72 of practice prevented his reconsideration of the matter. The appeal contends these rulings were erroneous.

The Department held, in Nathan H. Pinkerton (40 L. D., 268), that rule 72 of practice does not prevent the Commissioner of the General Land Office 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 the decision in *ex parte* cases.

The circular of April 22, 1909 (37 L. D., 655, 658), provides that the land 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.

The Department held in case of William L. Burton (unreported), February 26, 1912, that an amendment may be allowed under section 10 of departmental circular of April 22, 1909 (37 L. D., 655, 657), if filed within one year from discovery of the facts justifying such amendment. In that case the facts were similar to those in the present one. The amendment sought for and allowed was the exclusion of one 40-acre tract and the inclusion of another, because water could not be brought from the proposed irrigation system upon the tract sought to be excluded. The case is on all fours with the present one.

In the arid district possibility of irrigation of the land is ordinarily the controlling feature in inducing the entry. Without irrigation the land is practically worthless, and if the development of a proposed system of irrigation shows that water can not be brought upon certain subdivisions of the entry, it shows mistake in the original selection, for one having right to enter a given quantity of lands would never select lands non-irrigable, when lands irrigable lay open to him.

Upon authorities cited, the Commissioner's decision was erroneous and is reversed. No other objection appearing, the amendment will be allowed.

OINANEN v. ULVI.

Decided March 26, 1913.

ADDITIONAL HOMESTEAD—SECTION 2, ACT OF APRIL 28, 1904.

It is not essential that an applicant to make additional homestead entry under section 2 of the act of April 28, 1904, based upon a former entry to which title has been earned, shall be an actual resident upon the land

embraced in the original entry; it being sufficient under the act if he "own" and "occupy" the land—the term "occupy" as so used being construed to require only such occupancy as shows actual and exclusive possession and proprietorship of the premises.

LAYLIN, *Assistant Secretary*:

Kalle Oinanen has appealed from decision of April 3, 1912, by the Commissioner of the General Land Office, rejecting his homestead application for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 32, T. 50 N., R. 17 W., 4th P. M., Duluth, Minnesota, land district. The tract involved in this controversy, with other lands, was opened to settlement and entry at 9 o'clock a. m., June 20, 1910. On the day of the opening, at 9:26 a. m., August Ulvi filed homestead application for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, of said section 32.

June 21, 1910, at 10:20 a. m., Kalle Oinanen filed homestead application for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, of said section, for additional entry under the provisions of section 5 of the act of March 2, 1889 (25 Stat., 854), alleging settlement on the land applied for on June 20, 1910, at 9 a. m., and that he was at the time the owner of and residing upon the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said section, for which he had received patent March 24, 1910, under a former homestead entry. A hearing was had upon the conflicting claims for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and the local officers found from the evidence submitted that on the morning of June 20, 1910, at 9 o'clock a. m., Oinanen, being then the owner of the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said section, as above stated, went upon the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, the tract in question, immediately began clearing and cutting brush and continued in that work for the entire day. They held, however, that the evidence showed that he was not then residing upon the land embraced in his former entry, but that his actual residence at the time of his alleged settlement was at Cloquet, Minnesota.

Upon appeal, the Commissioner held that inasmuch as the former entry was not made prior to the act of March 2, 1889, *supra*, no additional entry by Oinanen under section 5 of that act was authorized, as said section authorized additional entry only where the former entry was "theretofore" made. He held, however, that the application could properly be considered as having been filed under the provisions of section 2 of the act of April 28, 1904 (33 Stat., 527), but further held that Oinanen was not entitled to make additional entry under that section, for the reason that the evidence showed that he was not an "occupant" of the land embraced in his former entry at the time of his application.

The evidence shows that Oinanen was living on the land embraced in his former entry up to September 8, 1909; that he returned to the land in the spring of 1910, and spent some weeks preparing it for cultivation, and planted a crop; that his family returned to the old

homestead July 13, 1910, which was only a short time after the date of the application in question. After Oinanen made proof on his former entry, he moved to Cloquet, some three or four miles distant. While residing there he made practice of visiting the land nearly every week and cultivated the land every season. On many of the visits to the land he was accompanied by his wife, and on July 13, 1910, he resumed his actual residence on the original homestead entry, where he has since remained.

Section 2 of the act of April 28, *supra*, reads as follows:

That any homestead settler who has heretofore entered or may hereafter enter, less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional entry is made, then the patent shall issue without further proof: *Provided*, That this section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry: *And provided*, That if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or, if having been initiated, shall be canceled.

In departmental instructions of July 27, 1907 (36 L. D., 46), it was stated with reference to said section:

Applicants for additional entries under this section will be required to produce evidence that they own and reside upon the land embraced in their original entries.

Also, in the administration of this section, and the somewhat similar provisions of section 2 of the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid Act, the Department has defined the expression "own and occupy" to mean such *residence* upon the original entry as would defeat a contest upon the charge of abandonment. As applied to an unperfected entry, or an entry to which title has not been earned, it is believed that the above interpretation is proper, because the claim of ownership or right to the land embraced in an entry which has not been earned by sufficient residence can only be maintained by the character of residence indicated, and therefore the necessity for residence upon such an entry as a condition for qualification to make an additional entry under the section here involved, follows from the term "own" as well as its adjunct "occupy." Strictly speaking, there is not in such case "ownership," but there is present right of possession with prospect of ownership, dependent upon compliance with the homestead law, which requires residence, and "residence" embraces "occupancy."

But where a person has earned his title to the land in his entry, where his claim of ownership thereof is based upon what he has done rather than what he is doing with reference to the entry, no present

residence is necessary to support his claim of ownership, and this portion of the act is fully met. A further condition is that he shall "occupy" the land in the former entry. The term "occupy" should, under such circumstances, be given its ordinary and usual meaning with reference to land in private ownership. In this sense the term does not require actual residence, but only such occupancy as shows an actual and exclusive possession and proprietorship of the premises. See "Words and Phrases Judicially Defined," Vol. 6, Page 4904, *et seq.*

In the instant case, it is clear that the land was "occupied;" it was not abandoned. Who "occupied" it? Clearly, the owner. He used it and exercised supervision over it. Congress might well have used, as it often has, the words "resided upon," but, for reasons satisfactory to it and with which we have no concern, it did not do so. It would seem, therefore, that we must give to the word "occupy" its generally understood meaning, as, to subject to the will and control, to use, and have possession of and dominion over:

In its regulations and decisions the Department has heretofore failed to make distinction between the necessary requirements applicable to cases where the application is based upon a former entry, title to which has been earned, and cases where title to the former entry has not been earned. Such regulations and decisions as are not in harmony herewith are accordingly modified to meet the views expressed herein.

Under this view of the law, Oinanen was qualified to make the entry applied for, and, inasmuch as he performed an act of settlement and has followed up the same by resuming actual residence upon the old entry within reasonable time, his application should be allowed under section 2 of the act of April 28, 1904, *supra*, in the absence of other objection. Therefore the decision appealed from is reversed.

MARY A. STURGES ET AL.

Decided March 31, 1913.

SMALL HOLDING CLAIM—EXTENSION OF TIME—ASSIGNMENT.

The limitation in the act of February 26, 1909, extending the time for filing small holding claims under the act of March 3, 1891, that such extension shall not "extend to persons holding under assignments made after March 3, 1901," applies only to voluntary assignments, and has no application to involuntary assignments through judicial sales for the benefit of creditors.

LAYLIN, *Assistant Secretary*:

February 2, 1912, the Commissioner of the General Land Office rejected the small holding application, No. 5966, of Frank E. Sturges,

filed February 25, 1910, in the office of the United States Surveyor-General at Santa Fe, New Mexico, under section 16 of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470), and extended by the act of February 26, 1909 (35 Stat., 655).

The Commissioner's decision was upon the ground that the assignment to Sturges occurred after March 3, 1901, and that the proviso to the act of February 26, 1909, *supra*, stipulated that the provisions of the law shall not "extend to persons holding under assignments made after March 3, 1901."

It appears from the record accompanying the appeal that the land involved, being 160 acres in Sec. 11, T. 20 N., R. 1 W., New Mexico, was, in 1906, in the possession of the Juri Tris Copper Company, who had acquired same through deeds from former occupants; that the company became insolvent; and, finally, this and other property of the company was, by decree of court, sold at public auction on February 6, 1907, to J. T. McLaughlin.

February 25, 1910, Sturges filed his application with the surveyor-general, alleging he was the owner of the land involved, and it appears from the proofs and affidavits filed with the records that he claims that the purchase made by McLaughlin at the public auction was for Sturges, the purchase money having been furnished by him, and that a few days after conveyance to McLaughlin under the sale the latter transferred same to Sturges. A copy of the deed to McLaughlin is submitted, but no copy of the deed from McLaughlin to Sturges is found with the record.

Assuming that the purchase at public auction was that of Sturges, and both Sturges and McLaughlin swear that such was the case, the question is presented as to whether or not such sale was an assignment within the meaning of the proviso to the act of February 26, 1909, and can not thereunder be recognized as a valid base for the application now before the Department.

It appears from the records of the Department that the proviso in question was recommended by the Secretary of the Interior, presumably to prevent speculation in assignments of small holding claims, and nothing is found in the report of the Department or in the report of the Committee on Private Land Claims (No. 1528), to warrant the conclusion that it was intended to relate to involuntary assignments, such as that here involved. I do not find that this particular law has been construed by the courts but it has been held by the Supreme Court of the United States that a purchaser at judicial sale of the original rights of an entryman to public lands is not an assignee within the meaning of the Repayment Act of June 16, 1880 (21 Stat., 287)—(*Hoffeld v. United States*, 186 U. S.,

273)—and construing section 3477 of the Revised Statutes, which nullifies all transfers and assignments of claims upon the United States, the Supreme Court in the case of *Erwin v. United States* (97 U. S., 392), held that the section applies only to cases of voluntary assignment of demands against the Government and that it did not embrace cases where there had been a transfer of title by operation of law: "The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evils at which the statute aims."

Small holding claims, so-called, recognized and authorized by the act of March 3, 1891, *supra*, were designed to protect those persons who had been personally, or through "ancestors, grantors or their lawful successors in title or possession," in the continuous, adverse possession of public lands of the United States in certain States and Territories, for twenty years next preceding survey of the lands.

The acts amending and extending that of 1891 do not limit or modify the privileges previously extended except as to the matter of assignments, and, considering the legislation had and its purpose, the Department is convinced that the limitation as to assignments was intended to apply only to voluntary assignments and not to involuntary assignments through judicial sales for the benefit of creditors as in the case here involved.

The Commissioner's decision rejecting the claim because of the said involuntary assignment made pursuant to decree of the court is, therefore, erroneous and is hereby reversed. It would appear, however, that the administrators of Sturges have not filed a copy of the deed from McLaughlin to Sturges, and it would further appear from a quotation in the deed executed by the receiver, under order of the court, to McLaughlin, that the land in question was conveyed to the Jura Tris Copper Company by William Jenks and wife "deed dated April 2, 1902, and recorded in book "J" of Mining Records of Bernalillo County, at page 533." Mr. Sturges's affidavit, submitted in support of his application, refers to deed from Jenks and wife to the copper company, said to have been recorded in book "J", at page 533, but does not give the date of the deed. The case is herewith returned with directions to the Commissioner of the General Land Office to ascertain whether other assignments than that made pursuant to the decree of the court were made of the small holding claim involved, subsequently to March 3, 1901; particularly whether the Jura Tris Copper Company secured the property through an assignment made after that date. Parties in interest should also be required to file a duly verified copy of the deed from McLaughlin to Sturges.

The case will then be adjudicated by the Commissioner in the light of the ascertained facts.

FISHER v. HEIRS OF RULE.¹

Decided February 28, 1913.

DEATH OF HOMESTEAD ENTRYMAN—RIGHTS OF HEIRS.

Where a homestead entryman dies without having established residence upon his entry, the entry thereupon terminates, and his heirs succeed to no rights whatever in the land.

EFFECT OF ORIGINAL HOMESTEAD ENTRY.

The making of an original homestead entry amounts to no more than a declaration by the claimant of intention to acquire title to the land in the manner prescribed by the statute, and bears substantially the same relation to the final acquisition of title as does the declaratory statement to purchase under the preemption law—no vested right being acquired by either as against the government.

DEATH OF ENTRYMAN—RESIDENCE—ACT OF JUNE 6, 1912.

The second proviso of section 2291, Revised Statutes, as amended by the act of June 6, 1912, does not change the law as it had theretofore existed, except to specifically relieve those succeeding to an entry, upon death of the entryman, from the requirement of residence upon the land.

ADAMS, *First Assistant Secretary:*

Allen G. Fisher has appealed from the decision of the Commissioner of the General Land Office, dated September 27, 1911, affirming the action of the local officers and dismissing his contest against the homestead entry made on June 28, 1904, by Highlan N. Rule, for the NE. $\frac{1}{4}$, Sec. 22, and N. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 23, T. 30 N., R. 55 W., Alliance, Nebraska, land district.

The affidavit of contest charged, in substance, that Highlan N. Rule died without having established residence upon said homestead, leaving as his heirs, his father, mother, two brothers and a sister; and that no settlement upon the land had been made by any person.

It appears from the record that the entryman, an unmarried man, died on July 29, 1904, leaving, as his heirs, father, mother, brothers and a sister, as alleged in the affidavit of contest. He had not then established residence on nor done anything in the way of cultivating or improving the land. These are the controlling facts in the case and no consideration will be given to the attempt, by the father for the other heirs, to acquire title to the land by less than three months residence thereon, coupled with certain improvements and the cultivation of a part of the tract.

Section 2291, Revised Statutes, requires residence and cultivation by a homestead entryman for five years immediately succeeding the time of the filing of the affidavit provided for in section 2290, Revised Statutes. That the entry was not subject to forfeiture, under section 2297, Revised Statutes, at the date of the entryman's death, does not alter the fact that he was then in total default, as to com-

¹ See decision on rehearing, p. 64.

pliance with the homestead law. Indeed, section 2297, Revised Statutes, reiterates the requirement of section 2291 that the establishment of residence upon the land shall immediately follow the filing of the affidavit. It is true that, ordinarily, no disadvantage would accrue, provided the entryman established actual residence within the six months period, but such delay is at his peril and if, as in this case, death intervenes, that fact can not be pleaded in lieu of compliance with law in the matter of residence. It follows, therefore, that the death of the entryman, which rendered such compliance impossible, terminated the entry, for, the Department must hold that, under any fair construction of section 2291, Revised Statutes, where an entryman dies without having established residence upon his homestead, his heirs succeed to no right whatever in the land, since it contemplated a succession by the widow, heir, or devisee to the right to complete a claim initiated not alone by the filing of the affidavit but by immediate and actual settlement in compliance with the law. Indeed, the making of an original homestead entry amounts to no more than a declaration by the claimant of intention to acquire the land in the manner prescribed by the statute, and bears substantially the same relation to the final acquisition of title as does the declaratory statement to a purchase under the preemption law. By neither the one nor the other is any vested right acquired as against the Government. See *Whitney v. Taylor* (158 U. S., 85, 95). Following the uniform rule of cases adjudicated under the preemption law, it must be held that, under the homestead law, a declaration of intention, never acted upon, to acquire public land by residence thereon, confers no heritable right to complete the entry without settlement on the land.

In this connection, it is not inappropriate to refer to the second proviso of section 2291, Revised Statutes, as amended by the act of June 6, 1912 (Public, No. 179), which reads as follows:

Provided, That when a person making entry dies before the offer of final proof, those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved of any requirement of residence upon the land.

Said proviso, part of an act passed to relieve and not to increase the burdens of homestead entrymen, did not change the law as it had theretofore existed, except to specifically relieve those succeeding to an entry from the requirement of residence upon the land. In other respects, it is a mere legislative declaration of the requirements of the old law.

In accordance with the views above expressed, the decision of the Commissioner of the General Land Office is reversed and the entry canceled.

FISHER v. HEIRS OF RULE (ON REHEARING).*Decided July 19, 1913.***HOMESTEAD—DEATH OF ENTRYMAN—RIGHTS OF HEIRS.**

The homestead law contemplates that its benefits shall be confined to actual settlers and their statutory successors; and where an entryman dies without having established residence, the entry thereupon terminates and his heirs succeed to no rights under the entry.

VALID ENTRY ESSENTIAL BASIS FOR HOMESTEAD PATENT.

A valid entry of record, asserted by the entryman or his statutory successor in interest, duly qualified, is the essential basis for a homestead patent; and supposed equities growing out of mistaken or illy-considered decisions of the land department will not warrant the issuance of patent in the absence of proper legal foundation.

DEATH OF ENTRYMAN WITHOUT RESIDENCE—CULTIVATION BY HEIRS.

Where a homestead entryman dies without having established residence, and his heirs thereafter cultivate the land, they do not thereby acquire any legal or equitable right which would warrant the land department in issuing patent to them for the land.

PREFERENCE RIGHT OF CONTESTANT.

Any question as to the preference right of a successful contestant to make entry of the land in controversy can only arise in connection with an application by contestant to exercise such right, and can only be raised by some one asserting a superior right to enter the land.

JONES, First Assistant Secretary:

Newton Rule, as heir at law of Highlan N. Rule, deceased, has invoked the exercise by this Department of its supervisory authority on behalf of his claim to the NE. $\frac{1}{4}$, Sec. 22, and N. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 23, T. 30 N., R. 55 W., 6th P. M., Alliance, Nebraska, land district, under and by virtue of the homestead entry, made by his deceased son, Highlan N. Rule, on June 28, 1904.

In its decision of February 28, 1913 [42 L. D., 62], canceling this entry, the Department, after finding that Highlan N. Rule died thirty-one days after making said entry without having established residence upon the land or done anything in the way of cultivating or improving the same, held as follows:

Section 2291, Revised Statutes, requires residence and cultivation by homestead entrymen for five years immediately succeeding the time of the filing of the affidavit provided for in section 2290, Revised Statutes. That the entry was not subject to forfeiture, under section 2297, Revised Statutes, at the date of the entryman's death, does not alter the fact that he was then in total default as to compliance with the homestead law. Indeed, section 2297, Revised Statutes, reiterates the requirement of section 2291 that the establishment of residence upon the land shall *immediately* follow the filing of the affidavit. It is true that, ordinarily, no disadvantage would accrue, provided the entryman established actual residence within the six months period, but such delay is at his own peril and if, as in this case, death intervenes, that fact can not be pleaded in lieu of compliance with law in the matter of residence. It follows, therefore, that the death of the entryman, which rendered such compliance impossible, terminated the entry, for, the Department must hold that, under any

fair construction of section 2291, Revised Statutes, where an entryman dies without having established residence upon his homestead, his heirs succeed to no right whatever in the land, since it contemplates a succession by the widow, heir, or devisee, to the right to complete a claim, initiated not alone by the filing of the affidavit, but by immediate and actual settlement in compliance with the law. Indeed, the making of an original homestead entry amounts to no more than a declaration by the claimant of intention to acquire the land in the manner prescribed by the statute, and bears substantially the same relation to the final acquisition of title as does the declaratory statement of a purchaser under the preemption law. By neither the one nor the other is any vested right acquired as against the Government. See *Whitney v. Taylor* (158 U. S., 85, 95). Following the uniform rule of cases adjudicated under the preemption law, it must be held that, under the homestead law, a declaration of intention, never acted upon, to acquire public land by residence thereon, confers no heritable right to complete the entry without settlement on the land.

A motion for rehearing of the decision of February 28, 1913, was denied by the Department on April 17, 1913.

It is urged in the pending motion (1) that the decision of February 28, 1913, is not warranted by the homestead law; (2) that, even if that decision be correct, it reverses a long line of departmental decisions, upon the faith and credit of which Newton Rule has acted; and (3) that Fisher is not entitled to a preference right under the act of May 14, 1880 (21 Stat., 140).

The principle announced by the Department in this case is not, as is assumed by counsel for Rule, a sudden and capricious interpretation of the homestead law by the land department but the deliberate judgment of the Supreme Court of the United States. Not only has that court held from the beginning that the purpose of the homestead law is, as was expressed in the title of the act of May 20, 1862 (12 Stat., 392), "to secure homesteads of *actual* settlers upon the public domain," but it has expressly excluded from the benefits of the law all persons except actual settlers and their statutory successors. "The policy of the homestead act, no less than the specific statement in the final oath, looks to a holding for a term of years by an actual settler with a view to acquiring a home for himself. In encouragement of such settlers, and none others, homesteads have been freely granted by the Government." *Adams v. Church* (193 U. S., 510, 516). See also *Moss v. Dowman* (176 U. S., 413).

In the case of *Moss v. Dowman*, *supra*, the Supreme Court, after emphasizing the fact that only actual settlers are beneficiaries under the homestead law, held:

Counsel say that "a *prima facie* valid entry of record operates to appropriate the land covered thereby and to reserve it, pending the existence of such prior entry, from all subsequent disposition"; that by analogy to express statutory provisions, a homestead entry without settlement is adjudged to be operative for six months; * * *

We deem it unnecessary to consider the correctness of these rulings or the power of the land department to secure to one who has made a formal entry a

certain length of time in which to perfect his settlement and improvement. The Revised Statutes in terms give no such right. It is true that section 5 of the act of May 20, 1862, c. 75, 12 Stat. 392, 393, carried into the Revised Statutes as section 2297, provides—

“If at any time after the filing of the affidavit, as required in section 2290, and before the expiration of the five years mentioned in section 2291, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government.”

But that section simply authorized the Government to annul an entry if thereafter it appears that the homesteader has actually changed his residence or abandoned the land for more than six months. But the very phraseology, “changing residence,” “abandoning land”, implies a settlement on the land which is changed and abandoned, and does not authorize a waiting for settlement and occupation. On the other hand, section 2291, Rev. Stat., providing for final proof, requires an affidavit that the applicant has “resided upon or cultivated the same for a term of five years immediately succeeding the time of filing the affidavit.” In other words, the one section contemplates an immediate settlement and occupation, and the other provides for temporary abandonment.

* * * * *

Whenever a homestead entry has been made, followed by no settlement or occupation on the part of the one making the entry, and that homestead entry has by lapse of time or relinquishment, or otherwise, been ended, any one in actual possession as a settler and occupier of the land has a prior right to perfect title thereto.

This case of *Moss v. Dowman* arose in the courts after this Department had, on December 19, 1894, rendered decision in favor of Dowman, holding that Moss's claim, as well as the others preceding hers, was invalid, because the entrymen had never established residence on the land after making their entries. The Supreme Court of the United States thus sustained the Department in its conclusions.

The correctness of this rule is not only apparent, but it must at once be seen that it is a wise one. Were this not the law, A could make homestead entry for a valuable tract, never go upon the land, nor establish residence thereon, nor do anything whatsoever toward complying with the homestead law, and having relinquished within a day less than six months after making entry, B could make entry, and, following A's example, never go upon the land, nor establish residence, and so on, until the speculative scheme could be matured by the sale of a relinquishment to a *bona fide* homestead settler, at a large price; all clearly in violation of the principles of the homestead law enacted for the purpose of securing homes for actual settlers at a minimum cost and not to provide a method of speculation, whereby *bona fide* settlers could be prevented from going on the public lands and making a home, without paying a large price for the privilege vouchsafed the settler by the law. Indeed, this feature was adverted to by the Supreme Court of the United States in the *Moss-Dowman*

case, and it was conclusively shown that section 2297, Revised Statutes, relied on here by Rule, has no application whatsoever.

So, when Highlan N. Rule died without having established residence upon his homestead, he was, as the Department has heretofore held, in default, and his inchoate right, if any such right existed to complete the entry by residence and cultivation, died with him, there being no statute providing for succession to a mere declaration of intention never acted upon. Death in such case is a relinquishment and extinguishment of the entry, and the land reverts to the public domain. The requirement of the law that there should be five years' residence and cultivation immediately following the date of the filing of the homestead application became impossible of fulfillment when the entryman died. Whatever equity, if any, Newton Rule acquired by subsequently placing improvements upon and cultivating the land is in his own right and not as an heir at law of his deceased son. It appears of record that he has perfected a homestead entry for 640 acres of land and has therefore no further standing under the homestead law.

With reference to the claim made by Newton Rule for equitable consideration in this case, it must be remembered that the jurisdiction of the land department to issue patents "upon principles of equity and justice, as recognized in courts of equity," is dependent upon section 2450, Revised Statutes, and the regulations thereunder. Not only is there no regulation that would warrant the issuance of patent in this case, but the Department, as a court of equity, would be powerless to make a rule or regulation that would sanction the patenting of public lands without warrant of law and in the teeth of the decisions of the Supreme Court of the United States interpreting the law. A valid entry of record asserted by the entryman or his statutory successor in interest, duly qualified, must be the basis of patent in homestead cases and supposed equities growing out of mistaken or illy-considered departmental decisions do not obviate the necessity for a legal foundation for patent. The decisions of the Department in the case of *Moss v. Dowman* and of the Supreme Court, above referred to, were rendered prior to the entry involved in this case, and they remain as authoritative statements of the law, binding the Department, as well as the parties in this case.

The pending motion need not, however, be determined by such general consideration, nor the relief sought confined to the issuance of a patent to the lands involved. The record discloses that the father of the entryman, who is also his heir at law, made homestead entry for 640 acres of contiguous land upon the very day that Highlan N. Rule entered the tract here in question. It is impossible to believe that Newton Rule was misled by or relied upon the depart-

mental decision in the case of *Heirs of Stevenson v. Cunningham* (32 L. D., 650), or the other cases cited in the brief filed by his counsel, in view of the fact that soon after the death of the son, he went upon the land embraced in the latter's entry and remained thereon until six months from the date of said entry when he removed to his own land. Not only is it clear that he knew that the letter, as well as the spirit, of the homestead law, as interpreted by the Supreme Court, demanded residence by some one asserting claim as a prerequisite to title under the homestead law, and made a pretence of following the rule laid down by the court, but it is evident that his stay upon his son's claim was a merely colorable compliance with the requirement of residence upon his son's land at a time when the law required his presence upon his own. If, as the Supreme Court held in *Moss v. Dowman*, *supra*, the Revised Statutes give a homestead entryman no right to delay for six months the establishment of residence, the waiver of this objection and passing to patent of the father's entry is, in itself, a broad exercise of the supervisory authority of this Department. Moreover, his alleged expenditures in buildings and fences and breaking 40 acres of land do not represent a total loss to him. Those amounts may be held, not unreasonably, to be fairly offset by nine years' use of the land for cultivation and the grazing of seventy-five head of cattle; and it would appear that a part of the fence claimed to have been erected around the son's claim is on a line of his own land.

Whether Fisher did or did not earn a preference right of entry by the prosecution of this contest is a question that has no bearing upon the issues involved. As was held by the Department in its decision of April 17, 1913, the question of preference right can only arise in connection with the application presented by the contestant in the assertion of a claimed preference right through his contest. This follows the uniform current of departmental decisions construing said act of May 14, 1880. Moreover, the question can be raised only by a party who asserts a superior right to enter the land.

In this connection, however, it may be observed that Fisher's claim to a preference right is challenged solely upon the ground that he refused to pay for testimony as to facts which were established or were wholly irrelevant to the question involved in the case. There is, upon the face of this record, no evidence that Fisher refused to pay for any testimony that it was not the duty of the local officers, under Rule of Practice 38, to exclude.

It can make no difference to Rule who may hereafter enter the land; he is only concerned with the question as to whether *he* may be allowed to acquire it. Fisher's claim of preference right by virtue of his contest has no bearing on the validity of Rule's claim. Fisher, however, on the face of this record, was entitled under the

law itself to a preference right to enter this land on the cancellation of Rule's entry; and it is represented in corroborated affidavit filed on behalf of Fisher's son that he and two other parties made entry for the land in contest, after the cancellation of Rule's entry, and that Fisher has placed valuable improvements upon the tract; thus he and the other two entrymen have both legal and equitable rights to be considered.

The motion is denied.

FRED A. RUSSELL.

Decided June 8, 1912.

PRINCIPLES GOVERNING DEALINGS BETWEEN UNITED STATES AND STATES.

In matters relating to property, and not affecting sovereignty, the United States and the several States, in their dealings with each other, are bound by the same principles of justice and fair-dealing that obtain between private persons.

SWAMP-LAND GRANT—PATENT ISSUED BY MISTAKE FOR LAND NOT CLAIMED.

Where by mistake patent issued to a State for a tract of land not claimed by it, instead of a tract claimed by it under its swamp-land grant, it is not entitled to receive patent for the tract claimed as swamp, until reconveyance to the United States of title to the tract erroneously patented to it.

ADAMS, *First Assistant Secretary*:

Fred A. Russell appealed from decision of the Commissioner of the General Land Office of June 20, 1911, rejecting his applications for soldiers' additional homestead locations for NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 6, T. 49 N., R. 25 W., 4th P. M., Duluth, Minnesota.

November 16, 1909, Russell filed applications to locate soldiers' additional homestead rights on the foregoing land. January 4, 1910, the State claimed the land and asserted that its original swamp-land selection list, now in the records of the State land office, copy of which is known as list No. 6, St. Cloud series, was sent to the General Land Office and another copy was transmitted to the local office at Duluth, which shows that the north half and not the west half of Sec. 6 was claimed by the State as swamp-land.

The records of the General Land Office show that June 16, 1873, the St. Cloud local office sent to the General Land Office the State swamp-land list No. 8, claiming the "W. $\frac{1}{2}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ Sec. 6." December 4, 1876, the selection of E. $\frac{1}{2}$ SW. $\frac{1}{4}$ was canceled as a duplicate and the W. $\frac{1}{2}$ and SE. $\frac{1}{4}$ were embraced in clear list No. 10, approved January 14, 1879, and were patented August 4, 1880, to the State.

The effect of this was that the State obtained patent for the SW. $\frac{1}{4}$, which it had not claimed, and did not receive patent for the NE. $\frac{1}{4}$, which it did claim, but it made no complaint and sought no correction.

The field-notes in the General Land Office show that the fractional NE. $\frac{1}{4}$ was swamp-land within meaning of the act of September 28, 1850 (9 Stat., 519), and show that the SW. $\frac{1}{4}$ was not swamp. More than thirty years have elapsed.

The Commissioner ruled Russell to show cause why his soldiers' additional applications should not be rejected for conflict with the State's swamp-land claim. He made return that he filed the applications when the land was vacant of record, and that the State is bound by its list 6, which was sent to the General Land Office, and its acceptance of clear list 10 and of patent pursuant thereto, so that it has no legal claim to the tracts in question, and no equitable right.

The Commissioner held that the swamp-land grant was one *in presenti*, and as the State made its claim in 1873, it can not be deprived of its right through a mere clerical error, and that, as the field-notes show the land is swamp, Russell's return was no bar to the rejection of the applications.

The State can not in good conscience retain the SW. $\frac{1}{4}$ of Sec. 6 and continue to claim the NE. $\frac{1}{4}$ of that section, thus obtaining the whole section of 640 acres, when, under its grant and application, it was entitled to no more than 480 acres. The State has an equity to ask correction of the mistake, but to do so must necessarily reconvey to the United States the SW. $\frac{1}{4}$ of Sec. 6, to which it was not entitled and which on its own showing it did not intend to claim. This is an equity to correct a mistake, and one who seeks equity for correction of mistake must himself do equity.

In matters relating to property, and not affecting sovereignty, the United States is bound by the same principles of justice and fair dealing that obtain between private persons. *Bostwick v. United States*, 94 U. S., 53, 66; *Chicago and Northwestern R. R. Co. v. United States*, 104 U. S., 680, 685; *Smoot's Case*, 15 Wall., 36, 47. The State of Minnesota, like the United States, is also a sovereign within the province of its sphere of action, and is bound by the same principles as apply in such controversies between the United States and others. This is not a question that affects the sovereignty of Minnesota, but is a matter of property right between the State and the United States. The State can not now ask that the United States shall patent to it or further recognize any claim of the State to the NE. $\frac{1}{4}$ when it has received by mistake, instead of it, the SW. $\frac{1}{4}$. It must surrender the one, in order to receive the other to which it is entitled.

The decision is therefore vacated, and the papers are returned to the General Land Office, with direction that it serve the State of Minnesota with copy of this decision, giving a reasonable time for it to exercise its election. If it do not make restitution of the SW. $\frac{1}{4}$ of Sec. 6, its claim to the NE. $\frac{1}{4}$ will be rejected, and in the meantime

Russell's applications for soldiers' additional homestead locations on the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ will be suspended to await action of the State, unless he elect to withdraw them. Should the State show that the time fixed by the General Land Office for its election is too short for it to act, the rule upon the State may be extended so that it may have time to act legally in the matter of a reconveyance.

FRED A. RUSSELL.

Motion for rehearing of departmental decision of June 8, 1912, 42 L. D., 69, denied by First Assistant Secretary Jones, July 22, 1913.

CONTEST—CONTESTANT—RELINQUISHMENT—PREFERENCE
RIGHT.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 1, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: In accordance with the decision of the department in the case of *Smith v. Woodford* (41 L. D., 606), the instructions approved September 15, 1910 (39 L. D., 217), have been amended to read as set forth below. You will apply the revised regulations in all pending unadjudicated and future contests.

1. In order to entitle a contestant to the preference right of entry conferred by section 2 of the act of May 14, 1880 (21 Stat., 140), it must appear not only that he has contested the entry and paid the land-office fees in that behalf but that he has actually procured the cancellation of the entry.

2. Where it appears of record that the defendant has been served with notice of contest personally or by publication, it will be conclusively presumed as a matter of law and fact that the relinquishment was the result of the contest, and the contestant will be awarded the preference right of entry without necessity for a hearing.

3. Where a good and sufficient affidavit of contest has been filed against an entry and no notice of contest has issued on such affidavit, or, if issued, there is no evidence of service of such notice upon the contestee, if the entry should be relinquished you will, as heretofore, immediately note the cancellation of the entry upon the records of your office. In such cases for purposes of administration a presumption will obtain that the contest induced the relinquishment and you

will at once so notify the contestant and that he will be allowed to make entry accordingly. If the relinquishment is accompanied by the application of another than the contestant, you will at once advise the applicant of the pending contest and of the presumptive preference right thereunder, and that should the contestant in the exercise of such right make timely application for the land, showing himself duly qualified, said right can only be avoided on a showing that the contest charge was not true, or that the contestant is not a qualified applicant, or that the land is not subject to his application. Should the contestant apply for the lands, showing himself duly qualified, within the preference-right period, and the intervening applicant file request for a hearing, with his corroborated affidavit as to the facts above stated in avoidance of a preference right in the contestant, within 20 days after the filing of the contestant's application, hearing will be had, after at least 30 days' notice to all interested parties, upon the issues thus presented, the intervening applicant having the burden of proof. The contestant must pay all costs of the testimony as to the truth or falsity of the contest charge, and upon any other issue each party must pay the cost of taking the direct examination of his own witnesses and the cross-examination on his behalf of other witnesses.

Should the local officers inadvertently allow an application filed with a relinquishment of a contested entry, they will, upon discovery of the error, immediately notify the contestant of his presumptive preference right and proceed in all other respects as above provided. Should a hearing be had, the intervening entryman may submit testimony with reference to his compliance with law prior to discovery of the erroneous allowance of the entry, as well as in support of the showing above provided for.

Nothing contained in the foregoing rule will preclude the exercise by the department of its authority to adjudicate cases as they may arise in accordance with the particular facts thereof and in the light of the settled principles of equity.

4. Where, prior to hearing in a contest, a junior contest is filed, alleging a valid ground for the cancellation of the entry, and in addition thereto the collusive nature of the prior contest, the junior contestant may, if the entryman has been served with notice of the prior contest, intervene at the hearing and submit testimony in support of his charges.

Should the junior contestant elect to offer testimony in support of his charge of collusion only, he will not gain a preference right of entry if such charge be established. If, at the time of the filing of the junior contest, notice is not issued on the prior contest, you will issue such notice and at the same time notice on the junior contest; the latter notice must recite all the charges contained in the affidavit

and state, in addition, that the junior contestant will be allowed to appear at the time set for taking testimony in the prior contest and offer evidence in support of his charges. The junior contestant will be required to serve notice on both the prior contestant and the entryman.

5. If, before the case proceeds to a hearing, the entryman's relinquishment be filed, both contestants must be notified of the cancellation of the entry and of their right to apply to enter the land within 30 days after the receipt of such notice. Should both apply within such period, you will set a day for hearing, of which each shall have at least 30 days' notice, at which the junior contestant will be allowed to prove his charge of collusion and so defeat the claimed preference right of the prior contestant.

6. Where a junior contest charging collusion is not filed until after the prior contest has proceeded to a hearing, it will be suspended pending the closing of the latter case, and must wholly fail if the entry be canceled as the result of the prior contest. This, however, will not prevent the junior contestant from attacking the application of the successful contestant to make entry, upon the ground of collusion or for any other valid cause, should the latter attempt to exercise the preferred right of entry, nor, should the prior contest result in favor of the entryman, will the junior contestant be precluded from prosecuting his case if his affidavit, in addition to the charge of collusion, states a sufficient ground for the cancellation of the entry other than the charge involved in the trial of the prior contest.

Respectfully,

FRED DENNETT,
Commissioner.

Approved:

LEWIS C. LAYLIN,
Assistant Secretary.

SETTLEMENT PRIOR TO JUNE 6, 1912—PROOF UNDER OLD
LAW—ACT OF MARCH 4, 1913.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, April 3, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is directed to the following provision in the Deficiency Act of March 4, 1913 (37 Stat., 912, 925):

That any person entitled to enter lands under the homestead laws, who may have established residence upon unsurveyed lands (which were subject to

homestead entry) prior to the passage and approval of the act of June sixth, nineteen hundred and twelve, entitled "An act to amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven, of the Revised Statutes relating to homesteads," may perfect his proof for such lands under said act of June sixth, nineteen hundred and twelve, or under the law existing at the time of the establishment of such residence, as he may elect, such election to be signified to the Department of the Interior in accordance with rules and regulations to be prescribed by the Secretary.

The effect of this legislation is to confer upon those qualified to make homestead entry, who, prior to June 6, 1912, settled upon unsurveyed public lands of the character subject to such entry, the rights conferred by the act of June 6, 1912 (37 Stat., 123), upon those who, on that date, had unperfected entries of record. There is nothing in the act that modifies or changes existing law, with reference to the timely assertion of settlement claims after the filing of the plat of survey in the local office. Entries entitled to the benefits of the act under consideration will, when made, be adjudicated as provided by the circular of February 13, 1913 (41 L. D., 479), with reference to homestead entries made prior to June 6, 1912.

Where proof heretofore submitted upon an entry, made since June 6, 1912, shows settlement to have been made upon unsurveyed lands prior to that date, but has been rejected by you for failure to show the cultivation required by said act of June 6, 1912, you will, if the papers are still in your office, reconsider the case with a view to possible acceptance of the proof under the old law.

Respectfully,

FRED DENNETT,
Commissioner.

Approved, April 3, 1913:

LEWIS C. LAYLIN,
Assistant Secretary.

COEUR D'ALENE LAND—ACT OF MARCH 3, 1913.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, April 4, 1913.

REGISTER AND RECEIVER,
Coeur d'Alene, Idaho.

SIRS: Your attention is directed to public joint resolution No. 72, approved March 3, 1913 (37 Stat., 1025), which reads as follows:

Joint Resolution providing for extending provisions of the act authorizing extension of payments to homesteaders on the Coeur d'Alene Indian Reservation, Idaho.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of an act of Congress

approved April fifteenth, nineteen hundred and twelve, authorizing the extension of time within which to make payments of certain moneys by homestead entrymen upon the Coeur d'Alene Indian Reservation, in the State of Idaho, be extended and held to apply to payments that became due prior to the passage of the act under the same conditions that apply to payments becoming due subsequently to the passage of the law. That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this resolution.

Approved, March 3, 1913.

Said joint resolution is to be read in connection with the act of April 15, 1912 (37 Stat., 85), and the circular of May 2, 1912, issued thereunder (41 L. D., 1).

Very respectfully,

FRED DENNETT,
Commissioner.

Approved, April 4, 1913:

LEWIS C. LAYLIN,
Assistant Secretary.

AUSTIN MANHATTAN CONSOLIDATED MINING CO.

Decided March 14, 1913.

MINING CLAIM—EXPENDITURES—REPAIRS TO TUNNEL.

Expenditures for repairs to a tunnel constructed as a common improvement for the development of a number of contiguous mining claims held in common, without further extension of the tunnel, can not be accredited as a basis for patent to other contiguous claims held by the same owners located subsequently to completion of the tunnel.

LAYLIN, *Assistant Secretary:*

The Austin Manhattan Consolidated Mining Company has appealed from the decision of the Commissioner of the General Land Office of December 27, 1911, holding for cancellation its mineral entry No. 04973, made October 22, 1910, at Carson City, Nevada, for Willow, Willow No. 1, Noonday Extension, Willow No. 2, Willow No. 3, Canajoharie, and Wishon Fraction lode mining claims, survey No. 3726.

The mineral surveyor accredited as an improvement, common to these claims and certain others, a tunnel approximately 5900 feet long, with three cross-cuts, one 2840 feet, one 342 feet, and one 450 feet long, with a drift 199 feet long, and a shaft 50 feet deep "deep timbered and well-constructed," and "now in process of further sinking." None of the improvements reported are upon the claims embraced in the above entry. The mineral surveyor reported their value to be \$150,000, and accredited a one forty-first part thereof to each of the above claims, and also the following lode claims: Dick Hocking, survey No. 3691, embraced in mineral entry 04974, made October 22, 1910; Miles, Brannan, Spokane, Union Fraction, Humes

Fraction, Empire State, Canon No. 1, Canon, and Littrell Fraction, survey No. 3715, embraced in mineral entry 05572, made December 6, 1911; 1905, Union, Emergency No. 2, Bonanza, survey No. 3721-A, embraced in mineral entry 05231, made November 14, 1910; Vulcan, Queen, George Hogan, survey No. 3719, Hightower, Pot Luck, and Pot Luck Extension, survey No. 3718-A, and fourteen other unsurveyed lode claims. He further reported:

This tunnel and shaft by means of cross-cuts and drifts will cut the veins of the several locations at depth and with one plant of machinery and by one set of workings all the lodes named can be worked through it more economically and advantageously than in any other manner.

July 11, 1911, the Commissioner required a further showing, holding that:

Before such improvement can be accepted as common to the forty-one lodes named in the field notes, it must be shown by abstracts of title and explanatory, corroborated affidavits, that ownership of all the claims was in the same individual or corporation at the time the work was done. . . . Inasmuch as claimant company did not acquire title to the Canajoharie location until January 11, 1910, nearly six months after the survey which valued the improvements then at \$150,000, it appears that common ownership of the group—at least as to the last named claim—was not effected prior to January 11, 1910. Five of the claims were not located until January 1, 1909, and it must be shown what amount of the work was done subsequent to that date, and how much subsequent to the time when common ownership began. . . . Furthermore, the forty-one claims must form a group of contiguous claims in order to obtain credit from the alleged common improvement.

In answer to the above requirement the entryman filed a waiver of any claim of the improvements as a credit to the fourteen unsurveyed locations, the Vulcan, Queen, George Hogan, survey No. 3719, and the Hightower, Pot Luck, and Pot Luck Extension, survey No. 3718-A, but sought to accredit them to the remaining twenty-one claims embraced in the entries, and forty-five other patented locations alleged to be owned by it. The showing made was to the effect that the Austin Manhattan Consolidated Mining Company purchased the tunnel with its cross-cuts, etc., January 23, 1908, and further alleged:

At the time of such purchase said tunnel through years of disuse had become largely filled with debris, its timbers had become partly decayed and it was unfit for use. Since its purchase said corporation has, at great expense, cleared and retimbered said tunnel, making it serviceable for use in developing said twenty-one unpatented mining claims, as well as in developing some of the Company's patented claims above described. From October 13, 1909, (the date upon which the remaining $\frac{1}{3}$ interest in the Canajoharie location was acquired by said Company) to July 2, 1910, (the date of last publication of the notice of application for patent for Willow et al. lodes, this group being the one in which the publication was first made of those groups depending on said tunnel, etc., for common improvements), said corporation expended upon said tunnel, together with its cross-cuts and in sinking said Frost shaft, the sum of \$41,302.82, and that the reasonable value of the work so done and the improvements so made was and is not less than said sum of \$41,302.82.

It is sought to accredit a one sixty-sixth part of the above expenditures to each of the twenty-one locations embraced in the present entries. The showing was accompanied by a blue print, from which it would appear that the forty-five patented locations and the twenty-one entered locations constitute a contiguous group of lode locations. It was also accompanied by abstracts of title of certain of the patented locations.

By his decision of December 27, 1911, holding the entry for cancellation, the Commissioner held that:

for the main workings to be accredited to the various groups now pending, contiguity must be established through other claims of the applicant, also owned by it at the time the work was done. . . . The availability of a common improvement depends in part, upon a showing that *all* the claims benefited were held in common at the time the work was done.

The groups depend for contiguity in a large measure upon the patented claims alleged to be owned by the Company, and the basis of the Commissioner's action appears largely to have been the failure of the entryman to furnish abstracts of title as to twenty-one of them, and because of alleged defects in the titles of others.

The Department is of the opinion that there is a more fundamental objection to the allowance of the repair work done upon the tunnel as an improvement common to the claims now sought to be entered than those raised by the Commissioner. The record is silent as to when, by whom, and for what purpose the tunnel was originally constructed. It is clear, however, that it was entirely completed before the location of the present claims and has not since been extended a foot. If it was constructed for the development of the patented claims now owned by the Company, it is simply an attempt to accredit, to after-located claims, repair work which would necessarily have to be performed in order to keep it available for the exploitation of the patented claims, for whose development it was run.

In *James Carretto and other lode claims* (35 L. D., 361), the Department held that each of a group of contiguous mining claims held in common and developed by a common improvement has an equal, undivided interest in such improvement, which is to be determined by a calculation based upon the number of claims in the group and the value of the common improvement. At page 364, the Department stated:

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.

The benefit of a common improvement springs from the fact of its construction, and when such construction is complete the benefit is complete. The repair work here sought to be accredited is necessitated simply because of the fact that the common improvement had been permitted to decay through disuse and merely put it in the same condition as it was at the time of its original construction.

In Aldebaran Mining Company (36 L. D., 551), the Department held that where a common improvement was constructed partly prior and partly subsequent to some of the claims in the group benefited, that the after-located claims could share in the common improvement, if the improvement represented a total value sufficient for patent purposes for all the claims, and if for each after-located claim, the common improvement had been subsequently extended so as to represent an added value of not less than \$500. In the present case, however, the tunnel and cross-cuts sought to be accredited as a common improvement to the after made locations have not been extended at all after such locations were made. They are now in the same condition as when originally constructed. No added value of \$500 for each of the later located claims has been put upon the common improvement here sought to be accredited. If such repair work can be accredited as a common improvement to claims located long after its construction, no limit other than that imposed by physical and engineering conditions could be placed upon the patenting of such claims without the tunnel ever being brought a foot nearer them, or ever in fact contributing in any respect to their development. The Department regards this as an unwarrantable extension of the doctrine laid down in the Aldebaran case.

The decision of the Commissioner is accordingly affirmed.

McGILLIVRAY v. GILLARD.

Decided April 14, 1913.

RELINQUISHMENT FOR CONSIDERATION—SECOND HOMESTEAD.

A homestead entryman who executes a relinquishment and places it in the hands of another, who disposes of it for a valuable consideration in excess of the filing fees, is disqualified to make second entry under the act of February 3, 1911, regardless of whether he actually received any part of the consideration for which it was sold.

LAYLIN, *Assistant Secretary:*

The land involved in this controversy is the NW. $\frac{1}{4}$, Sec. 11, T. 163 N., R. 88 W., 5th P. M., Minot, North Dakota, land district, at one time covered by a homestead entry of Paul Roderick, which was

canceled September 13, 1911, as the result of Government proceedings. On April 21, 1911, Gillard filed an affidavit of contest against Roderick's entry, on which no action was taken because hearing had been ordered on the Government proceedings. After these had been disposed of by the cancellation of the Roderick entry, Gillard, on September 26, 1911, made homestead entry of the tract.

On September 30, 1911, William McGillivray offered application to make second homestead entry of the tract and also filed an application in the nature of a contest against Gillard's entry, alleging settlement on the land about September 1, 1911, prior to Gillard's entry. Hearing was had and on the evidence introduced thereat the local officers found that McGillivray had settled on the land with his family on August 24, 1911, but that he was disqualified for making a second entry for the reason that he had relinquished a former entry for a valuable consideration, basing their action on the rule laid down in *Finley v. Ness* (38 L. D., 394). The action of the local officers was affirmed in a decision of the General Land Office of May 1, 1912, dismissing McGillivray's contest, from which the latter has appealed to the Department.

It was shown in evidence that McGillivray had made a homestead entry for land in the Glasgow, Montana, land district, and had also made an additional entry under the enlarged homestead act of February 19, 1909 (35 Stat., 639). Both these entries were included in a relinquishment by the entryman, dated May 6, 1911, and the land was thereafter entered by Arthur Gouge.

There is but little, if any, conflict in the testimony bearing on the question for determination in this case. The material facts are sufficiently set forth in the decision of the General Land Office and need not be here repeated in detail. It is clearly shown, and admitted by McGillivray, that he disposed of his relinquishment of the Montana entries through one Bangassen, his brother-in-law, and that the latter received in exchange therefor a span of mares valued at \$225. The deal was delayed and not consummated until after the proposition was submitted to McGillivray and approved by him. The mares were turned over to the brother-in-law and McGillivray contends that as they had never been actually delivered to him, he had not received a valuable consideration for his relinquishment. He admitted, however, that if he demanded the mares they would probably be delivered to him. Notwithstanding the evasions and evident effort on the part of McGillivray, when on the stand, to suppress the truth respecting the sale of the relinquishment, the evidence leaves no room for reasonable doubt that he disposed of it for a valuable consideration in excess of the amount of the filing fees he was required to pay on his entries.

In the act of February 3, 1911 (36 Stat., 896), allowing second homestead and desert land entries in certain cases, it is—

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.

The acts of April 28, 1904 (33 Stat., 527), and February 8, 1908 (35 Stat., 6), contained provisions similar to that above quoted. In considering these statutes, the Department, in the case of *Finley v. Ness*, *supra*, said:

Whether or not Ness actually received any money for the relinquishment of his former entry is not important . . . It is established that it was sold for a valuable consideration by the person in whose hands he placed it . . . Instead of filing the relinquishment in the local office so that the land might be cleared for entry by any other *bona fide* applicant he allowed it to become a subject of barter and sale . . . The Department cannot countenance the traffic here shown or consider it as being free from the disqualifying proviso in the acts of February 8, 1908, and April 28, 1904.

Applying this ruling to the admitted facts in the present case, it must be held that McGillivray is disqualified under the act of February 3, 1911, for making a second homestead entry. The decision appealed from is therefore affirmed.

BEN F. WATERS.

CULTIVATION—REDUCTION OF AREA—ACT OF JUNE 6, 1912.

The mere fact that the land embraced in a homestead entry is covered with timber and brush, which must be removed before it can be cultivated, is not sufficient reason to warrant reduction of the area required to be cultivated, by section 2291, Revised Statutes, as amended by the act of June 6, 1912.

Assistant Secretary Laylin to the Commissioner of the General Land Office, April 14, 1913.

Your letter of April 4, 1913, transmitted with favorable recommendation the application of Ben F. Waters for reduction of the required area of cultivation (Section 2291, Revised Statutes, as amended by act of June 6, 1912, 37 Stat., 123), presented in connection with his homestead entry for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lot 9, Sec. 6, T. 163 N., R. 71 W., Devils Lake land district, North Dakota.

The applicant states in his sworn application that three of the forty-acre subdivisions included in the entry are either so rough and broken or so swampy that they are incapable of cultivation, being valuable only for the cutting of hay or for grazing; that of the remaining forty-acre subdivision, the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, 25 acres could be

cultivated if the timber and brush were removed, but that the cost of clearing and cultivating would be \$45 or \$50 per acre and considerable time would have to elapse after the removal of the timber to allow the stumps to decay before the land could be cultivated.

The statements of applicant are corroborated by the report of a special agent of your office who examined the land and who recommends that the cultivation of 6 acres be held sufficient compliance with the law upon the part of entryman.

The language of section 2291, as amended, pertinent to this case, is:

That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of the entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in case of entries under section six of the enlarged homestead law double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation.

The regulations issued by the Department under this provision of law state that in view of the liberal reduction in the period of residence required upon homestead entries, accorded by the law, making it possible to secure title in three years and upon a showing of but two years' cultivation of one-sixteenth of the area entered and an addition one-sixteenth for the last year, cultivation must be construed to mean not only the breaking or stirring of the soil but the planting or sowing of seed and tillage of a crop; that in the administration of the provision relating to the reduction of the required area of cultivation the Department will not take into consideration anything except the peculiar conditions governing the tract entered, and whether, in view of the special physical and climatic conditions, the requirement of cultivation of the area above described is reasonable.

In this instance, as to the 25 acres susceptible of cultivation if the timber and brush were removed, the Department is clearly of the opinion that entryman is required, both under the law and the regulations, to cultivate not less than one-sixteenth of the area of his entry during one year and not less than one-eighth of the area of his entry during another year. The mere fact that, as a preliminary to such cultivation, timber and brush must be removed, constitutes no valid or sufficient reason why the entryman should be excused from compliance with the law. An entryman who selects for his homestead entry, land covered with timber or brush, must, if the entry be made in good faith for cultivation, expect at the time of making entry to clear the tract and reduce it to cultivation, and the mere fact that this process may involve much expense and labor affords no reason for relieving him from the requirement of the law. While

no doubt cultivation would be more difficult before the stumps of trees had been removed, yet their existence does not preclude cultivation, as all who have had experience with farming in timber countries know.

Entryman is not required to submit final proof under the provisions of section 2291, as amended, his entry having been made prior to the amendment of the statute. He may reside upon and improve the land for such period as when added to his service in the Army of the United States during time of war will aggregate five years, and submit final proof conforming with the requirements of section 2291 as in force at the date of his entry. If, however, he desires to secure the benefit of the more liberal provisions of the act as amended, he must, upon the showing made, be required to conform to its requirements as to cultivation. The application is accordingly denied.

HEIRS OF CLIFF L. ROOTS.

Decided April 17, 1913.

COAL LANDS—SETTLEMENT PRIOR TO WITHDRAWAL OR CLASSIFICATION.

A homestead entry made subsequent to the withdrawal or classification of the land for coal, but based upon settlement initiated prior to such withdrawal or classification, is subject to the provisions of the act of June 22, 1910, and the entryman is not, by reason of such prior settlement, entitled to an unrestricted patent under the provisions of the act of March 3, 1909.

LAYLIN, *Assistant Secretary:*

Charles L. Roots, claiming as heir of Cliff L. Roots, deceased, and Caroline E. Roots, claiming as transferee, have appealed from the Commissioner's decision of June 17, 1911, denying the application of said Cliff L. Roots for reclassification as non-coal of the W. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 21, T. 7 N., R. 26 E., Lewistown, Montana, land district, embraced in homestead entry 012483, and requiring the successors of the entryman to express willingness to receive patent in accordance with the reservations, conditions and limitations of the act of June 22, 1910 (36 Stat., 583), or to apply for a hearing to disprove the coal classification. The Commissioner stated that unless the claimant pursued one of the two courses indicated, the proof, which was held for rejection, would be finally rejected, and the entry, which was held for cancellation, would be finally canceled, without further notice.

It appears that entryman settled upon the land while unsurveyed, in November, 1900, and after survey thereof made entry February 9, 1907, and submitted satisfactory final proof of residence, improve-

ment, and cultivation, May 7, 1907. Final certificate issued May 20, 1907.

On October 15, 1906, the Department withdrew the land from entry or filing, under the coal land laws, for classification, and by Commissioner's letter of May 8, 1909, the land was classified as coal, valued at \$20 per acre. On September 15, 1910, the land was reclassified as coal land, price not fixed.

It is reported by a special agent of the General Land Office that entryman and his wife died in the spring of 1911, leaving as his heir a minor son, Charles L. Roots, who is the child of a divorced wife.

It is contended by appellants that inasmuch as the entry, though not actually made until after the withdrawal of the land from coal filing and entry, was initiated and based on a settlement which long antedated the withdrawal and was continuously maintained until after the entry and final proof, the case must be adjudicated under the provisions of the act of March 3, 1909 (35 Stat., 844), and, hence, that the act of June 22, 1910, *supra*, is without application. In this connection appellants contend that because the government did not, at time of final proof and entry, show the land to be chiefly valuable for coal, they are entitled to an unrestricted patent.

The act of March 3, 1909, *supra*, is applicable to those persons who in good faith locate, select, or enter, under the nonmineral land laws "public lands of the United States which *thereafter* are classified, claimed or reported as being valuable for coal." The act of June 22, 1910, *supra*, relates to those cases where locations, selections, or entries are made upon the surface of lands *theretofore* withdrawn or classified as coal lands or are valuable for coal. A proviso to section one of the act extends its benefits to those who, prior to its passage, had initiated "nonmineral entries, selections, or locations in good faith," upon lands withdrawn or classified as coal lands, such entrymen being permitted to perfect their entries on condition that they receive a patent reserving to the United States the coal in the lands and the right to prospect for, mine, and remove the same.

If, therefore, Roots's entry shall be held to have been made subsequently to a withdrawal or classification as coal, his entry must be disposed of with reference to the act of June 22, 1910, *supra*. It is contended, however, that his settlement, being prior to any coal withdrawal or classification, was such an initiation of a homestead claim as to entitle him to the benefits of the act of March 3, 1909. The language used in departmental decision of April 12, 1911 (40 L. D., 26), in case of John W. McClinton, supports the contention.

The withdrawal in question was based upon report from the Director of the Geological Survey to the effect that certain townships described in the accompanying list "are underlain wholly or in part by coal-bearing rocks. Of these townships certainly some and pos-

sibly all contain workable coal." Acting upon the theory that the lands contain workable deposits of coal, the President of the United States directed this Department to prepare an order withdrawing the lands from coal entry, which order was promulgated on the same day, and remained in force until the date of the classification and valuation hereinbefore described.

The order of October 15, 1906, is regarded by the Department as a coal withdrawal, and it follows that a homestead claim initiated thereafter would be adjudicable under the act of June 22, 1910, *supra*.

It is first necessary to inquire whether Roots's claim respecting the initiation of his claim under his settlement, as alleged, prior to any withdrawal or classification of the land takes his case out of the restrictive provisions of the act of March 3, 1909. In this connection it must be first noted that this act relates to those persons who have, in good faith, "located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed or reported as being valuable for coal." The term "locate" can have no reference to a settlement claim and is not in the practice or decisions of the Land Department applied to homestead claims. It includes scrip locations and certain other rights not predicated upon settlement but based upon the initiation of a claim to public lands through some definite act, other than settlement, which announces and defines the claim asserted. "Select" clearly does not embrace a settlement claim, the word "select" having a well-defined meaning both in the laws and in the practice of the Land Department. The only word used in either act having direct reference to homesteads or settlement claims, is the word "entered." Had Congress intended to recognize some preceding act upon the part of the claimant, upon which the homestead was initiated, such as settlement, it would clearly have indicated the same by the specific expression "a settlement" or "settled upon." It did so in the so-called withdrawal act of June 25, 1910 (36 Stat., 847). The Department does not believe, therefore, that a settlement *without entry* prior to the withdrawal or classification of the land for coal brings the case within the act of 1909. Accordingly, the case of John W. McClinton, *supra*, in so far as it conflicts with the views here expressed, is overruled.

The entry here in question, therefore, having been made after the withdrawal, is protected, if at all, only, and to the extent therein provided, by the act of June 22, 1910, *supra*, and must be adjudicated under that act. This entry, having been made prior to the act of June 22, 1910, is governed by the proviso to section one of that act, quoted above. In other words, the entryman had "initiated a non-

mineral entry . . . prior to the passage of this act, on lands withdrawn or classified as coal lands," and he may perfect the same "but he shall receive the limited patent provided for in this act."

The Commissioner's decision in the case at bar is affirmed to the extent of denying the application for unrestricted patent or a reclassification of the land as non-coal. Unless claimant shall, within thirty days of notice hereof, expressly refuse to receive a limited patent to the land, in accordance with the conditions of the act of June 22, 1910, the Department will, if all else be found regular, proceed to issue patent upon homestead entry 012483, under and subject to the reservations, conditions, and limitations of the said act of June 22, 1910. In event of refusal to accept a limited patent, the entry will be canceled.

HEIRS OF CLIFF L. ROOTS.

Motion for rehearing of departmental decision of April 17, 1913, 42 L. D., 82, denied by Assistant Secretary Laylin, June 14, 1913.

RECLAMATION—UMATILLA PROJECT, OREGON.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., April 17, 1913.

In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, the following public notice is issued and is applicable to any lands under the Umatilla Project, Oregon, opened to irrigation by public notices heretofore issued:

1. Any water right application heretofore filed will be abrogated as authorized by the act of February 13, 1911 (36 Stat., 902), upon the filing and recording of a new water right application of the form adopted by the Secretary of the Interior and compliance with all the requirements of this notice. Payments to be hereafter made on account of the portion of the instalment of the building charge under such new application shall be in accordance with the annual instalments thereof graduated as hereinafter scheduled. The first of such payments shall be held as due March 1, 1913, and the remaining payments shall be made according to said schedule of payments until the full sum of \$70 shall have been paid, less the amounts heretofore paid on account of the portion of the instalment for the building charge, which shall be credited on the last payments.

2. The graduated schedule of the portions of the instalments on account of the building charge is as follows; and the due dates for applications heretofore filed are as specified:

March 1, 1913	\$ 2.00
" 1, 1914	3.00
" 1, 1915	4.00
" 1, 1916	5.50
" 1, 1917	7.00
" 1, 1918	8.50
" 1, 1919	10.00
" 1, 1920	10.00
" 1, 1921	10.00
" 1, 1922	10.00
Total -----	\$70.00

3. As the terms herein authorized do not provide for payment for the furnishing of water for the irrigation season of 1913 the regulation is hereby established that water shall be furnished in the irrigation season of 1913 on a rental basis of \$1.50 per acre of irrigable land, subject to the conditions regarding water service and the amount furnished as provided in the public notices, orders and regulations heretofore in force upon the project; and no credit for the payment of such rental charge shall be allowed on any charges heretofore or hereafter due for building, operation and maintenance.

4. To take advantage of the provisions of this notice the applicant shall, within 60 days from the date hereof file a new water right application as hereinbefore provided and shall accompany the same by payment of the sum of \$1.50 per irrigable acre for the area shown on farm unit plats as a rental charge for irrigation water service in 1913 and accompanied also by the affidavit of the applicant supported by the affidavits of two competent witnesses and accepted by the project engineer that he has under cultivation crops requiring irrigation (not including nurse or cover crops) and has irrigated the proportions of the irrigable lands described in his water-right application as hereinafter stated; or if his land is not under crop and irrigated as aforesaid that he has adequately prepared his land for cultivation and irrigation by clearing, checking, leveling, furrowing or building borders, ditches flumes or other suitable works or structures so that water may be applied successfully in accordance with good irrigation practice over the following proportions of the irrigable area stated in his water-right application:

For the first	unit of the project	60 per cent of the irrigable area.
" " second	" " " "	50 " " " " " "
" " third	" " " "	40 " " " " " "
" " fourth	" " " "	30 " " " " " "

5. Such application when duly filed, accepted and recorded shall entitle the applicant to such deferment of the charges for building, operation and maintenance that his next instalment of such charges, being the first in the foregoing schedule of instalments, \$2.00 per acre of irrigable land, shall be regarded as due on March 1, 1913, and subsequent instalments on March 1 of each year thereafter. The portion of such charge on account of building shall be as scheduled in paragraph 2 hereof and the portion for operation and maintenance due March 1, 1914, and thereafter until further notice shall be of such amount and subject to such regulations as have been heretofore announced.

6. In cases where a prior water-right applicant has not been able to show that he has cultivated and irrigated the proportion of his lands specified in paragraph 4 or has not prepared his lands for irrigation as aforesaid and therefore is unable to secure the benefits herein provided for, such applicant may participate in such benefits by compliance with the following requirements.

7. Within 60 days from the date hereof, such applicant under paragraph 6 shall commence actual field operations in clearing, leveling, checking, or otherwise preparing his land for irrigation as aforesaid or in seeding, planting or otherwise cultivating as aforesaid, to the satisfaction of the project engineer and shall otherwise satisfy the project engineer that the operations thus commenced during the said 60-day period have been diligently prosecuted therein and at the expiration of that period are being prosecuted with due diligence, and in addition that the applicant has at his command such resources as in the opinion of the project engineer afford reasonable assurance that at the expiration of 8 months from the date hereof the above proportions of the lands or entry of said applicant will be fully prepared for or be actually in crop as above specified.

8. Each applicant under paragraph 6 desiring to enjoy the benefits herein offered and who intends to comply with the foregoing requirements shall within 30 days from the date hereof, notify the project engineer in writing of his intention, and within the 60-day period pay the rental charge for 1913 amounting to \$1.50 per acre and inform the project engineer of the steps he is proposing to take in accordance with the above requirements and otherwise supply the project engineer with such information that the latter can certify at the expiration of the 60 days aforesaid whether such applicant has made adequate showing of results and intention to entitle him to the benefits herein offered.

9. Each applicant under paragraph 6 who has made a showing satisfactory to the project engineer at the termination of the 60-day period aforesaid and who shall, at the expiration of the 8-months

period, make a showing in accordance with the above schedule of cultivation shall upon the filing, acceptance and recording of a water right application as above required be entitled to the benefits hereunder, but in case of his failure to show compliance within either the 60-day or 8-months period aforesaid the applicant shall be subject to the terms of the public notices and orders heretofore issued. The intent of this notice being to stay the enforcement of such public notices during such periods as to permit such applicant to comply with the cultivation requirements hereof.

10. This notice shall not apply to entries or water right applications on which two or more instalments of the building charge were due and unpaid on February 29, 1912, and which said instalments remain unpaid at the time of application hereunder.

11. New water-right applications, except those filed in accordance herewith, in lieu of previous water-right applications, shall be subject to the terms of the public notices and orders heretofore issued.

LEWIS C. LAYLIN,

Assistant Secretary of the Interior.

ISOLATED TRACTS—MOUNTAINOUS OR ROUGH LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., April 17, 1913.

Registers and Receivers, United States Land Offices.

SIRS: In order to conform the same to the terms of the first proviso to the act of March 28, 1912 (37 Stat., 77), the regulations thereunder on page 5 of Circular No. 202, dated December 18, 1912, and page 8 of Circular No. 203, regulations under the Kinkaid Acts effective only in Nebraska, dated December 18, 1912 [41 L. D., 448, 500], are hereby amended so that wherever the words "mountainous and too rough for cultivation" appear the same shall read "mountainous or too rough for cultivation."

These instructions will apply to all supplemental circulars and regulations under said act and you will be governed accordingly in the disposition of applications thereunder.

Very respectfully,

FRED DENNETT,

Commissioner.

Approved:

FRANKLIN K. LANE,

Secretary.

RESIDENCE—EXTENSION OF TIME—CLIMATIC CONDITIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
 GENERAL LAND OFFICE,
 Washington, D. C., April 18, 1913.

REGISTERS AND RECEIVERS,
*United States Land Offices,
 North Dakota and South Dakota.*

SIRS: Whereas it has been brought to the attention of this office that unusual climatic conditions prevail in your States to such an extent as to prevent the establishment of residence under a large number of entries and declaratory statements made at your offices between September 1, 1912, and November 15, 1912, all persons claiming under such entries and filings are hereby allowed until May 15, 1913, in which to commence residence under their entries and filings, and you are directed not to receive or allow any applications to contest any of said entries or filings on the ground that residence has not been established thereunder prior to May 15, 1913.

Very respectfully,

FRED DENNETT,
Commissioner.

Approved, April 18, 1913:
 FRANKLIN K. LANE,
Secretary.

LOTTIE M. UPHAM.

Decided April 19, 1913.

ENLARGED HOMESTEAD—ACT OF AUGUST 24, 1912.

The act of August 24, 1912, validating certain enlarged homestead entries where the entryman before making the entry had acquired title to a technical quarter section of land under the homestead law, has no application except in instances where the former entry was for a "technical quarter section."

LAYLIN, *Assistant Secretary:*

The Department has considered motion for rehearing filed in the above entitled cause wherein decision was rendered March 12, 1913, affirming that of the Commissioner of the General Land Office which held for cancellation the enlarged homestead entry involved in said cause for the stated reason that the entrywoman had already exhausted her homestead right by having made prior entry and secured patent thereon for 158.12 acres of land.

This motion sets forth particularly that this enlarged homestead entry was validated by the act of August 24, 1912 (37 Stat., 506), entitled "An act validating certain homestead entries."

Said act, by its terms, validates enlarged homestead entries only in cases where the entryman "before making such enlarged homestead entry, had acquired title to a technical quarter section of land under the homestead law." In this case Upham's prior entry, on which she secured patent as stated, was not for a technical quarter section of land but was in part for lands in one quarter section and in part for lands in another quarter section, namely, for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 1, 2, and 3, Sec. 31, T. 154 N., R. 82 W.

This entry is accordingly not within the purview of said act and the motion is denied.

AUGUSTA ERNST.

Decided April 19, 1913.

DESERT ENTRY—ASSIGNMENT—INTERMEDIATE DISQUALIFIED ASSIGNEES.

Where a desert land entry upon which final certificate had not issued passed through the hands of successive persons, some of whom were not qualified to take a desert entry by assignment, and finally came into possession of one who is so qualified, he may be recognized as entitled to hold the entry, notwithstanding such intervening disqualified assignees.

LAYLIN, *Assistant Secretary:*

Augusta Ernst has appealed from decision of March 14, 1912, by the Commissioner of the General Land Office, rejecting the assignment to her of desert land entry of Edith C. Reinhart, made February 20, 1893, to embrace, as subsequently amended, the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$, Sec. 28, T. 11 N., R. 8 E., unsurveyed, Helena, Montana, land district.

Final proof on the entry was made by the entrywoman on March 12, 1897, and was found satisfactory by Land Office letter "G" of March 31, 1897, and further action thereon suspended pending survey of the land.

By quitclaim deed dated August 30, 1911, Florence Westcott conveyed said land to Augusta Ernst whose affidavit as to her qualifications to take the same by assignment, together with the quitclaim deed thereto, was filed October 20, 1911. In an explanatory affidavit filed October 20, 1911, Florence Westcott alleged that she was one of the heirs and administratrix of the last will and testament of one Louis Geis, deceased; that a portion of the property devised to her by said decedent was the aforesaid entry of Reinhart, by whom, it is alleged, said entry was assigned to Anderson, who transferred the same to Louis Geis, who at the time of his death was seized and possessed of the property in question, and which he devised to her;

that at the date of the purchase of said land from Anderson, Geis was not qualified to take the same by assignment as he had previously made a desert land entry himself for 640 acres of unsurveyed land; that affiant is heir at law and sole devisee of said Louis Geis, whose said entry contained 640 acres of unsurveyed land, now perfected except as to its adjustment and final payment, which, however, cannot be made until the land is officially surveyed; that the purchase of the Reinhart land by the said Geis was made in good faith, but evidently under a mistaken belief that a desert entry upon which final proof had been made could be purchased by any person in like manner as entries perfected by the issuance of final certificate; that until recent years this was quite a common practice in Montana, and many entries of this character were transferred in good faith without regard to the limitations provided in the desert land law; that affiant being restricted under said law from holding as such devisee the Reinhart entry, she has sold and assigned the same to her mother Augusta Ernst, who is qualified to purchase and hold the entry by assignment. Copies of the records of titles to lands in Meagher County, Montana, are with the record and support the foregoing allegations with reference to the transfers mentioned. The Commissioner held upon the facts cited that the present assignment could not be recognized for the reason that it is not shown that Anderson ever qualified as the assignee of Reinhart; that even if such qualifications had been shown as to Anderson, nevertheless, the transfer to Geis could not be recognized because he then held 640 acres under the desert land law, and consequently he could not legally will the land entered by Reinhart to Westcott, and that the latter having no title thereto herself, could not assign or otherwise dispose of the same in any manner whatsoever.

Final proof was made on this entry about fifteen years ago, and the transfers above recited, except the last one, which is here under consideration, were evidently made upon the theory that said sales could be made as though the lands had been patented. But it was held in the case of Simeon S. Hobson (29 L. D., 453, syllabus) :

In the case of a desert entry of unsurveyed land, where the entryman prior to survey submits final proof, and then sells the land, such sale must be regarded as an assignment of the entry, proof of which should be furnished as required in other cases of assignment.

Therefore, as held in the above case, the intermediate transactions were subject to the rules governing transfers or assignments before patent and were defective because of failure to comply with such rules, and it now appears that some of the transferees were not qualified to hold. It does not follow, however, that the present transfer must be disapproved. Under the rulings of this Department homestead entries have been permitted to stand, although the entryman

was not qualified when he made entry, if he acted in good faith and became qualified prior to proceedings against the entry. This rule has been applied to aliens, minors and persons owning excess acreage. See James F. Bright (6 L. D., 602); *Vidal v. Bennis* (22 L. D., 124); *Jones v. Burch* (39 L. D., 418).

By analogy it would appear that these decisions have application to such a case as we have here, where the present transferee or assignee is qualified to hold.

There is another line of cases based upon the same principle which may be properly invoked in support of recognition of the present assignment. Under the common law, an alien was not qualified to hold real estate, but notwithstanding such disability he could take lands by purchase or devise and hold them against all the world except the State, nor could he be divested of his estate even by the State until after a formal proceeding called "office found"; and until that was done he could sell and convey or devise the lands and pass a good title to the same. See Digest Supreme Court Reports (1908), Vol. 1, page 134, *et seq.*

And so as to corporations the rule operates in such a way that although the State may, in a direct proceeding for that purpose, overthrow the title of the corporation and escheat the land to its own use, yet until it does so the corporation may in the meantime convey an indefeasible title to the land. See Thompson's Commentaries on the Law of Corporations, Vol. 5, pages 4483 and 4491. Also Digest Supreme Court Reports (1908), Vol. 2, page 1976, *et seq.*

A desert land entryman is permitted to assign his entry, and if such transferred or assigned entry be found by the Government in the hands of a person qualified to hold, the title should not be questioned simply because an intermediate transferee was not qualified to hold. The Government would not knowingly approve a transfer which would fix title in one not qualified to take, but where one qualified to hold is asking recognition of a transfer of an apparently valid entry, no reason is seen, in the light of the principles above illustrated, why such transfer should not be recognized and approved, even though the prior holder was disqualified.

It is observed that with the papers is an application by Matthew G. Daniel, dated July 16, 1912, to contest this entry upon the allegations that no clear right had been acquired by the original entrywoman or her successors in interest to the use of sufficient water to irrigate and reclaim the land; that about one-half of the said land is non-desert in character, and was non-desert at the time of the entry and proof; that at the time of final proof there had not been expended the sum of \$3.00 per acre in improving and irrigating the said land; and that the portions of the land which were desert in

character had not at the time of the final proof been reclaimed by irrigation.

Allowance of contest, especially after final proof has been made and accepted, is discretionary with the land department, and in view of the fact that this application to contest was not made until about nineteen years after the date of the original entry, and about fifteen years after acceptance of the final proof, and not until after the decision of the General Land Office holding the transfer to be ineffective, the contest is not to be seriously considered, and it is accordingly denied.

The decision appealed from is reversed.

ALBIN C. SWANSON.

Decided April 19, 1913.

FOREST LIEU SELECTION—UNSURVEYED LANDS—SETTLEMENT RIGHTS.

An application to make forest lieu selection of unsurveyed lands, which designates the lands as what will be, when surveyed, technical subdivisions of specified sections, attaches to the legal subdivisions so designated upon identification thereof by approval of the plat of survey by the Commissioner of the General Land Office, and precludes the attachment of subsequent adverse settlement rights.

LAYLIN, Assistant Secretary:

Appeal is filed by Albin C. Swanson from decision of June 24, 1912, of the Commissioner of the General Land Office affirming the action of the local officers in rejecting the application filed by said Swanson February 15, 1912, to make homestead entry for the SE. $\frac{1}{4}$, Sec. 26, T. 27 N., R. 10 E., W. M., Seattle, Washington, land district, for the stated reason that said lands are embraced in subsisting forest lieu selections made August 19, and August 24, 1899, by Bethel J. Rucker, one for the S. $\frac{1}{2}$ of said quarter-section, and other lands, and the other for the N. $\frac{1}{2}$ thereof and other lands.

Survey plat of this township was approved by the surveyor general December 1, 1910, accepted by the Commissioner December 21, 1911, and filed in the local office February 15, 1912, when Swanson's application for entry and Rucker's application to adjust said selections also were filed. Rucker, in making said selections, designated said lands by the above descriptions, although they were then unsurveyed, and his adjustment was to the same legal subdivisions. Swanson alleged in his application that he settled on said lands January 27, 1912. His application was rejected for the stated reason that said lands were identified in law by the approval December 1, 1910, by the surveyor general of said survey plat and that "the application to select, which was of record at said date, is construed

as a sufficient notice to an intending settler. See departmental decision in the case of *F. A. Hyde et al.* (40 L. D., 284)."

The Commissioner has mistaken the holding of the Department in the case cited. While the Department in that decision held that approval of the township plat of survey is an identification of selected unsurveyed lands, not identified in fact on the ground, as of the date of such approval, precluding subsequent adverse settlement, the approval of survey referred to in that decision was not the approval by the surveyor general but the approval by the Commissioner, which alone legally perfected the survey. *F. A. Hyde & Company* (37 L. D., 164); *Anderson v. State of Minnesota* (*Ibid.*, 390).

That the survey referred to in said decision in the case of *F. A. Hyde et al.* was the approval, or more properly the acceptance, by the Commissioner is seen from the Department's decision in the case of *De Long v. Clarke* (41 L. D., 278, 280). The date of approval of the survey, May 19, 1902, given in said case of *F. A. Hyde et al.* was taken from the record in the case as the date of the Commissioner's approval or acceptance, the record therein not showing it to be the date of the surveyor general's approval.

As Swanson's alleged settlement was subsequent to the date of acceptance by the Commissioner of the survey of these lands, his application was properly rejected.

As herein modified the decision appealed from is affirmed.

FANNIE D. WEIDERANDERS.

Decided April 21, 1913.

DESERT ENTRY—FILING FEES—ACT OF FEBRUARY 3, 1911.

The initial payment of 25 cents per acre required of a desert land entryman at the time of filing his application is within the term "filing fees," as used in the act of February 3, 1911; and the fact that an entryman received for his relinquishment the amount of such initial payment does not disqualify him from taking an assignment of a desert entry as a second entry under that act.

JOINT ASSIGNMENT OF DESERT ENTRY.

Where a desert entry has been divided and half assigned to each of two qualified assignees, it is competent for a qualified person to take an assignment of both halves of the divided entry, either by joint assignment from the two holders or by separate assignment from each of the portion held by him.

LAYLIN, *Assistant Secretary*:

May 23, 1910, Susan D. Whitlock made desert land entry No. 013546, for the NW. $\frac{1}{4}$, Sec. 18, T. 7 N., R. 9 E., Santa Fe, New Mexico, containing 149.33 acres. March 9, 1911, Whitlock assigned the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, of said section, to James M. Terry, and on the same

date assigned the S. $\frac{1}{2}$ NW. $\frac{1}{4}$ to Frank L. Standhardt. By joint deed of assignment, dated April 11, 1912, said Terry and Standhardt assigned their respective holdings to Fannie Dora Weideranders.

From a decision of the Commissioner of the General Land Office, dated July 3, 1912, refusing to recognize said assignment, appeal has been prosecuted to the Department.

Accompanying the assignment papers was the affidavit of the assignee in which she stated that in the year 1910 she made a desert land entry at Douglas, Wyoming, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 23, T. 31 N., R. 71 W., which was subsequently relinquished, and received therefor the sum of \$40, which was the filing fees paid thereon. In the decision appealed from, the Commissioner held that \$40 paid by the claimant upon her former entry, being 25 cents per acre required by desert land entrymen, was not fees as contemplated by the act of February 3, 1911 (36 Stat., 896), and she was therefore disqualified from accepting an assignment of a desert land entry.

This question has heretofore received the consideration of the Department in the case of Myron W. Kyre, decided March 15, 1913 [41 L. D., 652], in which it was held that said act contemplated any money required by the act to be paid at the time of making said entry. The Commissioner accordingly erred in rejecting said assignment upon this ground.

The further question is presented for consideration, as to whether or not recognition can be given the joint assignment of two or more claims originally embraced in a single entry.

The act of March 28, 1908 (35 Stat., 52), provided for the assignment of desert land entry in whole or in part, but limited such assignment to persons qualified to make original entry of the land assigned.

One who takes an entry by assignment exhausts his desert land rights as effectively as though he had made an original entry, and this is true even if he only takes a portion of such entry, so far as taking other lands not included in the original entry; but assignment of part of entry to a person, does not disqualify him from receiving assignment of another of the remaining part of the same entry.

The entry dates from the original filing, and is held upon the records of the land department as a single entry, although it may be divided through assignment and held by several separate assignees.

In the present case, Whitlock's assignees, Terry and Standhardt, assigned their respective halves of the original entry by joint assignment to the present claimant, and it might therefore be held that this transaction constituted but one assignment. This construction is, however, technical, and it is believed that the same result would have

been accomplished by separate assignments. This construction is not only within the plain provisions, but within the spirit and intent of the desert land act.

The decision appealed from is accordingly reversed, and the case remanded with instructions to recognize the assignment of Weideranders, unless other reason appear for refusal to recognize the same.

FRED H. PARKER.

Decided April 21, 1913.

HOMESTEAD—CLIMATIC CONDITIONS—ACT OF AUGUST 19, 1911.

The act of August 19, 1911, relieving homestead entrymen in certain States from residence and cultivation during the period therein specified, because of climatic conditions, furnishes no warrant for relieving such entrymen from residence or cultivation during any other period, the act clearly contemplating full compliance with the requirements of law both prior and subsequent to the period specifically provided for therein.

HOMESTEAD—CLIMATIC CONDITIONS—COMPLIANCE WITH LAW.

One who makes homestead entry of land subject and generally known to be subject to climatic or other conditions making compliance with the requirements of the law more or less difficult, takes upon himself a burden commensurate with such conditions; and so long as he retains the entry he must comply with what the law requires in the matter of residence, improvement and cultivation.

LAYLIN, Assistant Secretary:

Appeal is filed by Fred H. Parker from decision of May 9, 1912, of the Commissioner of the General Land Office holding for cancellation final certificate issued September 6, 1911, upon commutation proof submitted August 19, 1911, on said Parker's homestead entry made January 12, 1909, for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 30, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 31, T. 7 N., R. 14 E., B. H. M., Rapid City, South Dakota, land district, for the stated reason that the cultivation and improvements shown are insufficient to indicate good faith in fulfilling the requirements of the homestead law.

Said proof shows improvements valued at \$140, consisting of a sod house 10 by 16 feet, considerable fencing, well, $4\frac{1}{2}$ acres broken and not planted, and $1\frac{1}{2}$ acres broken and cultivated. One-fourth of an acre was planted in garden in 1910, and in the year 1911, 1 acre in garden and $\frac{1}{2}$ acre in corn. The entry contains 120 acres of cultivable land. Residence was established July 12, 1909, and continued to proof except for two absences aggregating eight months and five days.

Improvements and cultivation shown are manifestly meager and the cultivation at least is wholly insufficient to comply with the re-

quirements of the homestead law in commutation proof. The appeal contains an extended argument, to which full and careful consideration has been given by the Department, contending that the extreme conditions existing in this locality as to the dry nature of the soil and the drought prevalent in said locality had prevented this entryman from accomplishing more in the way of cultivation and should warrant the acceptance of proof notwithstanding the meager cultivation shown. These conditions are proper to be considered, but there is no warrant of law for accepting proof which does not show a substantial and *bona fide* compliance with the requirements of the law, and there is no provision of law authorizing any different amount or kind of compliance with law in this class of cases than in others. In this connection the Department takes notice of the act of August 19, 1911 (37 Stat., 23), relieving entrymen in this locality both from residence and from cultivation during the period from the date of that act to April 15, 1912. This act, however, while doubtless prompted by the fact of the existing drought prevalent in this locality, furnishes no argument in support of the contention made herein that the fact of such drought and of the condition of the soil excuses or mitigates compliance with law as to cultivation of such lands during other periods than the period of absence authorized by said act. There is nothing in the provisions of said act so indicating, and the provisions thereof are not indicative of any intention of Congress to relieve such entryman during other periods from full compliance with the requirements of the homestead law both as to residence and as to cultivation; on the contrary, said act leaves the homestead law wholly unaffected, in such requirements, as to other periods and specifically provides that "the time of actual residence during the period named shall not be deducted from the full time of residence required by law." This act clearly contemplates residence and cultivation, in all respects as required by the homestead law, both prior and subsequent to the period of absence specifically provided for in said act; and to hold that any less residence or cultivation may be accepted by the Department in proof because of climatic or other local conditions is clearly beyond the administrative province of the Department and is solely within the legislative province of Congress.

A homestead entryman of lands in a locality such as this, subject and generally known to be subject to climatic or other conditions making cultivation of such lands more or less difficult, takes upon himself a burden, commensurate to such conditions, of efforts in compliance with law as to cultivation which will, notwithstanding but with full and fair consideration of such conditions, evidence his good faith and make of such lands an agricultural home and home-

stead as contemplated by the homestead laws. He may, if he wishes, relinquish such entry if unable to comply with the requirements of the homestead law because of such conditions or for other sufficient reasons, without prejudice, under present law, to his homestead right, but so long as he retains the entry he must comply with what the law requires in the way of residence, improvements and cultivation, and do the acts and things required. Mere good intentions, with only inconsiderable compliance with these legal requirements, are not sufficient upon which the Department may adjudge title to a patent, and in commutation cases, in which class of cases a greater degree of strictness in proof is required, under the long established practice, than in final proof cases, the entryman must show that such considerable portion of the cultivable lands of the entry have been actually farmed, and in such manner as a farmer would reasonably be expected to farm in maintaining an agricultural home upon the land for the length of time involved.

The proof submitted does not show such condition as to cultivation in this case, and the decision appealed from is accordingly affirmed.

WITHDRAWALS OF PUBLIC LANDS—PROCEDURE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

Washington, April 21, 1913.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Your letter of April 12, 1913, refers to former practice of your office in withdrawing specific areas of public lands for disposition in aid of pending or proposed legislation and requests instructions.

In view of the enactment by Congress of the so-called withdrawal measure of June 25, 1910 (36 Stat., 847), authorizing the President to withdraw lands for public purposes, the Department believes that proposed withdrawals of public lands, unless specifically authorized by other laws, should be submitted to the President for consideration and action.

You will, therefore, in all appropriate cases submit your recommendation to the Department, which, in turn, will submit same to the President.

Respectfully,

LEWIS C. LAYLIN,
Assistant Secretary.

DESERT-LAND FINAL PROOFS—EVIDENCE OF WATER RIGHTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, April 22, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: The instructions of February 21, 1908 (36 L. D., 282), relative to evidence of water rights in final proofs on desert-land entries, are hereby revoked, and hereafter abstracts of title in such cases will be accepted as competent record evidence when certified by the legal custodian of the records of transfers or by a duly authorized abstractor of titles in conformance with the last clause of paragraph 42 of Mining Regulations as amended January 9, 1912 (40 L. D., 347).

Very respectfully,

FRED DENNETT,
Commissioner.

Approved:

LEWIS C. LAYLIN,
Assistant Secretary.

FRANK HOUGH MINING CO. v. EMPIRE PRINCE MINING CO.

Decided April 24, 1913.

ADVERSE CLAIM BY CORPORATION—VERIFICATION.

An adverse claim by a corporation, under section 2326, Revised Statutes, verified by its executive officer outside of the land district where the claim involved is situated but at its principal place of business, is within the meaning and intent of the law the act of the corporation itself.

LAYLIN, *Assistant Secretary:*

November 13, 1911, the Empire Prince Mining Company filed application for patent 03537, under section 2325, Revised Statutes, for the Black Prince and Empire lode mining claims, Durango, Colorado, land district.

During the sixty-days period of publication of notice of application for patent two adverse claims were filed, signed "The Frank Hough Mining Company by A. E. Reynolds, president," the papers being attested by the seal of the corporation and by its secretary, J. P. M. Humphrey. The adverse claims recite, among other things, that the adverse claimant is a corporation duly organized and existing under and by virtue of the laws of the State of Colorado, and

that its principal place of business is the Equitable Building, Denver, Colorado. Each was verified by A. E. Reynolds, in Denver, Colorado, before a notary public in and for the city and county of Denver, and concluded as follows: "That affiant makes this verification and affidavit on behalf of and as a verification of the said The Frank Hough Mining Company, the adverse claimant above named, and as its executive officer."

It is alleged that within thirty days from and after the filing of said adverse claims in the local office, the Frank Hough Mining Company instituted action thereupon in the District Court of Ouray County, Colorado, and that the action is now pending and undetermined in said court. Motions to dismiss the adverse claims were filed in the local land office by the Empire Prince Mining Company on the ground that same are invalid, insufficient, and inoperative for the reason that the verifications were made by the president of the adverse claimant company outside the land district wherein the claims are situated. The register and receiver found the claims to have been properly verified and otherwise sufficient, and overruled the motions. On appeal, this action was affirmed by the Commissioner of the General Land Office, and further appeal brings the case before this Department.

Motion has been made herein to dismiss the appeal on the ground that it is "obviously frivolous and interposed solely for delay." There is no showing whatsoever made in this behalf except the simple statement of local counsel for respondent, The Frank Hough Mining Company. The Department fails to find anything whatsoever to support this statement, and, therefore, finds to the contrary, and the motion to dismiss is denied.

The question raised by the appellant is an important and by no means a simple one, and has been vigorously argued in appellant's brief. While local counsel for respondent, the Frank Hough Mining Company, who has conducted the case on this appeal, has filed the motion to dismiss, he has made no attempt to aid the Department with an argument on the merits.

Section 2326, Revised Statutes, provides that "where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same." Section 2335, Revised Statutes, provides that "all affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated." The act of Congress approved April 26, 1882 (22 Stat., 49), is to the effect that—

The adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated;

and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

It is the contention of appellant that the adverse claims presented should not be received or considered by the Land Department because verified by its president outside of the limits of the land district wherein the claims involved are located, and that under the act of 1882, *supra*, verification must be made personally by the claimant if it occurs outside of the limits of the land district but may be made by agent within the limits of the land district if the claimant be temporarily or permanently outside of the district limits; that the verification in this instance by the president of the corporation was not the act of the corporation itself within the meaning of the act of 1882, but the act of an agent.

This contention is based upon what is said to be the general rule, that the officers of a private corporation are merely ministerial agents to conduct business for the benefit and under the authority of the corporation. While this contention is supported by various authorities the Department can not concur to the extent of holding that the act of an officer of a corporation is always that of an agent as distinguished from that of the corporation itself, or that a corporation can only act through a duly appointed or authorized agent.

In the case of *Pollard v. Vinton* (105 U. S., 7, 12), the Supreme Court said:

In the other case the officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents and are to be treated as the agents of the corporation or of the corporators it is also true that for some purposes they are the corporation, and their acts as such officers are its acts.

In the case of *Walker v. Woodside et al.* (164 Fed., 680), involving a case under the bankruptcy act of July 1, 1898 (30 Stat., 553), the Circuit Court of Appeals, Ninth Circuit, held that a petition in involuntary bankruptcy in which a corporation joins may be verified for the corporation by its president. Section 18 of the act of July 1, 1898, *supra*, requires in bankruptcy cases that "all pleadings setting up matters of fact shall be verified under oath." In the case just cited the verification of the petition was made through the signature of the corporation by its president with the seal of the corporation attached.

In the case of *Sherman Center Town Company v. Swigart* (23 Pac., 569), the Supreme Court of Kansas held that a contract, regular on its face, executed in behalf of a corporation and within the

scope of its business, by the president and secretary, is *prima facie* evidence of their authority to execute the same.

Section 858 of the Revised Statutes of Colorado, 1908, provides that it shall be lawful for any corporation to convey land by deed, sealed with the seal of the corporation and signed by the president. Section 856 provides that in the case of suits against any corporation organized under the laws of the State of Colorado "summons shall be served in that county where the principal office of the corporation is kept or its principal business is carried on, by delivering a copy to the president thereof."

• The decisions and acts cited tend to support the conclusion that in certain instances officers of corporations may act for them, and that such acts are regarded and held to be not the acts of agents but of the corporations themselves. Be that as it may, however, it is believed that the provisions of the applicable mining laws, the history thereof, and the practice thereunder are such as to warrant the conclusion that the principal officer of a corporation may, for and as the act of the corporation, verify an adverse claim under section 2326 at the principal place of business of the corporation outside of the land district where the claims involved may be situated.

Sections 2318 to 2335 were originally contained in the act of May 10, 1872, commonly known as the general mining laws. That portion of the act of 1872 now contained in section 2325, requires applicants for patent, whether a "person, association, or corporation," to file in the proper land office an application for patent under oath. That part of the act of 1872 now contained in section 2326, Revised Statutes, requires an adverse claim to "be upon the oath of the person or persons making the same." That part of the act of 1872 now contained in section 2335, requires "all affidavits required to be made under this chapter" to "be verified before any officer authorized to administer oaths within the land district where the claims may be situated." No provision was made for the execution of these affidavits outside of the land district or by agent. That corporations were intended to be admitted to all the benefits of the mining laws, including the right to locate and obtain patents for claims, is clearly shown by that part of the act of 1872 now contained in section 2321, as well as that part of the act hereinbefore mentioned and now embodied in section 2325.

The Supreme Court of the United States in the case of *McKinley v. Wheeler* (130 U. S., 630, 637), so held in a case where the right of a corporation to make a mining location was questioned. By the act approved January 22, 1880, Congress authorized applicants for patent, not resident of or within the land district where the claim is located, to be represented in the making of required affidavits by

“his, her, or its authorized agent.” Prior to that date corporations applying for mineral patents or filing adverse claims under the provisions of the mining laws, whether “residing” within or without the land district, would, under the contention of appellants, have been unable to execute applications for patents or adverse claims and would have been deprived of the benefits of the mining laws. After the enactment of the law of 1880, *supra*, corporations presenting mineral claims could, under the contention of appellants, have only obtained the benefits of such laws if not residents of or within the land district, because only in such cases was there express authorization to be represented by agents. Subsequent to the enactment of the law of 1882, *supra*, according to the contention of appellants, corporations could only assert adverse claims where their residence was without the limits of the land district and where they were represented in the proceeding by a duly appointed agent within the district, and prior to the enactment of the acts of 1880 and 1882, *supra*, corporations, under the contention made, could not have obtained the benefits of the general mining laws at all, because there was no statutory authority for them to act through agents and they could not act as corporations through their officers. This contention is obviously incorrect, for Congress expressly recognized the right of corporations to apply for and obtain mining patents, in sections 2321 and 2325, hereinbefore cited. Having accorded the corporations the right to locate mining claims and apply for and obtain patents thereupon it must necessarily follow that Congress contemplated that they should have the right to protect their interests in mining locations through the assertion of adverse claims under section 2326. It is evident from consideration of the mining laws that it was the purpose and intent of Congress that corporations should be permitted to enjoy the full benefit of those laws and that same might be obtained, as would necessarily be the case with corporations, through the acts of their officers or agents. This view is supported by the contemporary construction and administration of the act of May 10, 1872, *supra*, for in actual practice corporations did file applications for patent and adverse claims, verified by their officers or agents, which applications were received and favorably acted upon by the Land Department and the courts between 1872 and 1880.

The Department is of the opinion, therefore, that an adverse claim by a corporation, verified by its executive officer outside of the land district where the claims involved are situated but at its principal place of business, is within the meaning and intent of the law the act of the corporation itself. The adverse claims here involved are, therefore, held to be sufficient under the statute, and the application for patent against which they are directed will be suspended until

the suit or suits instituted thereunder "shall be settled or decided by a court of competent jurisdiction or the adverse claim waived."

The decision of the Commissioner of the General Land Office is affirmed.

DRAINAGE OF SWAMP AND OVERFLOWED LANDS IN MINNESOTA.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 24, 1913.

REGISTERS AND RECEIVERS,

Cass Lake, Crookston and Duluth, Minn.

SIRS: The instructions approved June 3, 1908 (36 L. D., 477), February 29, 1912 (40 L. D., 438), and May 16, 1912 (41 L. D., 18), issued under the act of May 20, 1908 (35 Stat., 169), are hereby revised and amended to read 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. Such lands are subject to the drainage laws to the same extent and in the same manner in which lands of a like character held in private ownership are or may be subject to said laws. The provisions of this act do not extend to entered lands for which final certificates have issued.

2. Officially certified lists showing the amount of the charges assessed against each smallest legal subdivision are required by section 2 of the act to be furnished the register and receiver of the land district in which the lands affected are located as soon as the charges are assessed. It is provided in section 21 of the act of the State Legislature, of April 18, 1905, chapter 230, Laws of Minnesota, 1905, that the amount which each tract of land shall be liable for shall bear interest from the date of the filing of the county auditor's statement showing drainage charges in the office of register of deeds, at the rate of 6 per cent per annum until paid.

3. 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.

4. 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 under the provisions of the act, even if he purchases land from the State. The

tracts must be purchased by legal subdivisions, but need not be contiguous. 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.

5. One of the conditions of the act is that every purchaser at the sale of the lands shall have the qualifications of a homestead entryman, but, a previous entry under the homestead law will not prevent purchase at a sale of the lands in amount which does not exceed 160 acres, including that previously entered, provided that his previous entry did not exhaust his homestead right; in other words, he may purchase such amount as he might then have entered under the homestead laws, and without regard to the location of the land previously entered. The tracts purchased need not be in one body.

6. Affidavits as to qualifications or as to the status of lands which may be required of purchasers under these regulations may be executed before an officer authorized to administer oaths in homestead cases.

7. 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. It is held by the department that a person purchasing land under a contract giving him right to acquire title, acquisition of which depends only on his own performance or default, is owner of such land and proprietor of it within the meaning and intent of section 2289, United States Revised Statutes. (See cases of *Smith v. Longpre*, 32 L. D., 226, and *Boyce v. Burnett*, 16 L. D., 562.)

8. Purchasers at any sale under the act may make their purchases by agent or attorney to the extent permitted by the State drainage laws of sales of lands held in private ownership.

9. 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.

10. Under section 5 of the act a purchaser at any sale of unentered lands will be required to pay to the receiver of the proper district land office the minimum price of \$1.25 per acre, or such other price as may have been fixed by law for such lands, together with the usual fees and commissions charged in original entry of like lands under the homestead laws. Entrymen for lands in the former Red Lake

Reservation are also required to pay the sum of 3 cents per acre to repay to the Chippewa permanent fund the cost of the drainage survey thereof, as required by section 8 of the act of May 20, 1908. The price of the land under said act of 1908 is not affected by the provisions of the free-homestead act of May 17, 1900 (31 Stat., 179).

11. Any part of the purchase money arising from the sale of unentered lands by the State which shall be in excess of the payments specified above and of the total drainage charges assessed against such lands shall also be paid to the receiver before patent is issued. In the case of the sale of unpatented lands the purchaser must, under section 6 of the act, make similar payments, except so much thereof as has already been paid by the entryman; and in such case if the sum received shall be in excess of the payments required under section 5 of the act of May 20, 1908, and of the drainage assessments and costs of the sale, the excess shall be paid to the proper county official for the benefit of and payment to the entryman.

12. Section 5 of the act provides for the issuance of patent for unentered land to qualified purchasers at any time after the sale when the proper payments have been made. Therefore no notice of the expiration of the statutory period of redemption is required to be given the United States; but in view of the fact that settlement on the land is permitted up to the date of sale and a settler has three months from date of settlement within which to replace his entry of record, no patent will issue upon such purchase until at least three months after the date of sale, and the purchaser will furnish his affidavit showing that no one is claiming the land by reason of settlement or occupancy initiated prior to the date of sale. Purchasers of entered but unpatented lands will be required to give the notices of redemption required by the State drainage laws, but the usual final-proof notice required of homesteaders need not be given.

13. Unless the purchasers of unentered lands shall, within 90 days after the sale, pay to the proper receiver the fees, commissions, and purchase price to which the United States may be entitled as mentioned above, and unless the purchasers of entered lands shall within 90 days after the right of redemption has expired make like payments, any person possessing the qualifications of a homestead entryman may pay to the proper receiver for not more than 160 acres of land for which such payment has not been made, the unpaid fees, commissions, and purchase price to which the United States may be then entitled, the sum at which the land was sold at the sale for drainage charges, and in addition thereto, if the land was bid in by the State, interest on the amount bid by the State at the rate of 7 per cent per annum from the date of sale, and thereupon the person making such payment shall become subrogated to the rights of the purchaser to receive a patent for said land. When any payment is made to effect

such subrogation, the receiver to whom the money was paid shall transmit to the treasurer of the county where the land is situated the amount for which the land was sold at the sale for drainage charges, together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charges if the land when sold was unentered. If the lands are Indian lands you will deposit the price paid for the land and 3-cent drainage charge to the credit of the appropriate Indian fund.

14. In case payment is made as above specified, you will issue the usual cash certificates and receipts and forward the papers to this office, together with evidence showing the qualifications of the purchaser on the form (4-007) provided therefor in the case of a homestead applicant, modified as per form herewith. Should no objection appear patent will issue in due course of business.

15. There is no provision in the law which requires residence on the land purchased under the act, or cultivation or improvement thereof.

16. In case a purchaser at a tax sale of entered but unpatented land should find that the entryman had not complied with the land laws as to settlement, improvements, and cultivation, and such purchaser should secure the cancellation of the entry as a result of his contest, he would then have the right to acquire title to the land upon making payment as provided in rules 10 and 13, and making the showing as to qualifications provided in rule 12 hereof.

17. The law makes no provision for the redemption of lands by a mere settler, and therefore only entrymen have the right to pay to the county officials the drainage charges prior to the sale of land for nonpayment of such charges.

18. To avoid confusion, misunderstanding, and conflict of rights it is hereby provided that no right of redemption, referred to in section 6 of the act, can be acquired by settlement or applications for lands which are subject to entry after the hour and date fixed for their sale under section 3 of the act of May 20, 1908. All applications for lands advertised for sale under said act received on or subsequent to the date of sale will be suspended until after the statement of sale, provided in section 4 of the act, is received, unless the applicant shall show by affidavit, duly corroborated, that he settled on the land in good faith prior to the beginning of the sale. You will reject all other such applications for lands which have been sold prior to their reception. Persons claiming the right of redemption by reason of bona fide settlement made on the land prior to the date of sale will be required to make homestead entry and acquire title under the homestead laws in addition to paying the State drainage charges.

19. The United States and all persons legally holding unpatented lands under entries made under the public-land laws of the United States are entitled to all the rights, privileges, and benefits given by said laws to persons holding lands of a like character in private ownership. A copy of all notices, required by the State drainage laws to be given to the owners or occupants of lands held in private ownership, is required by section 7 of the act to be given the register and receiver of the proper land district in cases where unentered lands are affected, and to entrymen whose unpatented lands are affected thereby. The United States and such entrymen have the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise as are given to persons holding lands in private ownership; and all entrymen shall be given the same rights of redemption as are given to the owners of land held in private ownership.

20. Section 8 of the act provides that entries and proofs may be made and patents issued for all ceded Chippewa lands (except in the Red Lake Reservation), which were withdrawn under the act of June 21, 1906 (34 Stat., 325), in the same manner in which entries, proofs, and patents for other lands are made and issued under the homestead laws, subject to the payment of the purchase price fixed by law for such lands. Persons making final proofs on entries in the Red Lake Reservation will be required to pay 3 cents per acre in addition to the purchase price originally fixed by law, except in cases where entry was made prior to November 10, 1906, the date of the withdrawal under said act of June 21, 1906.

21. The instructions of March 27, 1907 (35 L. D., 481), are hereby revoked. You will note on the application and receipt in all entries hereafter made the following: "Subject to act of May 20, 1908."

Very respectfully,

FRED DENNETT,
Commissioner.

Approved, April 24, 1913:

LEWIS C. LAYLIN,
Assistant Secretary.

DEPARTMENT OF THE INTERIOR.

HOMESTEAD ENTRY.

U. S. LAND OFFICE, _____, No. _____.

APPLICATION.

I, _____ (_____),
(Give full Christian name.) (Male or female.)

a resident of _____, do hereby apply to enter, under the
(Town, county, and State.)
act of May 20, 1908 (35 Stat., 169), the _____ section _____, township _____,

range-----, -----meridian, containing -----acres, within the-----
land district; and I do solemnly swear that I am not the proprietor of more
than 160 acres of land in any State or Territory; that I-----
(Applicant must state whether native born, naturalized, or has filed declaration of in-
tention to become a citizen. If not native born, certified copy of naturalization or
declaration of intention, as case may be, must be filed with this application.)
citizen of the United States, and am-----; that my post-office
(State whether the head of a family, married or unmarried, or over 21 years of age.)
address is-----; that this application is honestly and in
good faith made for my own benefit, and not for the benefit of any other person,
persons, or corporation; that I am not acting as agent of any person, corpora-
tion, or syndicate in making this entry, nor in collusion with any person, corpora-
tion, or syndicate to give them the benefit of the land entered, or any part
thereof, or the timber thereon; that I do not apply to enter the same for the
purpose of speculation, but in good faith for myself, and that I have not directly
or indirectly made, and will not make, any agreement or contract, in any way
or manner, with any person or persons, corporation, or syndicate whatsoever,
by which the title which I may acquire from the Government of the United
States will inure in whole or in part to the benefit of any person except myself.
I further swear 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 non-
mineral public-land laws, an amount of land which, together with the land now
applied for, will exceed in the aggregate 320 acres; and that I have not here-
tofore made any entry under the homestead laws (except-----
(Here describe former homestead entry by section, township, range, land district, and
number of entry; how perfected, or if not perfected state that fact.)
-----); that I am well acquainted with the character of the land
herein applied for and with each and every legal subdivision thereof, having
personally examined same; that there is not to my knowledge within the limits
thereof any vein or lode of quartz or other rock in place bearing gold, silver,
cinnabar, lead, tin, or copper, nor any deposit of coal, placer, cement, gravel,
salt spring, or deposit of salt, nor other valuable mineral deposit; that no por-
tion of said land is claimed for mining purposes under the local customs or
rules of miners, or otherwise; that no portion of said land is worked for
mineral during any part of the year by any person or persons; that said land
is essentially nonmineral land, and that my application therefor is not made for
the purpose of fraudulently obtaining title to mineral land; that the land is not
occupied and improved by any Indian.

Sign here, with full Christian name.

NOTE.—The remainder of the form is in accordance with the usual homestead
blank 4-007.

An Act To authorize the drainage of certain lands in the State of Minnesota.

*Be it enacted by the Senate and House of Representatives of the United States
of America in Congress assembled, That all lands in the State of Minnesota,
when subject to entry, and all entered lands for which no final certificates have
issued, are hereby made and declared to be subject to all of the provisions of
the laws of said State relating to the drainage of swamp or overflowed lands
for agricultural purposes to the same extent and in the same manner in which
lands of a like character held in private ownership are or may be subject to said
laws: Provided, That the United States and all persons legally holding unpat-
ented lands under entries made under the public-land laws of the United States
are accorded all the rights, privileges, and benefits given by said laws to per-
sons holding lands of a like character in private ownership.*

SEC. 2. That the cost of constructing canals, ditches, and other drainage works incurred in connection with any drainage project under said laws shall be equitably apportioned among all lands held in private ownership, all lands covered by unpatented entries, and all unentered public lands affected by such project; and officially certified lists showing the amount of the charges assessed against each smallest legal subdivision of such lands shall be furnished to the register and receiver of the land district in which the lands affected are located as soon as said charges are assessed, but nothing in this act shall be construed as creating any obligation on the United States to pay any of said charges.

SEC. 3. That all charges legally assessed may be enforced against any unentered lands, or against any lands covered by an unpatented entry, by the sale of such lands subject to the same manner and under the same proceedings under which such charges would be enforced against lands held in private ownership.

SEC. 4. That when any unentered lands, or any lands covered by an unpatented entry, have been sold in the manner mentioned in this act, a statement of such sale showing the price at which each legal subdivision was sold shall be officially certified to the register and receiver immediately after the completion of such sale.

SEC. 5. That at any time after any sale of unentered lands has been made in the manner and for the purposes mentioned in this act patent shall issue to the purchaser thereof upon payment to the receiver of the minimum price of one dollar and twenty-five cents per acre, or such other price as may have been fixed by law for such lands, together with the usual fees and commissions charged in entry of like lands under the homestead laws. But purchasers at a sale of unentered lands shall have the qualification of homestead entrymen and not more than one hundred and sixty acres of such lands shall be sold to any one purchaser under the provisions of this act. This limitation shall not apply to sales to the State, but shall apply to purchases from the State of unentered lands bid in for the State. Any part of the purchase money arising from the sale of any lands in the manner and for the purposes provided in this act which shall be in excess of the payments herein required and of the total drainage charges assessed against such lands shall also be paid to the receiver before patent is issued.

SEC. 6. That any unpatented lands sold in the manner and for the purposes mentioned in this act may be patented to the purchaser thereof at any time after the expiration of the period of redemption provided for in the drainage laws under which it may be sold (there having been no redemption) upon the payment to the receiver of the fees and commissions and the price mentioned in the preceding section, or so much thereof as has not already been paid by the entryman; and if the sum received at any such sale shall be in excess of the payments herein required and of the drainage assessments and cost of sale, such excess shall be paid to the proper county officer for the benefit of and payment to the entryman. That unless the purchasers of unentered lands shall, within ninety days after the sale provided for in section three, pay to the proper receiver the fees, commissions, and purchase price to which the United States may be entitled, as provided in section five, and unless the purchasers of entered lands shall, within ninety days after the right of redemption has expired, make like payments, as provided for in this section, any person having the qualifications of a homestead entryman may pay to the proper receiver for not more than one hundred and sixty acres of land for which such payment has not been made: First, the unpaid fees, commissions, and purchase price to which the United States may then be entitled; and, second, the sum at which

the land was sold at the sale for drainage charges, and in addition thereto, if bid in by the State, interest on the amount bid by the State at the rate of seven per centum per annum from the date of such sale, and thereupon the person making such payment shall become subrogated to the rights of such purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver shall transmit to the treasurer of the county where the land is situated the amount at which the land was sold at the sale for drainage charges, together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charge, if the land when sold was unentered.

SEC. 7. That a copy of all notices required by the drainage laws mentioned in this act to be given to the owners or occupants of lands held in private ownership shall, as soon as such notices issue, be delivered to the register and receiver of the proper district land office in cases where unentered lands are affected thereby and to the entrymen whose unpatented lands are included therein, and the United States and such entrymen shall be given the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise as are given to persons holding lands in private ownership; and all entrymen shall be given the same rights of redemption as are given to the owners of lands held in private ownership.

SEC. 8. That hereafter homestead entries and final proofs may be made upon all ceded Chippewa Indian lands in Minnesota embraced in the withdrawal under the act of June twenty-first, nineteen hundred and six, entitled "An act making appropriations for the current and contingent expenses of the Indian Department" (Thirty-fourth Statutes at Large, page three hundred and twenty-five), and patents may issue thereon as in other homestead cases, upon the payment by the entryman of the price prescribed by law for such land and on entries on the ceded Red Lake Reservation in addition thereto the sum of three cents per acre to repay the cost of the drainage survey thereof, which addition shall be disposed of the same as the other proceeds of said land.

Approved, May 20, 1908. (35 Stat., 169.)

JOSEPH WILLIAMS.

Decided April 25, 1913.

RIGHT OF WAY—RESERVOIR EASEMENT—UNSURVEYED LANDS.

The fact that an application for a reservoir easement upon unsurveyed lands, under the acts of March 3, 1891, and May 11, 1898, has been accepted and filed for general information, will not prevent the acceptance and filing for general information of a like application by a different party for the same land.

LAYLIN, *Assistant Secretary:*

This is the appeal of Joseph Williams from a decision of the Commissioner of the General Land Office, March 27, 1911, rejecting Williams's application, under the acts of March 3, 1891 (26 Stat., 1095), and May 11, 1898 (30 Stat., 404), for a reservoir easement upon unsurveyed land in what apparently should be when the present surveys are extended T. 14 S., R. 9 W., Montana meridian, Helena land district, Montana.

The Commissioner's action was put upon the ground that July 22, 1905, a map filed by the said Joseph Williams, the present applicant, together with John Lindsay, Cora L. Lindsay, John M. Steward, Emma Steward and Walter F. Steward was accepted for filing for general information for a reservoir on identically the same location as the one now applied for, the survey being made by the same engineer, and for that reason, it not being shown that Williams had succeeded to the rights of the other parties, the Land Department is without authority to grant the application in question. For the same reason it was held that the map constituting Williams's application could not be accepted for filing.

This Department can not assent to this view. Whatever might be said of the authority of the Secretary of the Interior to grant a right of way under said acts, upon surveyed lands over which there is a subsisting approved right of way under the same acts, it is entirely clear that in the matter of unsurveyed lands, the maps constituting the application being merely filed for general information, no sufficient reason exists in law or in any well-considered public policy, why they can not be received for that purpose.

The decision appealed from is accordingly modified with direction that the map in question be received and filed for general information in accordance with the regulations in such cases made and provided.

RECLAMATION—TIETON UNIT, YAKIMA PROJECT—PAYMENT.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., April 25, 1913.

The public notice for the Tieton unit, Yakima project, Washington, dated March 21, 1913 [42 L. D., 13], under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, establishing a system of graduated payments under specific conditions, is hereby amended by adding thereto the following paragraph:

7. Owners of, and entrymen upon lands for which acceptable water-right applications shall be hereafter filed in accordance with the terms of any public notice now or hereafter in effect for said Tieton unit, may be admitted to the benefits of this public notice, and make payments according to the schedule herein, by complying with all of the terms hereof as to reclamation and cultivation.

LEWIS C. LAYLIN,

Assistant Secretary of the Interior.

STEPHENSON v. PASHGIAN.

Decided April 28, 1913.

SETTLEMENT—RESIDENCE WITHOUT CULTIVATION OR IMPROVEMENT.

Merely remaining upon public land without *bona fide* cultivation and reasonably diligent effort in the way of improvement, is not the maintenance of such a settlement as the law contemplates shall reserve a tract from other appropriation—especially at the hands of a prior claimant who makes first application to enter the same.

ADVERSE CLAIMANTS FOR PUBLIC LAND.

Where a claimant for a tract of public land appeals to the letter of the law as against an adverse claimant, he must himself stand or fall by the letter of the statute.

LAYLIN, Assistant Secretary:

Samuel B. Stephenson has appealed from the decision of the Commissioner of the General Land Office, dated February 29, 1912, affirming the action of the local officers and rejecting his homestead application, filed on May 26, 1909, for lots 6 and 10, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 36, T. 14 S., R. 14 E., S. B. M., Los Angeles, California, according to the plat of resurvey filed in the local office on May 24, 1909, and awarding said land to John S. Pashgian, under the latter's homestead application, filed on May 24, 1909.

At the hearing before the local officers, on July 28, 1911, both Stephenson and Pashgian appeared in person and by attorney and submitted testimony. It appears from the testimony that, during December, 1906, Pashgian inspected said land and, in February, 1907, purchased, for \$275, the possessory claim of one Katherine Johnson, who had expended in the neighborhood of \$100 in plowing around, leveling, and clearing the tract. He at once made arrangements with his cousin, one Caspar P. Stone, to proceed with the work of reclaiming the land and authorized Stone to draw on him for \$1,000, to be used in such reclamation. Stone bought a tent for \$24, which he placed on the tract, and posted notices of Pashgian's claim at the corners of the land. Notice of Pashgian's claim under the desert land law was also printed in a newspaper published at Imperial, California. In March, 1907, Pashgian purchased sixty shares of water stock for which he paid \$990 and secured the promise of the water company to deliver water in about two months. He then had constructed a ditch 8 feet wide and 18 inches deep along the entire south line of the land. The company failed to deliver the water, notwithstanding the frequent and urgent requests that it be delivered. During August, 1907, he went upon the land and spent several hours in discussing with his agent, Stone, plans for its improvement and reclamation. During this visit, he wrote his name in large letters upon the tent previously erected by him.

Stephenson went on the land in September, 1907, and saw Pashgian's ditch and tent. It does not appear that he made any inquiry as to Pashgian's connection with the land and evidently contented himself with a very casual examination. While he states that it was his first impression that the ditch built by Pashgian was for the irrigation of the land to the south, he admitted that he learned, from an examination made a few days afterwards, that this could not be true, since the slope of the land was from the south towards the north. About October 1, 1907, he again went upon the land, repaired Pashgian's tent, which he occupied for a week, during which time he built a temporary shelter of boards, brush, and canvas. Within a short time, Stone sent a man to the land to do some work thereon, which Stephenson forbade. Stephenson was then notified by Stone to leave the land, and refused to do so; thereupon, certain proceedings were had in the local court, as result whereof Stephenson was left in possession. While the suit was pending, Pashgian had a comfortable house built on the land. At first Stephenson objected to the erection of the house, but finally consented to its being built, after notifying Pashgian's agent that he would claim the structure. The house was occupied for a short time by a party who was engaged for three and one-half days in leveling a part of the land for Pashgian. Stone and Stephenson then had an altercation, which resulted in Stone and the employees of Pashgian being driven from the premises at the point of a pistol. Not long after, Stephenson moved into the house built by Pashgian, where he has since resided.

It is disclosed by the testimony that the land in controversy is a part of what was known in the Imperial Valley as the "Excess Strip." The impression, prevalent in that locality, that there were unsurveyed lands in the valley may have originated in certain erroneous maps issued by the General Land Office which indicated a long and narrow strip of unsurveyed land, running north and south, including the Sunset Spring whose locus was, however, clearly shown by the original survey of lands in this vicinity, made in 1856. The Department has had frequent occasion, in other cases arising in the Imperial Valley, to refer to the confusion that resulted from this error of the maps with reference to alleged unsurveyed areas in the Imperial Valley. When settlers began to seek lands in that section, all of the monuments of the original survey had disappeared and several private surveys were executed in an effort to define in terms of that survey claims asserted to public lands. These private surveys indicated a strip of unsurveyed land lying between T. 14 S., R. 19 E., and T. 14 S., R. 15 E., which was the "Excess Strip" above referred to. Many efforts were made by desert land applicants to enter tracts in this strip under descriptions obtained by projection of the private survey lines to the east or west, which resulted in failure because the descriptions thus

secured were identical with those of entirely different lands, under said private surveys, which appeared upon the land office records to be appropriated. When the resurvey of the Imperial Valley was undertaken by the Government, desert land entries were permitted therein as for unsurveyed land, but applicants were required to describe the tracts desired by them according to the original survey. As to the land here under consideration, a description by the original survey was an impossibility (see Herman H. Peterson, 40 L. D., 562), and it was likewise impossible to give any description, except by metes and bounds; yet applications which described lands in the so-called "Excess Strip" by metes and bounds were uniformly rejected by the land department (as it now appears, from a failure to understand the situation), because the tract was not described in terms of the old survey. Pashgian was thus, prior to the filing of the plat of the resurvey, in a position where he could have made a desert land entry only under an impossible condition, *i. e.*, by giving a description of the tract under the original survey. It is true that, in his purchase from Johnson and in his published notice, it was attempted to describe the tract as the SW. $\frac{1}{4}$ of Sec. 31, T. 14 S., R. 15 E., but that subdivision, according to the so-called Sunset survey, one of the private surveys above referred to, was an entirely different tract of land, and the SW. $\frac{1}{4}$ of said section 31, according to the original survey of 1856, appeared of record, at that time, as embraced in an entry which has since been adjusted to other land. To add to the perplexity of his situation, Pashgian was advised by his attorney, prior to the filing of the plat of the resurvey, that he was disqualified to make a desert entry, he having previously held by assignment a desert entry for 40 acres. This is the explanation of the fact that Pashgian subsequently applied to make homestead entry, as above stated.

Pashgian would, theoretically, have been in better position to urge his superior legal claim to the land had he applied therefor under a metes-and-bounds description; but the Department is not disposed to hold that he lost any substantial claim to its consideration in failing to do that which had been repeatedly held to confer no right whatever.

Upon consideration of this record, it thus appears that Pashgian, having paid a valuable consideration for a former claim to the land, made expenditures looking to its reclamation far in excess of the requirements of the desert land law, as to the three annual proofs, made every reasonable effort to define and give notice of his claim, and that his failure to have his entry placed of record resulted from causes beyond his control, the result of unfortunate and chaotic conditions in the Imperial Valley, and from no laches on his part. On the other hand, Stephenson who, if he did not know, could have easily

ascertained, as he soon did ascertain, all the facts with reference to Pashgian's claim, is before the Department asserting a legal right based upon settlement and urges that there was, at the time his own claim attached, no law under which the Department can now recognize any legal right to the land growing out of the placing of valuable improvements thereon by a desert-land claimant. Obviously, Stephenson is in no position to assert any claim to equitable consideration, having gone advisedly and with his eyes open upon this tract, to which Pashgian was asserting claim under circumstances that entitle him to equitable relief, unless the law forbids.

From the date of Stephenson's settlement to the hearing before the local officers, nearly four years elapsed. During this time he had made a yearly attempt to raise a garden from waste water flowing from the land to the south; that this cultivation was merely colorable is obvious. In that hot and arid desert, water is a prime necessity for any agricultural use of land and it is not suggested that Stephenson owns a water right or has ever made an attempt to secure one. Though he claims to have expended \$150 during the fall of 1908 in leveling about 30 acres, he expended nothing during 1909, 1910, or 1911 to render the land suitable for an agricultural home.

The mere remaining upon public land without *bona fide* cultivation and reasonably diligent effort in the way of improvements is not the maintenance of such a settlement as the law contemplates shall reserve a tract from other appropriation, especially at the hands of a prior claimant who makes first application to enter the same. A settler has no more right, under the homestead law, to segregate land from the public domain, without compliance with the requirements of that law as to improvement and cultivation than has a homestead entryman; and where a claimant appeals to the letter of the law as against another claimant he must himself stand or fall by the letter of the statute.

The Department is convinced that when the township plat of survey was filed in the local office Stephenson had maintained no such legal settlement upon the land in controversy as the law requires; whatever claim to equitable consideration may be his is subject to the claim of Pashgian, which was prior in point of time and was first asserted in the local land office.

The Department does not concur in the Commissioner's suggestion that Pashgian be now allowed, at his option, to make desert land entry as was his original purpose. On the contrary, he is asserting a homestead claim to the land before the Department and testified at the hearing that it was his purpose from the beginning to make the land his home. He should be permitted and required to do this. With this modification the decisions below are affirmed.

STEPHENSON v. PASHGIAN.

Motion for rehearing of departmental decision of April 28, 1913, 42 L. D., 113, denied by First Assistant Secretary Jones, June 26, 1913.

WEATHERSPOON v. DOYLE ET AL.

Decided April 29, 1913.

CONTEST, RELINQUISHMENT, AND APPLICATION FILED SIMULTANEOUSLY.

An affidavit of contest has no effect until filed in the local office; and where left with the officer before whom it was executed, to be transmitted to the local office for filing, and such officer files in that office simultaneously the affidavit of contest, a relinquishment of the contested entry, and an application to enter the land, the relinquishment and application take precedence, notwithstanding they were executed subsequently to the affidavit of contest.

LAYLIN, Assistant Secretary:

This case involves desert land entry 010423, made April 17, 1912, by George B. Doyle, for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 25, and NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 36, T. 7 S., R. 46 E., W. M., La Grande, Oregon. April 22, 1912, W. Weatherspoon executed an affidavit of contest against said entry charging the nondesert character of the land and that the entryman had no adequate water supply. The affidavit was executed before a notary public who was in the office of and was an agent for United States Commissioner H. A. Clemens. April 23, 1912, Doyle executed a relinquishment before United States Commissioner H. A. Clemens and on the same day Henry E. Smith executed an application to make homestead entry for the land thus relinquished before the same officer.

The contest affidavit, the relinquishment and the application to enter were all left with said Commissioner, who at the request of all the parties was to deliver the papers to the local office. The Commissioner "in apparent fairness to all," as stated by the receiver, filed the three papers simultaneously. The register and receiver rejected the application to contest and on appeal the Commissioner of the General Land Office, July 9, 1912, affirmed that action holding under the authority of *Giltner v. Huestis et al.* (14 L. D., 144), that since the relinquishment was accompanied by an application to enter filed simultaneously with an application to contest, the contest affidavit could not be considered and was, therefore, rejected.

It is true, as contended, that the contest affidavit was first executed, but, as stated, it was not filed in advance of the relinquishment but at the same time.

It is charged in the appeal that the United States Commissioner endeavored to sell the improvements on the land so that Doyle, the desert-land entryman, "could get his money back," and to effect that purpose held the contest affidavit instead of immediately transmitting it to the local office when it would have been filed in advance of the relinquishment. This may be true, nevertheless since the contest was filed at the same time the relinquishment and Smith's application were filed, the application to enter took precedence.

A contest affidavit has no efficacy whatever until it is filed in the local office. It may antedate a relinquishment and its execution may be known to the entryman, who by reason thereof relinquishes an entry; but if not filed in local office prior to the filing of relinquishment to the land in the local office it will not be effective.

The action appealed from is affirmed.

STATE OF IDAHO v. NORTHERN PACIFIC RY. CO.

Decided April 29, 1913.

SCHOOL INDEMNITY SELECTION—LANDS WITHIN RESERVATION.

Under the express terms of the act of February 28, 1891, a selection of lands in lieu of sections 16 and 36 lost to the State's school grant by reason of being embraced in a reservation of the United States "may not be made within the boundaries of said reservation," notwithstanding the State may have applied for survey of the township within which the selected lands are located, under the act of August 18, 1894, prior to their inclusion in the reservation.

APPLICATION FOR SURVEY—FILING WITH COMMISSIONER.

An application by a State for the survey of a township under the act of August 18, 1894, has no effect as against other applications to appropriate lands within the township until it is received by the Commissioner of the General Land Office, and has no effect as against the United States until proper selection of the lands by the State.

EFFECT OF SELECTION UNDER THE ACT OF MARCH 2, 1899.

A pending selection by the Northern Pacific Ry. Co. under the act of March 2, 1899, is a "prior valid claim" within the meaning of the excepting clause in the proclamation of November 6, 1906, establishing the Coeur d'Alene forest reserve, now Clearwater National Forest.

LAYLIN, *Assistant Secretary:*

The State of Idaho appealed from two decisions of the Commissioner of the General Land Office of August 23, 1910, and on review December 20, 1910, rejecting State's school indemnity selection 02851 under act of February 28, 1891 (26 Stat., 796), for lots 2 and 3, S. $\frac{1}{2}$ NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$, Sec. 3, and other lands, in Secs. 19 and 30, T. 42 N., R. 4 E., B. M., Lewiston, Idaho, in lieu

of parts of Secs. 16, T. 41 N., R. 11 E., and other lands described in said list. Both the base and selected lands are within the Coeur d'Alene Forest Reserve, now Clearwater National Forest, in said district.

The case arises from application of the State under act of August 18, 1894 (28 Stat., 394), for survey of T. 54 N., R. 4 E., dated July 5, 1901, filed in office of the Surveyor-General for Idaho July 8, 1901, transmitted to the Commissioner of the General Land Office July 10, 1901, and received at the General Land Office July 15, 1901. Formal notice of withdrawal of the township under act of February 28, 1891, *supra*, did not issue from the General Land Office until January 30, 1905. The State selection was filed August 17, 1909, within sixty days after filing of township plat of survey in the local office.

In meantime, March 21, 1905, the township was withdrawn for inclusion in proposed Shoshone Forest Reserve, and by proclamation of November 6, 1906 (34 Stat., 3256), included in Coeur d'Alene Forest (now Clearwater National Forest), by proclamation effective July 1, 1908.

The Commissioner's decision of December 20, 1910, also sustained a selection list, No. 33 (02710), by the Northern Pacific Railway Company, filed in the local office July 11, 1901, under act of March 2, 1899 (30 Stat., 993), for some of above-described land—to wit: unsurveyed E. $\frac{1}{2}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 19, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 30.

The Commissioner's decision, so far as it rejected the State's claim, is on two grounds: (1) That the base and the selected land being in the same township, the selection violated act of February 28, 1891, *supra*; (2) relinquishment of the base land was without authority of law. The railway company's claim was sustained on the ground that the State did not make a proper selection of the lands within the preference period, so that they were not reserved by force of the act of August 18, 1894, *supra*, and not being reserved nor excepted by the executive proclamation establishing the Coeur d'Alene Forest Reserve, the company's list, rearranged July 26, 1909, to conform to the township plat of survey, attached, the act of March 2, 1899, was complied with.

The Solicitor for the Department of Agriculture filed a brief in the Department urging the claim of the Forestry Service that these lands be preserved for forest use. The railway company has filed briefs supporting the decision of the Commissioner as to validity of its claim.

The Commissioner's decision, so far as it rejected the State selections, was correct, without reference to the grounds on which that action was based. By plain terms of the act of February 28, 1891, *supra*, such selections, in lieu of sections 16 and 36 embraced in reser-

vations of the United States, "may not be made within the boundaries of said reservations." This alone is conclusive against the State's claim. The fact that the State had applied for survey of the township under act of August 18, 1894, *supra*, before inclusion of these lands in the Coeur d'Alene Forest Reserve, does not affect the case. It is true, the Department has often held that a reservation in favor of the State under act of August 18, 1894, *supra*, attaches from date of the application for survey, regardless of failure of the Commissioner of the General Land Office to cause notation of such withdrawal on records of the local office. (Thorpe *et al. v. State of Idaho*, 35 L. D., 640; Williams *v. State of Idaho*, 36 L. D., 20.) Such reservation is effective only against other appropriation. It does not hold against the United States, and at any time before a proper selection by the State, the President may withdraw lands so reserved, for forestry purposes. (Opinion, Attorney-General, January 30, 1911, 39 L. D., 482; Heirs of Irwin *v. State of Idaho et al.*, 38 L. D., 219.)

The State's claim must stand, if at all, on the act of August 18, 1894, *supra*, which provides:

It shall be lawful for the governors of the States of . . . Idaho to apply to the Commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor-General of the application made.

The procedure is plainly pointed out by the statute that the application shall be made to the Commissioner of the General Land Office, and when received by him he directs the Surveyor-General to make survey of such townships. In the present case, the application was filed with the Surveyor-General, addressed to him and to the Commissioner of the General Land Office. It could have no effect as against other applicants to appropriate the land until it reached the Commissioner of the General Land Office.

This was a statute granting a special privilege as against others seeking to appropriate public lands. It was held by Judge (now Justice) Lurton, in *Campbellsville Lumber Co. v. Hubbert*, 112 Fed., 718, concurred in by Judge (now Justice) Day, that:

An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and the validity of all acts done under authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional.

The court cited Sutherland on Statutory Construction, sections 454 and 458, wherein the author states the law in such cases to be:

When a statute is passed authorizing a proceeding which was not allowed by the general law before, and directing the mode in which an act shall be done, the mode pointed out must be strictly pursued. It is the condition on which alone a party can entitle himself to the benefit of the statute, that its directions shall be strictly complied with. Otherwise the steps taken will be void. . . . Where legislation points out specifically how an act is to be done, although without it the court or officials under their general powers would have been able to perform the act, yet as the legislature imposed a special limitation, it must be strictly pursued. . . . Enabling statutes, on the principle of *expressio unius est exclusio alterius*, impliedly prohibit any other than the statutory mode of doing the acts which they authorize. This is illustrated by the numerous cases where statutory rights and remedies are given in respect to which the statute must be strictly pursued. Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way. . . . Where a statutory power or jurisdiction is granted, which otherwise does not exist, whether to a court or an officer; and in all cases where, by the exercise of such a power, one may be divested of his property, the grant is strictly construed; the mode of proceeding prescribed must be strictly pursued; the provisions regulating the proceeding are mandatory as to the essence of the thing required to be done. . . . Where a statute confers a new right, privilege or immunity, the grant is strictly construed, and the mode prescribed for its acquisition, preservation, enforcement and enjoyment is mandatory.

Judged by these principles, the State acquired no preference right until the application reached the proper officer, the Commissioner of the General Land Office.

The statute expressly declares that the lands shall be reserved from other appropriation from the date of the *filing* of the application. Certainly it could not be said that the preference right commenced to run when the Governor of the State executed the application nor when he deposited it in the mail addressed to the Commissioner; neither would the mere deposit of the application with some other officer of the Government, not authorized by law to receive it, create the reservation.

The Commissioner of the General Land Office is by the act charged with its administration, and the provision is that when the application is made—

the Commissioner of the General Land Office shall proceed to immediately notify the surveyor-general of the application made by the Governor . . . for the withdrawal of said lands, and the surveyor-general shall proceed to have the survey or surveys so applied for made.

How can the Commissioner proceed to *immediately* notify the surveyor-general of the application until the application has been made to him? The statute says that the Governor may "apply to the Commissioner of the General Land Office for the survey." And when this application is made *to the Commissioner*, he then immediately

notifies the surveyor-general. It is quite clear that Congress never intended that the surveyor-general should have anything to do with the matter until he had received his directions from the Commissioner, and that the Commissioner should never have anything to do with it until the application was made to him, and that the reservation or preference right should not take effect, as the statute says, until "the filing of the application," which, taken in connection with the balance of the act, clearly means the filing of the application with the Commissioner—which, indeed, is the initiation of the whole proceeding.

Of course, if the State wishes to transmit the application to the Commissioner through the surveyor-general that would not invalidate the application; but the point is that the proceeding is not initiated nor the reservation effective until the application is filed with the Commissioner. Were this not true, then the logical result would be that the preference right would run from the date the Governor signed the application. This would reduce the case to an absurdity for it would practically confer upon the Governor of the State the right to reserve public lands of the United States from all appropriation under the public-land laws without any notice thereof whatsoever to the officials charged with the administration of the law, or a record made for the benefit of the land department and of the public who might be interested.

There are no records of the public lands kept in the office of the surveyor-general. Those are to be found in the General Land Office; and it is the Commissioner's duty to see that proper records of such applications are entered there and in the local land offices for the information of the public.

Qualified persons who desire to acquire public lands under the laws of the United States, in making an investigation to determine whether certain lands are vacant, unappropriated and unreserved, seek the records. This record could not be found in the office of the surveyor-general nor in the office of the Governor of the State, nor in the Governor's mental operations. Not before the application is filed with the Commissioner is there any record of it which is binding upon or notice to anybody.

It is not necessary to consider, under the terms of the statute, considering the special privilege granted to the State in derogation of the common rights of others, whether it would be competent for the Department or the Commissioner to make a rule or regulation providing that the application might be filed with the surveyor-general, and that this would create the reservation. The fact is that no such rule or regulation has ever been made. It is significant in this case that the application was not only filed with the surveyor-general but it was addressed to the surveyor-general also. It thus seems that

the Governor proceeded upon the erroneous theory, probably in view of the fact that it was a survey he was applying for, that the application should be made to the surveyor-general and not to the Commissioner.

The construction here placed upon the act is, as a general proposition, in fact favorable to the States. If the States will simply follow the directions of the statute and file their applications directly with the Commissioner of the General Land Office there will be nobody but themselves who could possibly give out information of the application, which might invite others to initiate claims to the land involved and thus defeat the States. On the other hand, if the States see fit to transmit the application through some other agency and thus run the risk of the contemplated application becoming known, it can not well be heard to complain if it should become publicly known. In this respect, however, it may be said, in the present case, there is no suggestion whatsoever that the railway company had any knowledge or notice when it selected the land, that an application for the survey of the land was contemplated by the State.

It has been suggested that certain language in the case of *Waskey v. Hammer* (223 U. S., 85, 93) militates against the view here taken. There is nothing in this suggestion. The court there simply held that a United States mineral surveyor is disqualified under section 452, Revised Statutes, from making a mining location. The Department had long so held. In the language referred to above, the court simply held that the words of the statute, "officers, clerks, and employees *in the General Land Office*," included subordinate offices or branches maintained under the supervision of the General Land Office, such as the offices of the surveyors-general and the local land offices. There can be no question of the correctness of that construction of the statute there being considered, but there is much difference between that statute and the one here under consideration and the object sought to be attained in each; so also there is much difference between the General Land Office and the Commissioner of the General Land Office. The Commissioner is himself an officer in the General Land Office, and when the statute provides that an application shall be made to the Commissioner of the General Land Office, and then proceeds to provide what shall be done by the Commissioner after the application has been made to him, it means that it must be made to him in Washington where his office is and not at Boise or any other place in the field where some subordinate officer might be stationed.

The railway company's selection was duly filed before the State's application for survey was received by the Commissioner of the General Land Office. Where a selection is regularly made and the selector had done all that is required of him, a right attaches to the

land which precludes its entry, or appropriation by others. The President's proclamation withdrawing the lands for national forest purposes, expressly provided that it should not affect lands "covered by any prior valid claim, so long as the withdrawal, reservation, or claim exists." The railway company's selection for this land was existent of record at and prior to the forestry withdrawal, and the subsequent claim of the State having been finally disposed of, the railway's claim became a valid one within the meaning of the exception contained in the President's proclamation. The lands are, therefore, properly disposable under the railway selection. The Commissioner's decision, rejecting the State selection and sustaining that of the railway company against the forest reservation, is affirmed.

STATE OF IDAHO v. NORTHERN PACIFIC RY. CO.

Motion for rehearing of departmental decision of April 29, 1913, 42 L. D., 118, denied by Assistant Secretary Laylin, June 14, 1913.

SURVEY OF NATIONAL FOREST HOMESTEADS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 30, 1913.

United States Surveyors General:

SIRS: An act approved August 10, 1912 (37 Stat., 287), creating appropriations for the Department of Agriculture for the fiscal year ending June 30, 1913, contains the following:

For the expenditure under the direction of the Secretary of Agriculture for survey and listing of lands within forest reserves chiefly valuable for agriculture and describing the same by metes and bounds, or otherwise, as required by the act of June eleventh, nineteen hundred and six, and the act of March third, eighteen hundred and ninety-nine, thirty-five thousand dollars: *Provided, however,* That any such survey and the plat and field notes thereof paid for out of this appropriation shall be made by an employee of the Forest Service under the direction of the United States surveyor general, but no land listed under the act of June eleventh, nineteen hundred and six, shall pass from the forest until patent issues.

An act approved March 4, 1913 (37 Stat., 828, 842), creating similar appropriations for the fiscal year ending June 30, 1914, contains the following provision:

Provided, That not to exceed \$35,000 . . . may be expended under the direction of the Secretary of Agriculture for the examination, survey, and platting of certain lands now listed or to be listed within national forests chiefly

valuable for agriculture and describing such lands by metes and bounds, as required (by the acts of 1899 and 1906 above mentioned), and hereafter such surveys, and the plats and field notes thereof, shall be made by employees of the Forest Service, to be designated by the United States surveyor general, and such surveys and the plats and field notes thereof shall be approved by the United States surveyor general.

The provisions of the act of March 3, 1899 (30 Stat., 1095), differ somewhat from those of the act of June 11, 1906. They apply only to that portion of the Black Hills Forest Reserve as changed and enlarged by the proclamation of September 19, 1898 (30 Stat., 1783), which is in South Dakota, and are not considered herein.

Hitherto metes-and-bounds tracts to be listed under the act of June 11, 1906, have, in general, been marked on the ground by and in a manner customary with the Forest Service, and courses and distances between markings obtained by methods more or less accurate but sufficient for the purpose. This was followed by a different marking, astronomical methods, accurate chaining, practically closed surveys, and critical examination of tracts and settlements in relation to prior surveys and vested rights, for use at final proofs. Such a survey and field notes thereof in proper form for permanent records were only obtainable through your special instructions approved by this office in each case.

It is now proposed to have metes and bounds surveys for listings so made by the officers of the Forest Service that they may be used as the surveys required at final proof under the act. The method of special instructions is adopted.

The following regulations, prepared with special regard to existing conditions, are issued for your guidance. In view of the ultimate purpose of such surveys made under your direction, it is convenient to refer to them as entry surveys in sections 1 to 53 hereof. These regulations will form part of your instructions in each case, and a copy will be furnished to the executing surveyor.

1. The direction instrument is to be a transit with or without solar apparatus, or a solar compass, of approved form, the least count of all arcs being one minute or less.

Horizontal distances, as lengths of lines, connections, and distances to objects noted will be returned in chains and links, and measured with the usual surveyor's chain or steel tape of 66 feet, adjusted to standard and divided or graduated into 100 links.

Approval is extended to the use of long steel tapes in making measurements directly on the slope, including the use of clinometers in the determination of slope angles, the slope distances to be properly reduced to true horizontal distances for entry in the official field notes. The fact of the use of the long steel tape and clinometer method is required to be stated in the field notes.

Kind and description of instrument and measure and their tests will be stated in the field notes.

Approval is extended to a restricted and proper use of the stadia method of measurement over surfaces that can not be accurately measured with the steel tape. You will require that there be included in the field notes the record of the test of the stadia wire interval as often as once a week when used, and a statement in the notes of the essential features of every stadia measurement, but not the detailed process of each reduction.

Offsets and well-conditioned triangulation may be employed when necessary, and details and results must be recorded in the field notes.

2. As required by statute, courses and bearings of all directions are to be found by reference to a meridian astronomically determined, and that they are so derived must be specifically stated in the field notes. They are not to be found directly or indirectly at any stage by reference to the magnetic needle. The meridian will be either determined or verified in connection with the specific survey in hand, or one already of record in your office may be used. From the meridian the compass bearings of directions, to the nearest minute of arc, will be found by necessary sustained angulation. The closing course of the survey thus obtained will be checked by direct reference to the meridian, and in case of discrepancy the series of courses will be examined and necessary correction made before leaving the field.

3. The meridian may be determined by a transit instrument from any of the astronomical observations authorized for use in regular surveys, in order of preference for this work as follows:

(a) Polaris at elongation, the latitude and star's declination being known. The latter may be had from the "Ephemeris," issued annually by this office. The latitude may be obtained from an observed greatest or least altitude of Polaris by properly applying refraction and polar distance; also from a meridian altitude of the sun's center, corrected for refraction and parallax, the declination being reducible from values tabulated in the Ephemeris when the longitude of the station is known with sufficient accuracy; also by account, that is, from the known distance, converted into arc, north or south of a point whose latitude is known.

As tangency of the plane of collimation to the apparent path of the star is the phenomenon observed, time is required only for convenience. It may be derived from values tabulated in the Ephemeris by applying a part of the daily change proportional to the longitude of the station from Greenwich, and a small tabulated correction due to the difference of the latitude of the station from 40° .

Azimuth at elongation in any latitude within the range of tabulation may be had by simple interpolation from values in the Ephemeris.

This method is the best and simplest, and is preferred. The only objection is that times of elongation are often inconvenient. Three other methods free from this objection, permitted in the regular surveys, are given below. Their use should not be authorized, however, until your office is assured, through your instructions or other source, that the surveyor is practically familiar with them.

(b) Polaris at a known hour angle, latitude and declination being known. This method requires that the error of the timepiece on local mean time be known. The time may be obtained by one of three methods authorized for use in regular surveys, namely: transit of sun over a meridian previously determined, the equation of time being reduced from values tabulated in the Ephemeris; altitude observation of the sun when refraction, latitude, declination, and equation of time are known; or comparison with a standard time telegraphic clock when the longitude of the station is known.

The Ephemeris tabulates values whence the azimuth of the star at any time at any station between latitudes 30° and 50° north may be found when the correct local mean time is known. This method is preferred next to the preceding.

(c) Sun at an observed altitude, refraction, latitude, and declination being known. In reducing from the Ephemeris the declination at the instant of observation, local mean time and longitude must be known with sufficient accuracy.

(d) Sun at an observed equal altitude before and after noon, latitude being known, and the change in declination in the interval.

4. A single determination of the meridian is not sufficient. A second, independent, determination will be had and in case of disagreement exceeding two minutes, the series will be discarded and a satisfactory series obtained; otherwise the mean of the determinations may be used.

5. The record in the field notes of the twin observations, up to and including the resulting azimuth of the reference object and final marking of the meridian, must also state and show the derivation of time, latitude, and longitude used in the reductions. Detailed computations will be submitted on sheets separate from the field notes, which, after examination in your office, you will submit to this office with the returns.

6. Approval is extended to use of a solar apparatus of approved form, in combination with a direction instrument, for determining meridians. Its use requires that the local apparent time and longitude be known with sufficient accuracy for reduction of declination and the refraction in declination or polar distance. To be considered in adjustment, an apparatus must hold the true meridian within two minutes of arc at all approved working hours with such an instrument, before and after noon, the testing meridian to be determined

independently in approximately the latitude of the work in hand, by either of the three methods already mentioned. Such a test of recent date to the work in hand is to be recorded in the field notes. A partial test while the survey is in progress may often be had by an afternoon determination of a course ascertained in the morning, or vice versa, and such test should be of record. The action of the instrument and courses obtained should be checked by the angles of the survey independently read on the horizontal limb.

In field notes there should be recorded the details of at least one of the daily observations, that is, the local mean time and the latitude and declination settings. If the latitude setting, which must be that given by the apparatus at the station, is not the correct latitude, the index error should be stated.

7. A corner will be established at each change in direction of the boundaries of the entry survey, and if within regular surveys, at each intersection with the established section boundaries as these exist on the ground, distances being noted to the nearest regular corners each side.

The corners of a survey will be numbered consecutively beginning with No. 1. If within regular surveys, this number will be assigned to a regular corner, the same being a corner of the entry survey, or to an intersection with an accepted section boundary in good standing. In other cases the entry survey will be connected to the nearest corner of accepted regular surveys in good standing if within 2 miles, otherwise to a locating monument within the same distance, the latter to be connected to the nearest corner of regular surveys if within 2 miles; in either case the entry survey corner nearest to the point connected will be designated No. 1. The method of obtaining connections will be stated in the field notes, whether by direct measurement, random line, or traverse, with details of the latter.

8. It is essential that these surveys, unconformable to the regular system, be marked on the ground in the most permanent manner. A corner may consist of a durable stone not less than 24 inches long, set 14 inches in the ground, or a post of durable wood not less than 3 feet long, 4 inches square, set 24 inches in the ground, or a tree or rock in place. If the stone or post is longer than the minimum length mentioned, the extra length will be set in the ground. As stone is preferred, a justifying remark should appear in the field notes when posts are used.

9. Corners will be neatly scribed or chiseled on the side facing the claim, for instance, 3-HES45, for corner 3 of Homestead Entry Survey No. 45; a like marking will be placed on suitable bearing trees, bearing objects, etc., with the usual symbols, B T, B R, etc. Each corner or bearing point will be defined by a nail, arrowhead, or other distinctive mark. Distances to bearing trees will be measured to

centers, and scribings will be deep, and will read axially with the tree, with the B T as near the ground as possible, that the stumps may retain the markings should the trees be cut down.

10. Memorials of charcoal, marked stone, charred stake, or other distinctive material will be buried at the corner point when practicable, under the post or stone.

11. A corner will be witnessed by a mound of earth or stone, and additionally by two bearing trees (diameter to be expressed in inches), rocks, or objects when such can be had within 200 links of the corner point, selecting those that will best coordinately designate the point and in preference within the claim, and when these are not available that fact will be recorded and pits supplied; distances thereto will be recorded in links.

12. Corner witnesses at intersections with established section boundaries will be according to the regular closing section corner arrangements, forms, and dimensions—see forms 1 and 2, page 38 of the Manual of 1902—due regard being given to the direction of the closing line, as in section 67, page 30. If figure 10, Plate IV, originally prepared to illustrate positions for a north direction, be turned about to correspond with the direction in which the closing line is being run, it will indicate a proper disposition of mound and pits relative to the corner point. In case of oblique intersection, see sections 68 and 69, page 30, remembering always that the section boundary is the line being closed to. Such corners will have the symbol C C in addition to the other prescribed markings, and will be included in the consecutive series of corner numbers for the entire survey.

13. When corners at changes in direction of the boundary, not also intersections with established section boundaries, are witnessed by a mound and pits (of which there should be two), consider those portions of figure 1, Plate V, which show the NW. and SE. corners of a reservation, as modified to state pits and mound of the dimensions and in the positions stated in the following corner description, and the diagram will then represent proper size and arrangement of witnesses for the conditions therein figured. In case of reentering angles the pits may be nearer the corner point, and in case of an interior angle less than 90° the pits may have to be placed more remote. The mound will be placed within the boundaries of the tract as surveyed, diagonally from the corner point, as shown in the figure.

Set a granite stone, 26x10x8 ins., 16 ins. in the ground, over a stone marked with a cross for cor. 3 of this survey, marked 3-HES45 on side facing the claim; no bearings, therefore dig pits, 24x24x12 ins., crosswise on this and the succeeding course, 7 ft. dist.; and raise a mound of earth, 4 ft. base, 2 ft. high, $3\frac{1}{2}$ ft. dist., within the claim.

14. A meander corner will have the mound, and pit if any, on line, and of the dimensions and in position relative to the stone or post indicated in figure 25, Plate IV.

15. As it is not purposed to issue the Manual of 1902 for the limited use it would be in these surveys, you will prepare a suitable synopsis of the Manual sections mentioned, with sketches, in harmony with the three foregoing paragraphs, and issue with the special instructions in each case.

16. Where witness corners are employed, justifying conditions requiring them will be stated in the field notes. Such corners should be as near to the respective true points as those conditions, the method of construction adopted, and a regard for permanence will permit. There will be one on each of the two lines meeting at a true point for corner. If such a witness can not be established on line within three chains of the true point, some other and suitable position will be selected within that distance and preferably on the tract. Witness corners will be in all respects as corners at true points would be, with the additional symbol W C plainly marked. All details of description and of position relative to true points are to be recorded in the field notes.

Courses will run to and start from true points for corners, and the field notes must definitely so indicate.

17. When connection to a locating monument becomes necessary, a locating or mineral monument already established and of record in your office should be used if within 2 miles, it being desired to avoid unnecessary increase of disconnected reference points. Otherwise a locating monument should be established within that distance, of the substantial form, with witnesses, mound, bearing trees, bearing objects, etc., and in the position in the region, prescribed for mineral monuments, concerning which the surveyors of the Forest Service appear to have been instructed. Proximity to the survey in hand is not the prime requisite in determining the location of such a monument; regard should be had to its convenient future use. When practicable it is desired, for obvious reasons, that the monument be connected by course and distance with other like monuments or surveys in the vicinity.

Except when a locating monument will not be required, you will furnish the surveyor with a number in your series of such monuments for his use in connection with the specific survey should occasion arise. If not used, the number may, in your discretion, be employed in connection with another survey. The letters U S L M and the number will be chiseled or cut on the side of the monument.

Full record of the locating monument thus established should appear in the field notes, as to the circumstances requiring its erection, and its description, markings, position, bearings, and connections.

18. Corners or previously established monuments to which the entry survey is connected become by relation monuments of the survey, and as such should be left in good condition, the repairs being described in the field notes.

19. Important natural topography should be noted along the boundaries of and within and near the claim, with special regard to timber, streams, and soil; also natural curiosities, as fossils or organic remains; also ancient works of art, as mounds, embankments, etc.; also improvements of every kind on the claim as to their position, nature, extent, value, and character of permanence; also the position, nature, and extent of easements held under statutes, as rights of way, etc.—in brief, all facts as to the claim and its surroundings ascertainable by survey should be noted and recorded.

Heights of hills, ridges, and banks of streams, depths of ravines, ascents and descents, size of buildings, and like dimensions should be recorded in feet.

Inquiry and field examination should be made to a reasonable extent as to the nonmineral character of the lands, and results stated in the field notes, especially when presumption to the contrary may arise through presence in the locality of known mineral claims, surveyed or unsurveyed; for, if the contrary is asserted and maintained as to any portion at any stage in the proceedings to patent, an amended survey will be necessary.

20. Field notes must state how and by what visible evidences the surveyor identifies on the ground as authentic the locating monuments and corners of prior surveys, used or referred to in the entry survey. If evidence found agrees with the description furnished by your office, a short form may be used; for instance, "Which is a granite stone, showing 10 ins. above ground, marked and witnessed as described by the surveyor general": otherwise the full description as found will be stated. Such agreement in description is not always or necessarily conclusive; and in cases of misclosure the supposed corner may be spurious, or at least not official, and its position should be checked by lines run to undoubted corners.

21. With other information you will furnish the surveyor with listed descriptions of all alien claims in the neighborhood of the survey, to the extent of your records. But such information is not necessarily conclusive or complete, and the surveyor will note the position of the survey relative to all near-by and contiguous claims of any nature as monumented on the ground, that may come to his knowledge, making connections and retracements necessary for the purpose, and state the owners' names if known.

22. When a roadway through a homestead is exempted from listing, it is not held to defeat one entry to embrace tracts thus separated. The tracts will be designated, "Tract A," "Tract B," etc.

The limits of the road or roads will constitute the boundaries of the tracts, and will be surveyed and marked as such, retaining one consecutive series of corner numbers for the entire survey. Alinement of the boundaries intersected by the road will be preserved, and connecting distances thereon between the tracts will be noted.

A road exemption from a tract to be described as in section 32, will require a demarcation of the boundary of at least the components invaded by the exemption, as in the like case of a metes and bounds tract, requisite subdivision lines of sections involved being temporarily located preparatory thereto. And when field processes of such subdivisions render it convenient, other similarly described adjacent components may be included. The survey will receive a consecutive number in your series, and corners be marked accordingly.

23. When a portion of a stream or other body of water is a boundary of the tract, the same will be meandered at mean high-water mark between terminal meander corners, by noting the general courses and lengths along the sinuosities, without monuments at each change in direction of the meanders so run. (Monuments at the angle points would give the lines between them the character of a boundary, which would limit the tract and thereby deprive the applicant of the rights usually attaching to water frontage.)

Also, in case it is intended to give an applicant the benefit of a water boundary and at the same time exempt a road along the bank, both sides of the road should be surveyed and monumented as herein prescribed, but in such a manner as to leave a strip of land to the applicant between the road and the meandered line, that the strip to which the benefits attach may appear upon the plat according to which patent is intended to issue.

24. Determination of the position of the metes-and-bounds survey relative to accepted section boundaries *as these exist on the ground*, including intersections therewith, and to section subdivision boundaries in certain cases, is incident to a complete survey. Without it segregations can not be made in your office when hereafter required. It may impose justifying retracements, and in some cases restoration resurveys and a limited section subdivision. Under normal conditions these will not be excessive. When extensive obliterations or gross inaccuracies in surveys are developed, the surveyor should make full report to your office through the proper channel, of conditions found and his thorough search for corners and their witnesses of record, including memorials, and await your further instructions. After considering facts and records, you may find it advisable to connect the metes-and-bounds survey to a locating monument and the latter to the nearest identified corner of the regular surveys involved.

25. The tract embraced in the survey must not exceed 160 acres in area, or 1 mile in length. If two or more contiguous listings

are to be embraced in one entry, or in an entry and another "additional" to it under authorizing statutes, the total area and length are limited as stated.

In harmony with a recent communication from the department, in which the subject of proper widths and lengths of entry surveys was fully discussed, the following instruction is stated:

Any tract not exceeding 160 acres in area which may be contained in a square mile, the sides of which extend in cardinal directions, is understood to be within the meaning of the law.

As it is also the instruction of the Forester in the National Forest Manual on Claims, etc., in effect February 1, 1912, and the application of the rule to four possible cases illustrated therein by sketches, it is not expected that surveys will be presented that you may not approve under the rule.

26. A survey must not embrace lands patented, and necessary retracements will be made to that end. Neither should it embrace other claims, surveyed or unsurveyed, or entered lands, unless with the full understanding on the part of the applicant that an amended survey will be required at his expense if necessary to eliminate conflicts not proper to be included in patent. Surveys should be conducted accordingly.

27. Conflict with another claim of any description will be ascertained by noting intersections with its boundaries, retracing the latter for the purpose, and ascertaining the bearings and lengths of the boundaries of the conflict.

28. If the whole or any portion of the boundary of a legal subdivision, not also a section boundary, constitutes the boundary of a metes and bounds tract, the same will be temporarily located on the ground in accordance with the principles stated on pages 21, 22, and 23 of circular of June 1, 1909, a copy of which should be furnished to the surveyor; and the field notes must describe in detail all random lines and fallings, retracements, measurements, offsets, and processes incident to such location, with the resulting course and length of the boundary so ascertained. Corners of the survey which are also quarter or sixteenth-section corners will be additionally marked as such.

29. Should it be necessary for the completion of the survey to restore any missing official corner, in its original position always, such restoration will be made according to methods of the stated circular; and the field notes should fully describe an exhaustive search for the missing corner, including memorials if any, and for each and all of its witnesses of record, as well as the method and other details of its restoration.

30. Surveys will be made within suspended or unaccepted regular surveys in all respects as within accepted work, including closing corners and intersections, in order that data may be available for segre-

gations should suspensions be removed or surveys accepted; and the status of the surveys, as accepted, approved, unapproved, suspended, etc., will be stated in the field notes in its proper connection. In those cases, however, connections will also be made to locating monuments or, in preference, to accepted official corners of the regular surveys in good standing, as if the suspended or unaccepted work did not exist. Should corrections subsequently be required of the suspended or unaccepted work, provision should be made at that time for a noting of the position of the entry survey relative to the corrected work, sufficient for segregation purposes.

31. Before leaving the field the surveyor should again read your instructions to ascertain that he has fully accomplished them. He should also test his survey for closure within the allowable limit of one three-hundred-and-twentieth, or 25 links per mile of perimeter, and make field corrections if necessary. Tabular statements of latitudes and departures, showing errors of closure, will be stated in the field notes. Submitted with the latter, but separate therefrom, will be a computation of areas, preferably by double meridian or double latitude distances.

If on surveyed land the traverse and area computations will be separate for each section involved. In this case there will also be submitted with the field notes, but separate therefrom, like traverses involving the several connections, grouping with them in the traverses adjacent portions of the boundaries of the section and of the entry survey in such a way that traverses of the closed figures thus to be formed may best reveal the sufficiency of the entry survey and its agreement with established section boundaries as of record or retraced. Such traverses must close within the limit stated. In case of misclosure necessary and sufficient justifying retracements of the prior surveys should be made and used in the traverse submitted.

32. Unless there are road reservations (sec. 22), metes-and-bounds surveys are not required within accepted regular surveys in good standing when the tract to be listed is to be described by legal subdivisions, or as a quarter or a half of a quarter-quarter section or rectangular lotted tract, or as a quarter or a half of a quarter-quarter-quarter section or rectangular lotted tract. But survey is required of metes-and-bounds parcels to be included therewith in listing and entry, in which case statutory contiguity must be obtained by a preliminary location of those regular boundaries that are also to bound the metes-and-bounds tract.

33. Manifestly, the execution of the survey must be subsequent in dates to those of your instructions. The survey will be an actual, independent survey made at the time in all its details, and not computed or compiled from former surveys official or otherwise. When discrepancies are developed, the prior surveys should be sufficiently

retraced, and details of the retracement and resulting correct courses and distances appropriately recorded in field notes.

34. Field notes are to be prepared only on paper of the quality, size, and ruling in current use for regular surveys. They may be in writing or typewriting, in noncopying ink, using both sides of the paper, and in form for binding on the side. To be acceptable they must be clerically neat, not crowded, unmistakably legible, and free from erasures, corrections, or interlineations. Cut sheets will not be accepted, or those upon which writing appears beyond the ruled margins or within one-half inch of top or bottom edge. The sheets will be temporarily bound by stitching or fasteners admitting of removal without injury to the papers when future binding in books is contemplated.

From the abbreviations authorized by the Manual of 1902, you will list to the surveyor only those which are applicable and convenient in these surveys, to the exclusion of all other abbreviations, and instruct, and when necessary illustrate their proper and consistent use, especially in corner descriptions.

35. Field notes will have the following general arrangements:

(a). The title page should eventually contain information of the character suggested by the following form:

[Acts of June 11, 1906, Aug. 10, 1912, and Mar. 4, 1913.]

FIELD NOTES
of
Homestead Entry Survey No. 506
situated in the
Battlement National Forest
in
unsurveyed Section 30, Township 11 South, Range 93 W.
and
surveyed Section 25, Township 11 South, Range 94 W.
of the
Sixth Principal Meridian
COLORADO.

Survey executed by John T. Monroe (state official designation).

Under special instructions dated August 15, 1910.

Survey commenced September 20, 1910.

Survey completed September 25, 1910.

Applicant for listing, James Brasher.

Application No. 704, dated June 27, 1910.

List No. , dated

(b) The caption on each page will be, for instance, HOMESTEAD ENTRY SURVEY No. 506: COLORADO.

(c) Brief preliminary remarks deemed necessary by the Forest Service, as to applicant for listing and date and number of his application, etc., followed by reference to your special instructions by date, homestead entry survey number, position of claim by section, township, and range, and whether on surveyed or unsurveyed lands, with name of national forest and the statutory authority,

namely, the acts of June 11, 1906, August 10, 1912, and March 4, 1913, as the case may be.

(d) Commencing date of survey, and establishment of meridian of reference, with full data and results, as hereinbefore specified.

(e) Record of retracements, resurveys, and restorations of specific lines and corners, with dates.

(f) Temporary locating of required boundaries of legal subdivisions, with dates.

(g) These preliminaries being recorded, then will follow the field notes proper of the claim, commencing with corner No. 1, its full description, witnesses, bearing trees and objects, and connections. Record the magnetic declination at this point, measured from the true meridian, time of day to be stated, and the resulting mean declination deduced by aid of a brief table of diurnal variations for your district, which you will furnish, prepared from values tabulated in the Manual of 1894. Thence proceed with courses in consecutive order from corner to corner, around the entire tract, to the place of beginning. If a corner or boundary of the tract is identical with a corner of or on a line of another survey, or section line, or boundary of a legal subdivision, that fact should be stated. Descriptions of corners established and corners referred to or used; connecting lines; full details of triangulation, offsets, and traverses and results; chainage to topography on line; bearings and distances to improvements and other objects; intersections with prior surveys and conflicts therewith—these will be recorded in order in their proper places as the survey progresses from corner to corner. The date of each day's work will appear.

(h) Areas in acres (to two decimal places) of conflicts if any, portions in each section, and total area.

(i) List and descriptions of improvements, with approximate values.

(k) Description of the tract in respect of the character of the land, timber, water, use, and value for various purposes. Mineral or nonmineral character to have specific mention.

(l) Proximity of the tract to other like tracts, settlements, mining camps, centers of trade, townsites, and to officially surveyed mining or other claims and others not so surveyed but well known.

(m) Such other matters relative to the claim and its surroundings as are deemed proper and necessary to a complete report. Then will follow the concluding date of survey and the official signature of the surveyor.

(n) Traverses showing closing errors.

(o) Final affidavit of assistants, to be made before an officer qualified to administer oaths, or if one is not available, that fact will be stated and the affidavit made before the surveyor in his official capacity.

(p) Final affidavit of the surveyor, to be taken before an officer qualified to administer oaths and having a seal. The affidavit should have substantially the following form:

I, John T. Monroe, (here state official designation), do solemnly swear that, in strict conformity with the special instructions of the United States surveyor general for Colorado, dated August 15, 1910, and the laws of the United States, I have well, faithfully, and truly, in my own proper person, surveyed a tract of land upon the application of James Brasher, No. 704, dated June 27, 1910, for listing under the act of June 11, 1906, the same to be known as Homestead Entry Survey No. 506, situated within the Battlement National Forest, in unsurveyed section 30, Township 11 South, Range 93 West; and surveyed section 25, Township 11 South, Range 94 West of the Sixth Principal Meridian, Colorado, and the related retracements and resurveys and section subdivisions, which are represented in the foregoing field notes as having been surveyed by

me; and I further solemnly swear that all the corners of said survey have been established and perpetuated in strict accordance with the stated special instructions, and in the specific manner described in the field notes, and that the foregoing are the original field notes of such survey.

It is noted that the form of certificate of assistants, final oath of surveyor, and your approval, Form 4-679, may be followed, slightly modified, for these surveys.

36. Plats will be prepared on drawing paper at least equal in weight and quality to that in current use for plats of mineral surveys, on sheets of the size and with border prescribed for regular township plats, and to a suitably large scale in each case. The title may be brief and substantially as follows, for instance:

Plat of
Homestead Entry Survey No. 506
in the
Battlement National Forest
in
Section 30 (unsurveyed) T. 11 S., R. 93 W.
and
Section 25 (surveyed) T. 11 S., R. 94 W.
of the
Sixth Principal Meridian
COLORADO.

37. In addition to the entry survey in detail, with its associated retracements and resurveys designated as such, section subdivisions, and connections, all "strictly conformable" to the field notes, the plat will also indicate near-by surveys, claims, and important topography.

38. If in a surveyed section, section subdivisions should be shown on the plat to an extent sufficient to indicate remainders of legal subdivisions invaded by the entry survey, but without areas and without lot numbers other than those already appearing on the plat of regular survey. After the entry has passed to patent, its survey and segregations created thereby will be shown with other patented areas on township plats subsequently prepared; and in these cases small portions of legal subdivisions consequent on segregations of patented mineral claims, that may be included in adjacent lots created by the entry survey, should be included if the resulting lot is of proper form and area. (See p. 74 of Manual of 1902.)

39. The status of surveys and protractions should be definitely stated on the plat; for instance, as patented, accepted, suspended, surveyed, unapproved, etc., as the case may be.

40. On the plat unsurveyed section lines will be indicated by broken lines, if their positions can be protracted with reasonable certainty. Surveyed section lines will be full, with courses and distances as of record, retraced, or restored. Mineral and other surveys may be shown in full lines, with corner numbers when advisable. Unsur-

veyed mineral or other claims, also section subdivision lines, will be dotted. The entry survey boundaries will be full and relatively heavier.

Lines should be appropriate in character and lettering simple in style and distinctive in size and form for the matters represented, that the plat may be correctly and easily read. Single-stroke letters and figures, not shaded, are preferred, to the exclusion of vertical and Roman forms.

41. In tabular form, as on regular township plats, there will be stated the prior and entry surveys, executing deputy or other surveyors, contracts, group numbers, and special instructions with dates, dates of surveys and of approvals. Also in tabular form, there will be stated the areas of conflicts, portions in each section, and total area. Following these tables will be stated the list by number and date when known, and the latitude, longitude, and mean magnetic declination of and at some point of the survey, preferably at corner No. 1.

Within the outlines of the survey will appear, for instance, H. E. S. No. 506, with total area.

42. Your certificate to the plat will have the following general form, for instance:

This plat of Homestead Entry Survey No. 506, situated in section 30 (unsurveyed) in Township 11 South, of Range 93 West, and section 25 (surveyed) in Township 11 South, of Range 94 West of the Sixth Principal Meridian, Colorado, is strictly conformable to the field notes of the survey thereof on file in this office, which have been examined and approved.

43. Cooperative procedure of your office and that of the District Forester will be substantially as follows:

That officer will forward to you a list of surveyors of the Forest Service, accredited as trustworthy and competent for surveys of the character above described, to whom, if you find no objection, you will issue special instructions.

44. Upon receipt from the district forester of a request for instructions for the survey of a given tract by metes and bounds, under the stated act of June 11, 1906, you will ascertain from the local land office the reservations, and the entries, agricultural, mineral, etc., whose boundaries may have to be recognized or respected. You will also carefully consult the records of your office. With his request for instructions the district forester will, in his discretion, transmit two copies of a preliminary plat and field notes of the tract, together with any other facts or information which he may be able to furnish, which will be of service in preparing the instructions.

45. From information thus assembled, you will prepare special instructions for the entry survey, assigning thereto the succeeding number in your series of entry surveys, or if the series is not started,

commence with No. 37. A number once assigned will not be used in connection with another tract or another application for the same tract. The instructions will be addressed to the accredited surveyor designated by the district forester, or if not designated at the time, the place for the name of the accredited surveyor will be left blank, the same to be filled in by the district forester in due course and your office advised.

The instructions will be accompanied by a diagram to a convenient scale, showing the assembled information, including courses, distances, etc., of prior surveys, also the approximate latitude and longitude as shown by your records, the same to be corrected by the surveyor according to the facts. Matters not conveniently representable on the diagram, as brief corner descriptions, and the conditions, status, and irregularities of prior surveys, should also be furnished to the surveyor.

46. You will refrain from instructing the surveyor in any matter strictly within the jurisdiction of the Forest Service. But it is intended that your instructions be such as are necessary, yet sufficient, in each particular case for a survey and returns in all respects acceptable at final proof.

When the surveyor may easily err, the special instructions should not consist merely of reference to or quotations from these regulations or the circular of June 1, 1909; but you will clearly set forth the details of requisite operations in the light of conditions as far as known, and, in addition, fully advise, as far as practicable, what should be done if conditions are found to be otherwise. Your instructions should be specific, sufficient, and special.

47. You will transmit two copies of the special instructions and diagram and one of the two copies of the preliminary plat and field notes, if such are furnished by the district forester, to this office by letter, in which you will state the information assembled and discuss the special instructions in their relation to conditions presented.

Records will be consulted, the instructions examined, and one copy thereof returned to your office as promptly as possible. You will then transmit the instructions as approved to the district forester, with the request that he cause the survey to be made in strict conformity therewith, and in due course transmit to your office the requisite returns in prescribed form complete for your official action. The returns will consist of original field notes, two transcripts thereof, and plat in quadruplicate, with the associated papers already mentioned.

48. It is expected that, in the majority of cases, there will be no complications or conditions not sufficiently covered by this circular. For such surveys your instructions should be brief and formal. In many other instances the strictly special features will be quite simple.

Judiciously select these two classes, and transmit to the district forester the instructions and information therefor, without prior submission to this office; but transmit a copy in each case for filing, and in your letter state your action under this section.

49. As returns are to be prepared by the Forest Service under your direction, it will be of manifest advantage in the cooperation, and it is so suggested, that the district forester, after an entry survey is checked in his office for limits of closing and statutory area and length, submit to you a preliminary draft of field notes and preliminary diagram, sufficiently indicating contemplated forms of returns. These you will at once critically examine, indicate needed changes in survey, field notes, and plat, and return promptly to that officer, retaining a sufficient copy for convenience in examining returns. Your consideration of the draft and diagram is expected to be complete, that survey and returns may not need further change.

50. When received from the district forester, as above, the returns will be considered in the usual order of business in your office, unless otherwise directed by this office, and when found to be satisfactory, will be officially approved and certified by you as usual.

51. The original plat and field notes will remain in your files. The duplicate plat and one transcript of field notes will be transmitted to this office; they will be deemed to be the plat and field notes prescribed in the stated act of 1906 to be filed by the entryman. Upon advice of this office, you will transmit the triplicate plat and one transcript to the proper local land office for its files. At the same time you will transmit the quadruplicate plat to the local land office, to be supplied to the entryman when he applies to make final proof, for posting on the claim as required by the act of 1906; this purpose will be stated in your letter of transmittal.

When the triplicate plat is transmitted, you will notify the district forester thereof.

52. With your letter transmitting transcript field notes and duplicate plat, you will inclose copies of any supplemental instructions you may have issued. And when such instructions are requested by the district forester, concerning which you are in doubt, you will submit to this office a full statement of conditions affecting the question presented, and await advice.

53. The cooperative procedure above instructed has relation only to listing surveys intended as bases for individual entries. It does not apply to surveys for listings of larger metes-and-bounds tracts or tracts involving the extension of the regular system.

54. By the stated act of March 4, 1913, the unexpended balance of the appropriation of \$35,000, for the current fiscal year, and a similar appropriation for the ensuing fiscal year, will be available also for surveys of lands *already listed* within national forests.

In respect of such listings and entries based thereon, your attention is directed to section 25 hereof and the construction therein stated of the statutory 1-mile limit. All instructions of this office inconsistent therewith are hereby recalled.

55. After June 30, 1913, such surveys by metes and bounds—that is, lands already listed—as are intended for use at final proof under the act of 1906, will be made by employees of the Forest Service under your direction and these regulations. This rule applies also to metes-and-bounds entries of lands which, since entry, are exempted from national forests, where the entryman is not, within the statutory final-proof period, allowed to amend his entry to conform to the usual legal subdivisions.

Surveys amendatory of existing listings, intended as bases for individual entries, including those to be bases for allowable amendments of entries already made, are sufficiently covered by preceding sections.

Surveys for final proof on entries based or to be based on listings not made under the cooperation plan of the acts of 1912 and 1913 will be subject to the following additional regulations; namely, such surveys can embrace only listed and opened lands. They must therefore be restricted to or within the boundaries of such lands as marked on the ground, or if not marked, to or within the boundaries intended by the Forest Service in the listing. That this restriction is observed, and how, should specifically appear in the field notes, with identifying descriptions of listing corners as found, and bearings and distances thereto when, for proper reasons, their positions are not occupied by entry survey corners. The listing corners have served their legitimate purpose when the tract is identified, and should be destroyed after positions are noted, the facts being recorded in the field notes.

The fact of entry will not require change in forms prescribed in section 35c, *supra*, of field notes, plats, affidavits, and approval; but the fact should be briefly mentioned in the preamble of the field notes, with name of entryman, local land office, serial, and date.

56. Applications from entrymen for metes-and-bounds surveys of their entries, received at your office subsequent to June 30, 1913, will be treated substantially in like manner as requests for instructions from the district forester. In addition, however, to other relative information from the local land office (sec. 44), you will obtain details of listings and entries required in preparing special instructions in each case. Duplicate field notes and plats of most of the listing surveys already made are on file in this office, and will be transmitted on your request.

Of the provisions of the stated act of 1913 you will advise entrymen for whom surveys have been authorized by this office but in-

structions not issued by your office, also applicants in the case of entry-survey applications now pending in your office or filed therein prior to July 1, 1913, and allow them to modify their applications, if they so desire, to request that the surveys be made by the Forest Service under these regulations, and upon such requests you will proceed as on applications submitted after June 30, 1913. Unexpended balances of deposits for office work will be returned to depositors upon application and your usual accounting.

57. Although the status of entered lands is different from that of lands to be listed under the cooperative plan, matters requiring your careful attention are not materially different, as surveys in each case must be sufficient for final proof. Therefore, reposing confidence in your judicious selection, you will proceed in these surveys also, as directed in sections 47 and 48 in respect of transmitting and submitting special instructions.

58. The preparation of returns being provided for as stated, the necessary office work in your office, connected with surveys under these regulations, will be performed by your regular clerical force without expense to entrymen.

59. A survey embracing lands proper to be entered and patented, to the exclusion of other lands, a sufficiently substantial and distinctive marking on the ground, and a concise but complete and correct record are required. These regulations are designed to embrace all requirements necessary and sufficient thereto. It is to be expected that details not specifically prescribed herein will vary, but unless obviously discordant therewith, they should not in general be regarded by you as necessarily subject to change (see sec. 49), or as a bar to your approval, thereby needlessly introducing delays and complicating procedure.

60. It is desired and expected that you will cordially cooperate with the district forester, and promptly acknowledge and respond to his proper requests for instructions and information, that he be not embarrassed in his field assignments or office work.

61. The first letter received from your office relative to an entry survey will be assigned a number by this office, which will also be assigned to all succeeding correspondence on the same subject. In reporting action, please state the authorizing letter. When mentioning a letter of this office, also state the date of your letter, if any, to which the office letter is reply; this is desired for convenient office reference, copies of replies to your letters being filed therewith.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

LEWIS C. LAYLIN, *Assistant Secretary.*

JOSEPH RUPLEY.

Decided April 30, 1913.

RESIDENCE DURING WINTER MONTHS—CLIMATIC CONDITIONS.

Residence during the winter months will not be required upon a homestead entry of land near the crest of the Sierras, where on account of its altitude, the severity of the weather, and the depth of the snow, it is not habitable during the winter.

LAYLIN, *Assistant Secretary:*

The United States Department of Agriculture appealed from decision of the Commissioner of the General Land Office of June 29, 1912, dismissing a Government proceeding for cancellation of Joseph Rupley's homestead entry for N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and lots 3 and 4, Sec. 14, T. 12 N., R. 15 E., in the Eldorado National Forest, Sacramento, California.

October 20, 1902, Rupley made homestead entry, against which the Commissioner on November 28, 1910, directed proceedings on adverse report of a forest officer charging that claimant has not established and maintained residence on the land. Hearing was regularly had, at which both parties offered evidence, and October 20, 1911, the local office found for Rupley, recommending the proceeding be dismissed. The Commissioner affirmed that action.

The Commissioner reviewed the evidence at length and an extended review of the evidence need not here be repeated. It shows that Rupley substantially improved the land, so that twenty acres of timothy grass was sown, and that he grazed cattle thereon during the open season of each year. A portion of his family has been on the land continuously during the only period of each year that the land could be inhabited up to the date of hearing. This was his residence during such months. In the fall he would gather his stock and return with his family to the lower lands about Smiths Flat. He has now substantial buildings and a well furnished house on the land.

There is a district of land near the crest of the Sierras where the Department has often excused winter residence because of the deep snow. Such was the case of Rhoda A. McCormack, 6 L. D., 811, in the La Grande District, Oregon; Daniel Lombardi, 7 L. D., 57, Sacramento, California; Jesse F. Wagner, 9 L. D., 450, Sacramento, California. The two latter decisions involved entries in vicinity of the land here in question, and Lombardi's case involved land in the same township. The present case is controlled by those decisions.

The Commissioner's decision is affirmed.

MEIKLEJOHN ET AL. v. F. A. HYDE & CO. ET AL.

Decided April 30, 1913.

MINERAL LAND—GRANITE DEPOSITS—FOREST LIEU SELECTION.

Land containing deposits of granite of quality and in quantity sufficient to render it valuable therefor is mineral land and not subject to forest lieu selection under the act of June 4, 1897.

LAYLIN, *Assistant Secretary*:

July 3, 1900, F. A. Hyde & Company filed at Seattle, Washington, an application, No. 3063, under the act of June 4, 1897 (30 Stat., 36), to select the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, T. 27 N., R. 10 E., W. M., in lieu of certain land within a National Forest in California. Proceedings were directed by the Commissioner November 5, 1909, upon the report of a special agent, charging that the base land had been fraudulently obtained from the State of California, which proceedings are still pending.

January 7, 1910, E. H. Meiklejohn and J. O. Buzard tendered mineral application 01867 for the same land, based upon the Granite Association Placer location. They claimed that the tract is valuable for its deposits of granite building stone and other valuable minerals. After a hearing to determine the rights of the parties, the register and receiver found the land to be mineral in character and recommended the rejection of the lieu selection. Their action was reversed by the Commissioner in his decision of March 18, 1912, finding the land to be nonmineral in character. The mineral applicants have appealed to the Department.

Resident counsel for the mineral applicants request that the matter be set down for oral argument, to which Mrs. E. S. Clary, a transferee of F. A. Hyde & Company, objects, upon the ground that the attendance of her counsel from Seattle would entail upon her a large and unnecessary expense. In view thereof, and also of the exhaustive briefs filed by counsel, the Department is of the opinion that an oral argument is unnecessary. See also case of A. W. Lafferty (37 L. D., 479). The request is accordingly denied.

The land lies near the town of Index, Washington, and along the Skykomish River Valley. A granite ledge or bluff, which arises abruptly to a height of 1,000 feet or more, traverses the tract from southwest to northeast, covering, approximately, one-third of its area. The remainder is comparatively level and carries a heavy stand of timber estimated at from 2,100,000 feet to 2,300,000 feet and of a value of from \$4,000 to \$6,000. Near its southwest corner and in the NE. $\frac{1}{4}$, Sec. 19, upon the face of the same granite ledge, is the Soderberg quarry, granite from which has been quarried for a long time, being used for street curbing and paving; in the construction of the dry dock at Bremerton, Washington, for building, monumental and

ornamental purposes. The Soderberg quarry is adjacent to the Great Northern Railroad and upon a level with it, while that part of the ledge lying within the tract is controversy is estimated to be at least from 150 to 350 feet above the railroad. On behalf of the lieu selector, it was contended that this height above the railroad made the working of the granite impracticable, especially in view of competition from the Soderberg quarry and other quarries in the immediate vicinity more favorably situated. The mineral applicants have run a tunnel about 58 feet long into the side of the bluff about 350 feet above the railroad tract and contend that the granite could be quarried therefrom by means of a system of derricks or other systems. The granite is of a massive formation and of a good quality. The country rock of the Cascade Mountains is frequently granite, which exists in large quantities.

The land was cruised March 14, 1909, by a cruiser who reported a stand of timber amounting to 2,118,500 feet, and further stated:

About $\frac{1}{3}$ of this 40 is a granite bluff. No timber of value. The bluff, however, is valuable as a granite quarry. Timber lays on S. $\frac{2}{3}$ of 40. Ground slopes S. and is steep but unbroken.

A placer location, stating that the locators had discovered "a valuable placer deposit bearing granite and other valuable minerals," was made June 25, 1909, by the mineral applicants. The application for patent states it to be under the "acts of Congress approved July 9, 1870, May 10, 1872, and August 4, 1892."

Section 2318, R. S., reserves from sale, except as otherwise expressly directed, land "valuable for minerals." Under section 2319, "all valuable mineral deposits in lands belonging to the United States" are free and open to exploration and purchase. Under section 2329 all forms of such deposits, except veins of quartz or other rock in place, are subject to entry and patent as placers. The act of August 4, 1892 (27 Stat., 348), permits the entry, as placers, of "lands that are chiefly valuable for building stone."

The granite contained in the Soderberg quarry, situated as above stated, upon the same ledge which traverses this tract, was held to be a mineral by the Supreme Court and so excepted from the grant to the Northern Pacific Railway Company (Northern Pacific Railway Company *v.* Soderberg, 188 U. S., 526). The case arose upon a suit in equity in which the bill alleged that there was situated "upon said premises a ledge of granite of good quality, of the value of more than \$5,000, and that the defendant is engaged in quarrying and removing the same." It was tried upon an agreed statement of facts, stating that—

The land in controversy is rough and mountainous land, and its principal value consists in the granite thereon which is of a good and merchantable quality, valuable for building stone, and of the value of more than \$5,000.

The District Judge stated the question presented as follows (99 Fed. Rep., 506) :

The land which is the subject of this suit contains a large and valuable ledge of granite. It is situated in the Cascade Mountains, and is apparently of no value except for the granite. There is no controversy between the parties as to any material fact, and their rights with respect to the land depend entirely upon the determination of the question whether granite is a "mineral," within the definition of that word as it is used in the act of Congress granting lands to aid in the construction of the Northern Pacific Railroad.

The Circuit Court of Appeals (104 Fed. Rep., 425-6) stated the question as follows:

The question presented in this case is whether land which is chiefly valuable for granite of a good, merchantable quality is mineral land within the meaning of the exception from the grant of lands to the Northern Pacific Railroad Company.

Justice Brown stated it (188 U. S., p. 529) :

Whether lands valuable solely or chiefly for granite quarries are mineral lands within the exception of the grant of 1864—

and upon page 525 quoted, with approval, the language of Baron Parke in *The Earl of Rosse v. Wainman* (14 M. & W. 859, 872), that—

Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals.

The question whether certain deposits of stone or rock, valuable as building stone or for other kindred purposes, are subject to mineral entry, has been considered upon several occasions by the Department. In *Freezer et al. v. Sweeney* (21 Pac. Rep., 20), the Supreme Court of Montana, upon February 2, 1889, states that the officers of the Land Department had held that placer locations could be made of lands containing "quarries of rock valuable for building purposes," and approves such holding. In *Forsythe et al. v. Weingart* (27 L. D., 680), in which the prior mineral claimants had "opened up a valuable quarry of stone," the Department held (syllabus) :

Land chiefly valuable for the building stone found therein is subject to location and occupation under the mining laws, and a placer location of such a tract precludes the sale thereof to a subsequent applicant under the act of June 3, 1878.

In this connection the Department has considered deposits of sandstone, marble, limestone and granite. In *McGlenn v. Wienbroecker* (15 L. D., 370) land not suitable for farming purposes but containing large quantities of a very superior sandstone upon which several quarries had been opened and operations commenced, was subject to entry as a placer claim. Likewise, in *Van Doren v. Pledsted* (16 L. D., 508), a deposit of sandstone of a superior quality

for building and ornamental purposes and extensively utilized as such, rendering the land only valuable for a stone quarry, could be entered as a placer claim under the general mining laws.

In *Pacific Coast Marble Company v. Northern Pacific Railroad Company et al.* (25 L. D., 233), the Department held that land neither agricultural nor grazing and valuable only for the marble it contained was subject to placer entry under the mining laws and excepted from the grant to the Northern Pacific Railroad Company. So in *Henderson et al. v. Fulton* (35 L. D., 652) a quarry of marble was held enterable under the placer and not the lode law.

In *Morrill v. Northern Pacific Railroad Company et al.* (30 L. D., 475) the Department considered a deposit of limestone. The mineral protestant there alleged that he had developed upon the land a large deposit of limestone valuable for fluxing purposes and also for building purposes, and that the land had no value for agricultural purposes. It was said at page 479:

The quantity of limestone contained in the lands appears to be sufficiently great to demonstrate that they are valuable for mining purposes, provided the limestone can be successfully mined and marketed.

A large quarry of limestone has been opened a few hundred yards above the railroad track, which passes through the lower edge of said lands, from which quarry it appears that the limestone can be rapidly and cheaply loaded upon the cars, to facilitate which Morrill has erected a suitable platform near the railroad track. Large quantities of limestone have been taken out and removed from said lands by people residing in the neighborhood for building purposes and used chiefly in the building of foundations for houses; but it does not appear that it has a market price for this purpose. It does appear, however, that Morrill, a few years prior to the hearing, sold upwards of three thousand tons of limestone from said quarry to the Anaconda Smelting Company, on which sale he realized a clear profit of fifteen hundred dollars. The limestone so sold was used for fluxing purposes, and similar material is still being used by the Anaconda smelters, taken from land adjoining that in controversy.

In *H. P. Bennett, jr.* (3 L. D., 116), it was held that land containing a high cliff of granite rocks, whose value consisted entirely of a quarry in the face of the cliff, could be entered as a placer claim.

As hereinbefore stated, the ledge disclosed on this land is of a good quality of granite and of massive formation. It is adjacent and similar in quality to the granite deposit contained in the Soderberg placer mining claim patented by this Department under the mining laws and held both by the Department and the Supreme Court of the United States to contain a valuable mineral, excepted for that reason from the grant to the Northern Pacific Railway Company. The Soderberg granite is shown to have been successfully quarried and to have been used for building, monumental and ornamental purposes and in construction of the navy dry dock at Bremerton, Washington.

Those ten-acre subdivisions of the land here involved traversed and covered by the granite ledge are, therefore, held to be valuable for

their mineral deposit and not subject to selection under the act of June 4, 1897, *supra*. Lieu selection No. 3063 will, therefore, be rejected and canceled to that extent. The ten-acre tracts outside of the granite ledge described have not been shown to contain granite in valuable and workable quality and quantity. The mineral application is therefore rejected to that extent and the lieu selection will, in the absence of other objection, be allowed to stand as to such ten-acre subdivisions. If it be found impracticable to segregate the mineral from the nonmineral portions by ten-acre subdivisions a segregation survey may be had for that purpose.

The decision of the Commissioner is modified to the above extent and the case remanded for further proceeding in harmony herewith.

In the adjudication of this case no consideration has been given an *ex parte* affidavit made by one of the mineral applicants and filed after the appeal to the Department has been perfected. An *ex parte* affidavit in a contested case between parties, such as this, can not be considered in arriving at a determination upon the merits.

MEIKLEJOHN ET AL. v. F. A. HYDE & CO. ET AL.

Motion for rehearing of departmental decision of April 30, 1913, 42 L. D., 114, denied by First Assistant Secretary Jones, August 13, 1913.

ZERA W. BALLINGER.

Decided April 30, 1913.

NATIONAL FOREST HOMESTEAD—FORM—JURISDICTION.

The form of agricultural tracts within forest reserves listed for entry under the act of June 11, 1906, is wholly within the discretion of the Secretary of Agriculture, so long as the inhibitions contained in the act are not violated; and the Land Department has no jurisdiction to prescribe the form of an entry under that act, provided it is not more than one mile in length and does not embrace more than 160 acres.

NATIONAL FOREST HOMESTEAD—FORM.

Any tract of agricultural land within a forest reserve, not exceeding 160 acres in area, which may be contained in a square mile the sides of which extend in cardinal directions, is within the purview of the act of June 11, 1906.

LAYLIN, *Assistant Secretary*:

Zera W. Ballinger has appealed from decision of June 29, 1911, by the Commissioner of the General Land Office, requiring amendment of survey of his homestead entry in a national forest under the act of June 11, 1906 (34 Stat., 233).

The Commissioner stated in his said decision with reference to the form of the entry:

In this case, 16 acres of the tract is laid out $\frac{1}{4}$ of a mile long averaging about three chains wide, and is only occupied by a timber road. This is a branch or arm extending from the occupied and improved body of land. The effort to seize and control this road is not explained. The form seems to infringe another regulation, namely, that which limits the length. From the S. W. corner No. 7 to No. 9, and thence up the timber road to No. 14 is more than one mile, and the whole boundary is almost three miles. The fact that the Forest Service has listed and released this abnormally-shaped area does not justify allowing a patent for such a tract.

The Commissioner referred to decision in 37 L. D., 250, wherein it was stated that it is the policy of the Government to have entries, whether they be for agricultural or mining lands, in compact form; that Congress has repeatedly announced the practice and the Department has always and does now insist upon it; that the public domain must not be cut into long narrow strips; no shoestring claims should ever receive the sanction of the Department. The Commissioner directed that the narrow strip or arm of about 51 chains should be cut off.

The decision referred to by the Commissioner was one involving a placer claim under the mining laws. Such claims are required to conform as nearly as practicable with the United States system of public land surveys. A wholly different law is to be construed in the present case. The said act of June 11, 1906, provides, in part—

That the Secretary of Agriculture may in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves . . . which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this act. Upon the filing of any such list or description, the Secretary of the Interior shall declare the said land open to homestead settlement and entry in tracts not exceeding 160 acres in area and not exceeding one mile in length.

The scientific system of rectangular surveying of public lands which was established at the very beginning of our Government by the Continental Congress and which has been since generally followed with some modifications, has unquestioned merit and has simplified not only the administrative features connected with the making of entries and transmission of titles in the first instance, but has also made more certain and convenient subsequent conveyancing by numbers instead of an irregular survey cumbersomely described by metes and bounds. It may be deplored from some viewpoints that

this orderly method has been departed from in the law now under consideration, but Congress in its wisdom has no doubt weighed as against the value of the regular survey the advantage of disposing of agricultural lands in forest reserves as they may appear, although irregular in shape, with retention of those adjacent lands too rough for agricultural purposes or more valuable for timber, and it has been provided by this special legislation that irregular tracts may be taken and the survey of same by metes and bounds is specifically authorized. Under this legislation the form of tracts to be listed for entry is wholly within the discretion of the Secretary of Agriculture so long as the inhibitions contained in the act are not violated. This Department has no jurisdiction to prescribe the form of such a claim provided it be found not more than one mile in length and to embrace not more than 160 acres in area. Therefore, that portion of the Commissioner's decision which objects to the claim because of its lack of compactness, irrespective of its length, is not concurred in.

The second objection made by the Commissioner is that the claim as surveyed exceeds the one mile limit. It has a substantial body in fairly compact form, embracing the greater part of the acreage, and appended therefrom at an approximate right angle is a narrow strip about 51 chains long and but little over three chains in width. The aggregate area is 73.23 acres. The length of this narrow strip with its continuation in the same general direction through the main body of the claim does not exceed one mile. It is not believed proper to include the length of the said narrow strip and then turn in a different direction and take the length of the main body of the claim in its extent and combine the two distances to determine the extreme length of the claim within the meaning of the act. If this claim were placed inside a parallelogram touching its extreme points, it would be found that the greatest length in any one general direction would be a line running mainly northeast and southwest and turning for a short distance to a line almost north and south. Following the body of the claim in this general direction, without crossing any of the exterior boundary lines and without considering any projections of the claim departing from this line, the extreme length of the survey is less than one mile.

Furthermore, this Department has adopted the rule obtaining in the Forest Service, which provides:

Any tract not exceeding one hundred and sixty acres in area which may be contained in a square mile, the sides of which extend in cardinal directions, is understood to be within the meaning of the law. (See instructions of March 24, 1913.)

The present claim satisfies that rule.

The decision appealed from is reversed.

RAY W. CONKLIN.*Decided May 5, 1913.***ISOLATED TRACT—SOLDIERS' ADDITIONAL APPLICATION.**

The fact that part of the land contiguous to a tract otherwise surrounded by lands which have been entered, filed upon, or sold by the government, is embraced in an application to make soldiers' additional entry, does not prevent the enclosed tract from being regarded and sold as an isolated or disconnected tract within the meaning of the act of June 27, 1906.

ISOLATED TRACT—PURCHASE BY AGENT.

The fact that an applicant to have an isolated or disconnected tract offered for sale does not personally appear and bid for the land, but procures another, as his agent, to appear and make the purchase for him, in no wise affects the validity of the sale.

LAYLIN, Assistant Secretary:

December 12, 1911, there was offered for sale by the register and receiver at Lemmon, South Dakota, as isolated tracts of land, the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, T. 13 N., R. 10 E., B. H. M., Lemmon, South Dakota, and Ray W. Conklin, after competitive bids at lower offers had been made, became the purchaser thereof at \$1.60 per acre. Cash certificate 026597 was duly issued to him for offered tracts.

The sale was duly authorized by the Commissioner of the General Land Office on October 20, 1911, on the application of Earl B. Hammon, when due advertisement, posting, etc., were made.

The Commissioner of the General Land Office June 26, 1912, held that the sale of said SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and said NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, was "unauthorized" because the tracts are not isolated within the meaning of the act of June 27, 1906 (34 Stat., 517), as interpreted by regulations of June 6, 1910 (39 L. D., 10), this for the reason that while the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ is contiguous to all of the tracts sold and is embraced in an application of one Currington, dated August 28, 1911, to make soldiers' additional entry, such an application nevertheless does not appropriate the land and still leaves it not isolated.

It was further held that as the applicant for the sale, Earl B. Hammon, did not make the purchase, and as the sale to Conklin was made without evidence conclusively showing the absence of collusion, the same cannot be approved without further showing that Hammon's application was in fact made in his own behalf and not for Conklin the purchaser.

From said action Conklin has appealed.

It clearly appears from showing accompanying appeal that in purchasing the land Conklin acted as the agent of Hammon the petitioner; that on the very day of purchase, December 12, 1911, Conklin, the agent, in pursuance of instructions from Hammon, conveyed the land to Nina Currington in trust for Hammon—the con-

veyance having been made to secure said Nina Currington the payment of the money borrowed from her to pay for the land; that the trust deed was recorded in proper office, December 14, 1912.

Under instructions of June 6, 1910 (39 L. D., 10), it was clearly pointed out that an agent for an intending purchaser of isolated tracts might make the purchase for his principal.

It appears that Hammon, the applicant, resides about seventy miles from the local office where sale was made; that the weather was uncertain at that time in South Dakota and it was difficult for Hammon to attend the sales, that Conklin was instructed to buy the land in his own name and thereby be able to make the necessary non-mineral affidavit.

The plan adopted to ultimately secure title to Hammon the applicant for the sale was not objectionable as now shown by the record.

The sale of the land was made under the act of June 27, 1906, *supra*, which reads 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 upon any pending entry or location.

The act just quoted amended the act of February 26, 1895 (28 Stat., 687), which is substantially in the same terms except as to the proviso thereof which reads as follows:

That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government.

The act of June 27, 1906, *supra*, gave the Commissioner greater discretion in respect to the sale of isolated tracts by eliminating the proviso (just quoted) in act of 1895, which required that tracts shall not be regarded as isolated "until the same had been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon or sold." The act of 1906 repealed the provision just referred to in the act of 1895. Peter F. Kolberg (37 L. D., 453).

There is nothing in the terms of said act of 1908, which justifies the statement that the tracts purchased might not have been regarded as isolated. Nor do the instructions of June 6, 1910, *supra*, as stated in decision appealed from, so interpret said act as to justify the statement that the lands sold were not isolated.

A soldiers' additional application only had been filed on the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 10, when application for sale herein has been made. All

the surrounding lands had been "entered, filed upon, or sold"—a condition precedent in act of 1895, to make the lands applied for and sold "isolated or disconnected." A soldiers' additional homestead application is a filing.

The legislative intent was to have regarded as "isolated or disconnected" tracts when surrounded by lands which had been entered or filed upon. When the Commissioner, with all the facts before him, directed the sale of the tracts and they were sold under that authorization, all prescribed forms for the sale having been followed, he acted within the power given him by statute.

Let patent issue on certificate given, unless matters not of record exist which would render that action improper.

The action appealed from is reversed.

NIXON v. ELDREDGE.

Decided May 7, 1913.

FORT HALL INDIAN LANDS—PURCHASER—QUALIFICATIONS OF ENTRYMAN.

The word "purchaser" as employed in the proviso to the first paragraph of section 5 of the act of June 6, 1900, providing that no purchaser of Fort Hall Indian lands by that section opened to settlement and entry should be permitted to purchase more than 160 acres of the land thereinbefore referred to, applies only to entrymen under the homestead, townsite, stone and timber, and mining laws of the United States, and has no application to a purchaser of lands sold at public auction under the second proviso to the last paragraph of said section 5; and lands purchased under said second proviso to the last paragraph of said section 5 should not be taken into consideration in determining the qualifications of one making entry under the supplemental act of March 30, 1904.

LAYLIN, *Assistant Secretary*:

The land involved in this controversy is the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 15, T. 6 S., R. 34 E., 80 acres, Blackfoot, Idaho, land district, and is a part of the lands opened to settlement and entry at 9 o'clock a. m., September 6, 1904, under the provisions of the act of March 30, 1904 (33 Stat., 153), in accordance with instructions approved by the Department June 30, 1904 (33 L. D., 80).

The contention between the contestant and contestee over the land in question has been long continued and several phases thereof have heretofore been decided by the Department.

The entry under consideration was made by Eldredge October 25, 1907, under the No. 12303, new serial 0168.

April 30, 1908, Nixon filed contest affidavit against such entry, alleging—

That said Nathaniel M. Eldredge was not at the time he made said entry qualified under the homestead law, under which said land was thrown open

to entry, to make such entry, he having prior to said entry acquired an amount of land under the provisions of the act of June 6, 1900, as to disqualify him from making such entry.

The hearing was before the local officers in October, 1909, both parties appearing in person with counsel and witnesses and submitting testimony.

July 19, 1910, the local officers joined in decision recommending the dismissal of the contest. From this decision Nixon appealed, and on April 28, 1911, the Commissioner of the General Land Office modified the decision of the local officers and directed that Eldredge be allowed thirty days from notice in which to elect which 40-acre tract embraced in his entry he will retain, and upon his failure or refusal to do so or to appeal within the required time his entire entry was held for cancellation. From this decision Eldredge has appealed to the Department and Nixon has filed a cross appeal insisting upon the cancellation of the entire entry.

Very extended brief is filed in behalf of each party, but in view of the conclusion of the Department as to the question involved and the proper disposition thereof, no discussion of the arguments presented in such briefs is found necessary.

The statutory enactments affecting the case at bar are section 5 of the act of June 6, 1900 (31 Stat., 672), which reads as follows:

That on the completion of the allotments and the preparation of the schedule provided for in the preceding section, and the classification of the lands as provided for herein, the residue of said ceded lands shall be opened to settlement by the proclamation of the President, and shall be subject to disposal under the homestead, town site, stone and timber, and mining laws of the United States only, excepting as to price and excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common school purposes and be subject to the laws of Idaho: *Provided*, That all purchasers of lands lying under the canal of the Idaho Canal Company, and which are susceptible of irrigation from the water from said canal, shall pay for the same at the rate of ten dollars per acre; all agricultural lands not under said canal shall be paid for at the rate of two dollars and fifty cents per acre, and grazing lands at the rate of one dollar and twenty-five cents per acre, one-fifth of the respective sums to be paid at time of original entry, and four-fifths thereof at the time of making final proof; but no purchaser shall be permitted in any manner to purchase more than one hundred and sixty acres of land hereinbefore referred to; but the rights of honorably discharged Union soldiers and sailors, as defined and described in section 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 to be paid as aforesaid.

The classification as to agricultural and grazing lands shall be made by an employee of the General Land Office, under the direction of the Secretary of the Interior.

No lands in sections sixteen and thirty-six now occupied, as set forth in article three of the agreement herein ratified, shall be reserved for school pur-

poses, but the State of Idaho shall be entitled to indemnity for any lands so occupied: *Provided*, That none of said lands shall be disposed of under the town-site laws for less than ten dollars per acre: *And provided further*, That all of said lands within five miles of the boundary line of the town of Pocatello shall be sold at public auction, payable as aforesaid, under the direction of the Secretary of the Interior for not less than ten dollars per acre: *And provided further*, That any mineral lands within said five-mile limit shall be disposed of under the mineral-land laws of the United States, excepting that the price of such mineral lands shall be fixed at ten dollars per acre, instead of the price fixed by the said mineral-land laws.

And the act of March 30, 1904 (33 Stat., 153), reading as follows:

An act relating to ceded lands on the Fort Hall Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands in the former Fort Hall Indian Reservation, in the State of Idaho, within five miles of the boundary line of the town of Pocatello, offered for sale at public auction on and after July seventeenth, nineteen hundred and two, in accordance with the provisions of the act of June sixth, nineteen hundred (Thirty-first Statutes, page six hundred and seventy-two), and the proclamation of the President of May seventh, nineteen hundred and two, thereunder, and which remain unsold after such offering, shall be subject to entry under and in accordance with the provisions of section five of said act and at the prices therein fixed, at a time and in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided*, That the improvements made by certain Indians upon the following described lands, namely: Lot four, section one, township seven south, range thirty-four east, and the southeast quarter of the northeast quarter, section eighteen, township seven south, range thirty-five east, and the east half of the southeast quarter of section twenty-one, township six south, range thirty-four east, and which have heretofore been appraised, shall be paid for at the said appraised value, at the time of and by the person making entry of the respective tracts upon which such improvements are situated.

The undisputed facts material to the issue are: Eldredge at the time he filed his said homestead application had acquired by purchase at public sale under the provisions of the act of June 6, 1900, the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 23, T. 6 S., R. 34 E., 40 acres, within five miles of the boundary line of the town of Pocatello, such purchase having been made on July 17, 1902, and that by timber and stone cash entry, No. 2112, he had also acquired title under said act of June 6, 1900, to the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 17, T. 6 S., R. 36 E., 80 acres, within the limits of the former Fort Hall Indian Reservation, but not within 5 miles of the boundary line of the town of Pocatello. There was further contention by contestant that Eldredge had become, with others, interested in a large tract of land within said 5-mile limit to the extent of a personal ownership of 53 and a fraction acres. The Department, however, concurs with the conclusion of the two lower tribunals that this latter charge is not sustained by the evidence.

Returning to a consideration of the statutes above quoted, it is noticed that the land being opened to settlement by the proclamation of the President was made subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States only, and that in the first proviso persons making entry under the provisions of the statute are referred to as purchasers, and later in said proviso is the provision that no purchaser shall be permitted in any manner to purchase more than 160 acres of land hereinbefore referred to. This word "purchaser" is held to apply only to entrymen seeking title to some portion of such land under the homestead, townsite, stone and timber, and mining laws of the United States, and to have no application whatever to the purchaser of lands sold at public auction under the last paragraph of said section 5. Said sale at public auction was for the purpose of obtaining money to make repayment to the Indians who had ceded said lands to the United States and no statutory limitation is placed upon a purchaser at such sale, neither is a purchaser or bidder at such sale required to be qualified to make homestead entry. Such restrictions as to the qualification of bidders would have had a direct tendency to limit the number of bidders and reduce competition at the public sale, and for this reason probably no such restriction was made by statute. The effect of the act of March 30, 1904, was to remove the \$10 minimum limit fixed for the sale of the lands within 5 miles of Pocatello and make same subject to disposal under the homestead, townsite, stone and timber, and mining laws of the United States in the same manner that the balance of said ceded lands outside of said 5-mile limit had been opened to entry previous to said act of March 30, 1904. It follows that the only entry made by Eldredge which applied upon the 160-acre limit was the 80 acres embraced in his timber and stone entry, and he was therefore qualified at the date he made the entry of the land in question to make such entry to the extent of 80 acres, and no other objection appearing, will be entitled to receive patent therefor.

The decision appealed from is modified in accordance with the views herein expressed and the case is returned to the General Land Office for further proper and appropriate proceedings.

NIXON v. ELDREDGE.

Motion for rehearing of departmental decision of May 7, 1913, 42 L. D., 153, denied by First Assistant Secretary Jones, July 30, 1913.

DOUGLAS LYTLE.

Decided May 7, 1913.

RECLAMATION HOMESTEAD—REINSTATEMENT—ACT OF JUNE 23, 1910.

Where a homestead entry within a reclamation project was, after the submission of final proof, conformed to a farm unit and canceled on relinquishment as to the remainder, prior to the act of June 23, 1910, the entry will not be reinstated as to the canceled portion for the purpose of permitting the entryman to assign such portion under the provisions of that act.

LAYLIN, *Assistant Secretary*:

Douglas Lytle has appealed from decision of June 3, 1912, by the Commissioner of the General Land Office, denying his application for reinstatement of a portion of his homestead entry, for the purpose of permitting him to make assignment thereof.

The entry was made September 5, 1903, for lots 1 and 2, and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 4, T. 49 N., R. 10 W., N. M. M., Montrose, Colorado, land district, containing 159.05 acres, subject to the provisions of the act of June 17, 1902 (32 Stat., 388). Final proof was submitted September 10, 1908. Farm unit plats were approved June 30, 1908, by which the entry of Lytle was divided into four farm units. On January 8, 1909, Lytle relinquished lot 1 and the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 4, thereby conforming his entry to farm unit "B", or lot 2 of said section.

April 26, 1912, Lytle filed application for the reinstatement of the said canceled portion of this entry in order that he might assign the same under the provisions of the act of June 23, 1910 (36 Stat., 592). The Commissioner, in the decision appealed from, denied the application for reinstatement, citing in support of his holding departmental decision in the case of Alexander P. Jacobs (40 L. D., 322, syllabus):

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.

The act of June 17, 1902, *supra*, permitted homestead entries to be made for lands withdrawn under the second form for the purpose of irrigation. Such entries were limited to 160 acres, and were subject to reduction by the Secretary of the Interior to an area of not less than 40 acres, and by the act of June 27, 1906 (34 Stat., 519), subject to reduction to an area of not less than 10 acres, the farm unit in any event to be of an area sufficient, in the opinion of the Secretary, for the support of a family upon the lands to be irrigated.

Section 5 of the act of June 25, 1910 (36 Stat., 835), provides that lands reserved for irrigation purposes are not subject to entry until farm units shall have been established, nor until water is available for irrigation of the land. Prior to this latter act, the practice, in accordance with the law, was to permit entries for the full area of 160 acres, if farm units had not been established, and then when the farm units were thereafter established, the entries were conformed to such units. This resulted in reduction of the area of the greater number of the entries so made. Thousands of entries were so reduced and conformed to farm units of less than 160 acres.

The act of June 23, 1910, *supra* provides:

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.

Very naturally, after the date of the latter act, entrymen would prefer to assign their excess holdings and obtain some consideration therefor, rather than to simply relinquish and cause the excess to revert to the Government without consideration. But, if final proof had not been made, or the entryman be not ready to submit satisfactory proof prior to establishment of farm units and reduction of the entry, he could not avail himself of the privilege of assignment of the excess portion of his entry, and in case the conformation has been effected by cancellation of the excess portion before proof could be submitted, such canceled portion will not be reinstated for the purpose of allowing assignment. See case of Jacobs, *supra*.

The principle announced in the Jacobs case applies with equal or greater force in this case. The proof in this case had been made, but the act of June 23, 1910, *supra*, had not been passed when this entry was conformed to a farm unit. Therefore, the excess portion of the entry reverted to the Government at a time when the entryman had no right of assignment. If reinstatement of the canceled portion should now be made in this case, for the purpose of affording opportunity for assignment of that portion, like action in other cases of entries heretofore reduced would, in fairness, have to be taken. It would be a mere gratuity to grant such privileges, and the gratuity could not be uniformly applied, for the reason that it would undoubtedly be found that many of the tracts thus eliminated from conformed entries have been reentered by other persons,

or awarded to others in adjustment of their respective claims. Therefore, even if the Department should attempt to bestow this gratuity, it would be dependent upon chance, and while it might be applied in some cases, it could not be applied in others, for the reasons stated.

The decision appealed from is affirmed.

CHARLES C. JENSEN ET AL.

Decided May 8, 1913.

ENLARGED HOMESTEAD—ENTRY UNDER SECTION 6—SETTLEMENT RIGHT.

Residence is not required upon an entry under section 6 of the enlarged homestead act of February 19, 1909, and the preference right of entry conferred by section 3 of the act of May 14, 1880, upon a settler on the public lands, has no application to a settler seeking to make enlarged homestead entry of land designated under said section 6.

LAYLIN, *Assistant Secretary:*

On October 12, 1903, sections 7 and 8, T. 21 S., R. 2 W., Salt Lake City, Utah, land district, were, with other lands, temporarily withdrawn "pending determination as to the advisability of including said sections within the proposed Fillmore Forest Reserve." On May 26, 1911, said sections 7 and 8 were restored to settlement on July 24, 1911, and to entry on August 23, 1911. On June 17, 1911, said sections were designated as subject to entry, under section 6 of the act of February 19, 1909 (35 Stat., 639).

On August 23, 1911, Charles C. Jensen filed his homestead application for the NW. $\frac{1}{4}$, Sec. 8; Martin Jensen, his homestead application, under said section 6, for the NE. $\frac{1}{4}$, Sec. 7, and NW. $\frac{1}{4}$, Sec. 8; and Ernest W. Herbert, his homestead application also under said section 6 for the NE. $\frac{1}{4}$, Sec. 7, and NW. $\frac{1}{4}$, Sec. 8. All three of the applicants alleged settlement on the lands claimed by them on July 24, 1911, and subsequent improvement thereof.

The local officers held that the applications were simultaneously filed and ordered a hearing to determine the respective rights of the parties. Pursuant to notice, all three appeared before a designated officer on October 30, 1911, and submitted testimony upon consideration whereof the local officers rendered decision in favor of Herbert and against the other two applicants and, on June 1, 1912, the Commissioner of the General Land Office affirmed their action. Charles C. Jensen and Martin Jensen have appealed to the Department.

The Commissioner's decision contains a full statement of the facts developed at the hearing, which need not, therefore, be repeated herein. The action below was based solely upon the finding that

Herbert was the first settler upon the land and that he followed up his settlement by residence within a few days thereafter.

Residence is not required of one who makes entry under section 6 of the act of February 19, 1909, *supra*, and entry under that section can be legally made only upon lands found by the Secretary of the Interior not to have upon them "such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible." The law not requiring residence, it necessarily follows that no right to the land can be acquired by doing what it declares to be unnecessary, if not impossible. The preference right of entry conferred by section 3 of the act of May 14, 1880 (21 Stat., 140), upon a settler on public lands has, therefore, no application to cases arising under section 6 of the act of February 19, 1909, *supra*, since it is obvious, as has been uniformly held, that the settlement referred to in said act of May 14, 1880, is a settlement accompanied with or immediately followed by residence upon the land. There is no authority for holding that a preference right of entry under any of the homestead laws can be acquired through acts of cultivation and improvement not accompanied by residence.

Moreover, even were it conceded that Herbert had acquired a preference right of entry, under section 6 of the act of February 19, 1909, *supra*, such preference right would have extended only to the NE. $\frac{1}{4}$, Sec. 7, on which his house was built, since, prior to the passage of the act of August 9, 1912 (37 Stat., 267), there was no law recognizing a settlement right to more than 160 acres. See *Cate v. Northern Pacific Ry. Co.* (41 L. D., 316).

The case is, accordingly, remanded to the General Land Office for consideration and action in harmony herewith, after an examination in the field shall have been made by a special agent of that bureau to determine whether the land in controversy is properly subject to entry under section 6 of the act of February 19, 1909.

The Department has grave doubts, after a careful consideration of this record, as to the correctness of the designation of said land as subject to entry under said section 6.

PRACTICE—EVIDENCE—DEPOSITIONS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, May 9, 1913.

CHIEFS OF FIELD DIVISIONS.

SIRS: It is noticed that it is the general practice upon the part of Chiefs of Field Divisions whenever the testimony of any witness is

desired in hearing cases whose evidence must be secured by means of deposition, to have commissions issued for the taking of this testimony on oral deposition rather than by interrogatories.

It is well appreciated that in many cases the testimony of a witness can properly be presented only by the taking of oral depositions, as, for instance, where the case is involved or the testimony of the witness is of a technical character.

However, it is the opinion of this office that in cases where the testimony of a witness may be readily adduced by formal interrogatories, this method should be adopted. There are several reasons which may be urged in support thereof. First, the agent in charge of the case is most familiar with the facts which should be developed by the testimony given under deposition and he, therefore, can best formulate the questions to be propounded. Secondly, the use of interrogatories obviates the necessity for the attendance before the officer taking the same of a representative of the Government who may have little familiarity with the details of the case, and also saves the expense incident to his attendance. Thirdly, the taking of depositions on interrogatories affords an opportunity to the defendant to submit cross-interrogatories to be propounded to the witness and does not necessitate the employing of counsel to appear before the officer taking the deposition. In many cases the defendants are precluded because of the expense involved from being represented when the deposition is taken orally. It is the desire of this office to make it easy for defendants in Government contest cases to present their side of the case, and the taking of testimony on interrogatories will assist to that end.

You are accordingly directed to make out the interrogatories whenever the testimony can just as well be taken in that way as otherwise. It must not be understood that this direction applies to the taking of a large number of depositions in one case at the same time and place, but it is more particularly directed to those cases where the deposition is of an isolated witness. The prime purpose is to prevent any undue or unnecessary hardship upon the public land claimant.

The determination as to whether or not the deposition shall be taken orally or upon interrogatories is left to your discretion, but in arriving at your decision you should be controlled by the suggestions and directions which are set forth herein.

Respectfully,

FRED DENNETT,
Commissioner.

Approved, May 9, 1913:

LEWIS C. LAYLIN,
Assistant Secretary.

CHARLES S. ALBRIGHT.

Petition for the exercise of the supervisory authority of the Secretary of the Interior to review departmental decisions of July 15, 1912, not reported, and March 6, 1913, 41 L. D., 608, denied by Assistant Secretary Laylin, May 10, 1913.

DESTRUCTION OF USELESS PAPERS.**INSTRUCTIONS.**

DEPARTMENT OF THE INTERIOR,
Washington, May 14, 1913.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: By the act of Congress approved February 16, 1889 (25 Stat., 672), it is made the duty of the head of each Executive Department of the Government to submit to Congress, from time to time, a schedule of and report concerning such papers as have accumulated in the files of said Department; not needed or useful in the dispatch of the current business thereof, possessing no permanent value, and of no historical interest, the purpose of such statute being to provide for and authorize the destruction of all such papers, upon approval of such schedule and report by the joint committee of the House and Senate on the disposition of useless papers in the Executive Departments.

It appears that no instruction or regulation has been adopted whereby to direct or control the choice and selection of papers intended to be destroyed pursuant to this statute, and it is deemed fitting now to direct that no schedule of useless papers prepared in conformity to the requirements of such statute shall embrace any paper belonging to any of the several classes of papers below enumerated, to wit:

1. Papers pertaining to the files of a case in which the jurisdiction of the Department has not been exhausted and terminated by the issuance of a patent or other evidence of title.

2. Papers required by law or departmental regulation or practice to be filed as a part of, or in support of, an application for title under any one of the public land laws.

3. Papers possessing a permanent evidentiary value and materially bearing on and affecting the right of any applicant for patent or other evidence of title to receive the same, or on the relative rights of two or more rival claimants for the same tract of land, including herein the essential portions of the records of all litigated contest proceedings.

Original documents and papers, of special importance to the individual by whom they have been filed as exhibits in the record of a contest, may, in all cases where a certified copy of such document would have been equally competent as evidence, be returned to the person by whom they were so filed, upon his request made for such return and upon his substituting therefor a duly certified copy thereof, prepared either by the local register or recorder in whose office the same may have been once recorded, or by the Commissioner of the General Land Office. No such original exhibit shall be returned, however, until the contest in the record of which it was filed shall have been finally terminated and closed.

4. Ancient and modern documents of historical importance or interest, such as might or ought to be selected for preservation in and as a portion of the permanent national archives.

5. All official reports and other documents pertaining to investigations of and concerning alleged fraudulent or illegal claims to public lands, or of and concerning alleged misconduct of public officials, including all records pertaining to proceedings for the disbarment of attorneys practicing before the Department.

6. All schedules and returns transmitted by registers and receivers, showing entries made and moneys received in their offices.

The foregoing list is not to be construed as indicating that papers not specifically included therein are authorized to be destroyed under the act of February 16, 1889, *supra*, but as indicating generally the character of papers and documents that should not be reported for destruction under said act.

Respectfully,

LEWIS C. LAYLIN,
Assistant Secretary.

FREE USE OF TIMBER ON PUBLIC LANDS.

INSTRUCTIONS

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, May 20, 1913.

CHIEFS OF FIELD DIVISIONS:

On March 25, 1913, the Department approved two circulars Nos. 222 and 223 [42 L. D., 30, 22], the former containing rules and regulations governing the free use of timber upon vacant mineral public lands pursuant to the act of June 3, 1878 (20 Stat., 88), and the latter containing rules and regulations governing the free use of timber upon vacant nonmineral public lands pursuant to the act of March 3, 1891 (26 Stat., 1093). Supplies of these circulars have already been transmitted to you.

You will observe that the following requirements have been set forth in each of the two above circulars:

(1) In all cases where the amount of timber to be cut does not exceed \$50 in stumpage value, the person, or persons, for whose use the timber is to be cut, must notify you by registered letter before commencing to cut. The rules and regulations pertaining to timber cutting on mineral lands have been changed by the new circular so as to enable qualified persons to take timber, not exceeding \$50 worth in stumpage value, without the necessity of filing an application.

(2) In all cases where the amount of timber to be cut will exceed \$50 in stumpage value, whether the application contains one petitioner or a number of petitioners, an application must be filed. The new rules and regulations have been so worded that in the opinion of this office the ambiguity which District Judge Dietrich held the last clause of section 4 of the rules and regulations set forth in the circular of February 10, 1900 (29 L. D., 572), contained, according to an opinion rendered by him October 12, 1910, in the Circuit Court of the United States for the District of Idaho, in the case of the *United States v. Rummel and Strang*, has been obviated. If the cutting is to be done through an agent, or agents, a copy of the contract establishing the agency must be filed with the application in every case, together with a bond in a sum equal to the triple amount of the stumpage value of the timber applied for.

(3) The method of disposing of the top, lops and other débris resulting from the cutting, will be prescribed by you, and the fulfillment of such prescription will be incorporated in the bond as a condition.

(4) The area to be cut over must be limited to an extent which will actually produce the amount of timber applied for.

(5) Nonresident corporations are not entitled to become beneficiaries under the aforesaid acts. See 39 L. D., 80.

(6) The cutting of timber for traffic or sale is not to be permitted.

You are not to grant permits for timber on nonmineral lands where the amount applied for exceeds \$200 in stumpage value. Such applications must be transmitted to this office, together with a report thereupon containing your recommendation, for the consideration of the Secretary of the Interior. This rule is applicable whether the application contains one petitioner or a number of petitioners, and not more than one permit will be granted by you during any twelve months' period, if the stumpage value of the timber applied for exceeds \$200, where the subsequent application contains the name or names of one or more of the petitioners which were on the previous application. In such cases the Secretary's approval will be necessary.

An application filed on a mineral blank form for timber to be cut from supposedly mineral land may be granted, subject to the rules

and regulations pertaining to the cutting of timber on nonmineral lands, if, upon investigation by you, the land from which the timber is to be cut is nonmineral in character.

The acts of July 1, 1898 (30 Stat., 618), and of March 3, 1901 (31 Stat., 1439), are to be construed in connection with the act of March 3, 1891, *supra*, in those States wherein they are applicable.

The words "and all other mineral districts of the United States," contained in the act of June 3, 1878, *supra*, do not enlarge the scope of that act so as to embrace any States not specifically mentioned therein. See 38 L. D., 75.

The instructions contained in the circular of August 21, 1907 (36 L. D., 73), are to be adhered to with reference to the administration of circulars 222 and 223, except as modified by these instructions.

New blank forms will be prepared and transmitted to you at the earliest practicable date. Until then, however, you will use the forms now on hand, with such modifications as they may require.

Respectfully,

FRED DENNETT,
Commissioner.

Approved, May 20, 1913:

LEWIS C. LAYLIN,
Assistant Secretary.

JOSEPHINE B. HARRISON.

Decided May 20, 1913.

DESERT LAND ENTRY—ANNUAL PROOF—BY WHOM MADE.

A desert land entryman is not required to make oath as to annual expenditures upon or for the benefit of his entry, but proof of such expenditures may be made by "two or more credible witnesses" resident in the State and vicinity where the land is situated.

LAYLIN, *Assistant Secretary:*

Josephine B. Harrison appealed from decision of the Commissioner of the General Land Office of May 16, 1912, requiring additional evidence upon annual proof on her desert-land entry for NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 11, and W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 12, T. 23 S., R. 64 W., 6th P. M., Pueblo, Colorado.

March 10, 1910, she made entry for above land, and September 7, 1911, she filed in the local office first annual proof by Henry H. Tompkins, Jr., as her attorney-in-fact, with an affidavit that she is at present in New York, and return to Colorado for executing the proof would be impracticable. The Commissioner held that the act of March 3,

1891 (26 Stat., 1095), requires claimant to make proof in person; and while the General Land Office has in some cases allowed proof by an attorney-in-fact where the claimant was not able to appear, no sufficient reason is given in this case to permit all the proofs to be filed in that manner. The Commissioner, however, stated that on a proper showing the General Land Office would permit one annual proof submitted by an agent.

The appeal states:

We cannot understand the stand taken by the Commissioner that because the Harrison proof was for three years it cannot be accepted, whereas if it were for but one year, it might be accepted. This conclusion appears to us to be entirely without merit. If the claimant had been in the Pueblo land district she would certainly have made proof for the entire three years, and since the proof was being filed by an agent why would he not be as well qualified to submit three years' proof as he would be to submit one year's proof. This is the simplest way of meeting the government requirements where the claimant has enough expenditure for the three-year period. It saves much unnecessary bother and expense.

The contention made is more broad than the power of attorney. The power which the entryman gave to her agent was limited to making proof for one year. It authorized him:

to make, execute and file in the United States Land Office at Pueblo, Colorado, my annual desert proof for the first year after entry for my desert land entry #010141, made March 10, 1911, at the Pueblo, Colorado Land Office, for the NE. $\frac{1}{4}$, N. $\frac{1}{2}$, SE. $\frac{1}{4}$, Section 11; W. $\frac{1}{4}$ NW. $\frac{1}{4}$, Section 12, Township 23 South, Range 64 West, containing 320 acres, and to make, execute and file as my agent, and by reason of my temporary absence as aforesaid, any and all lawful proofs and documents whatsoever which may be needful or requisite to perfect the proof of my first year's expenditure upon my desert land claim in accordance with the desert land laws of the United States and the rules and regulations of the Department of the Interior, made in pursuance thereof and in conformity therewith.

The power of the agent is exhausted in making one year's annual proof by the terms of this power.

Aside from the terms of the power, it is noticeable that the agent she has empowered is proprietor of the Tomkins Reservoir and irrigation system. She purchased from him an eighth interest in the reservoir and ditches by which reclamation is to be made. If she can make an entry in this manner, and then leave the owner of the irrigating system to make all her proofs without her presence, it is an easy matter for a reclamation company or an individual owning reclamation works to obtain entries to be made for their use and benefit by persons who are only temporarily in the locality. The desert-land act permits entry only by persons who are citizens of the State in which the land lies. The requirements that proofs shall be made by the entryman in person follows the spirit of the law that entrymen shall be residents of the State where the land is.

Under the circumstances presented in the present case, the proofs may be accepted for one year as first annual proofs, but further than that they can not be accepted under the law and regulations, nor yet under the power which Tomkins was exercising in making the annual proof. He was only authorized to make first annual proof. It can be accepted only to that extent.

It must be here noted that the statute requires proofs of annual expenditures to be made in a particular way (26 Stat., 1095):

Said party shall file during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map, or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid, the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled.

The words "two or more credible witnesses" imply some other persons than the entryman, and the law does not require the oath of the entryman as to annual expenditures.

In *United States v. George*, No. 442, October term, 1912, March 24, 1913, the Supreme Court had under consideration an indictment of a homestead claimant for perjury. The statute in that case provided:

If . . . the person making such entry . . . proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years . . . and makes affidavit that no part of such land has been alienated . . . 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 . . . shall be entitled to a patent.

George had been indicted for perjury in making affidavit that he had resided on and cultivated the land for five years. The Government endeavored to uphold such indictment on the ground that regulations require an affidavit from the entryman, as well as two other witnesses. The court held:

a regulation was promulgated which prescribed forms of taking pre-emption and final homestead proof by questions and answers, and provided that "the claimant will be required to testify, as a witness, in his own behalf in the same manner." It was testimony exacted in pursuance of this regulation and in the manner directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant was required to testify as other witnesses. In other words, three witnesses were required; section 2291 requires two only and, as we have said, points out what proof, in addition, the claimant himself shall give. It is manifest that the regulation adds a requirement which that section does not, and which is not justified by section 2246. To so construe the latter section is to make it confer unbounded legislative powers. What, indeed, is its limitation? If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or wit-

nesses in addition to what section 2291 requires, why not other conditions, and the disposition of the public lands thus be taken from the legislative branch of the Government and given to the discretion of the land department? It is not an adequate answer to say that the regulation must be reasonable. The power to make it is expressed in general terms. If given at all it is as broad as its subject and may vary with the occupant of the office. This is to make conditions of title, not to regulate those constituted by the statute.

In the present case, therefore, it appears that affidavit is not required of the entryman as to annual expenditure. If given, other evidence by two credible witnesses must be given, notwithstanding the affidavit of the claimant. It follows that where such affidavit may be made is immaterial, as no affidavit by the claimant need be made.

The decision must therefore be reversed and her future annual proofs may be made by any two credible witnesses resident of the State and vicinity of the lands entered.

MANN v. MANN.

Decided May 20, 1913.

HOMESTEAD—RIGHTS OF WIDOW AND MINOR CHILD.

Upon the death of a homestead entryman leaving a widow and a minor child, the right to complete the entry inures to the widow, if qualified, to the exclusion of the child; and where the widow, claiming her statutory right, forfeits the same by failure to reside upon or cultivate the land during the lifetime of the entry, such right does not, while the widow is living, devolve upon the minor child.

LAYLIN, *Assistant Secretary:*

William Mann made homestead entry November 6, 1902, for lot 24, Sec. 7, T. 11 S., R. 23 E., T. M., Gainesville, Florida, land district.

Final proof was submitted March 16, 1909, by J. S. Mann as guardian of Predida Mann only minor heir of the entryman. In this proof it was stated that the entryman died January 9, 1907, leaving no widow and only one minor child and that the guardian had cultivated the land every season since the entryman's death. Final certificate issued February 23, 1911, in the name of the heir.

Subsequently the case was investigated by a special agent who found that Predida Mann was the only child of the entryman; that her mother died when she was three or four years of age and that in March, 1903, the entryman married Emma Bell Henderson, who lived with him about one year, when they separated.

June 17, 1912, Emma Bell Mann filed a corroborated affidavit in which she alleges her marriage to the entryman March 8, 1903, lived with him about a year, that their separation was not her fault, that

they were never divorced, and she requested that as his widow she be allowed to perfect the entry. She does not claim to have resided upon or cultivated the land since the entryman's death and states that she was ignorant of her right until a few days before the date of her affidavit. The widow has appealed to the Department from a requirement of the General Land Office of July 5, 1912, that she shall show cause why the entry should not be patented to the minor heir.

As authority for the action appealed from the General Land Office cited the case of Phillippina Adam (40 L. D., 625), wherein it was held that where a homestead entryman dies leaving a widow and children surviving and the widow renounces her statutory right in favor of the heirs, or is disqualified for completing the entry, the children are entitled to perfect the entry and take title in the same manner as if the widow were dead. The conditions shown in the Adam case are, however, entirely different from those presented in the present case and the ruling in that case cannot therefore govern here. In the Adam case the widow had renounced her right and had expatriated herself and thereby become disqualified to complete the entry by reason of her marriage after the entryman's death to an alien, with whom she had removed to Canada. Here the widow insists upon her statutory right and, so far as the record shows, is under no disqualification to perfect the entry. She is not entitled to do this, however, having failed to reside upon or cultivate the entry within the limit of time allowed therefor by section 2291 Revised Statutes.

Her failure in this respect does not, however, inure to the benefit of minor heir or devolve upon the heir any right to perfect the entry and acquire title to the land. In *McCune v. Essig* (199 U. S., 382, 389), after quoting sections 2291 and 2292 of the Revised Statutes, the court said:

It requires the exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by so doing is entitled to a patent. If he die his widow is given the right of residence and cultivation, and "shall be entitled to a patent as in other cases." He can make no devolution of the land against her. The statute which gives him a right gives her a right. She is just as much a beneficiary of the statute as he is. The words of the statute are clear, and express who in turn shall be its beneficiaries.

The facts disclosed in the present case are almost identical with those found in the case of *David R. Weed* (33 L. D., 682), wherein the Department held (syllabus):

There is no law authorizing the submission of final proof by the heirs of a deceased entryman during the lifetime of the widow. Where final proof is submitted by and on behalf of the heirs of a deceased entryman during the lifetime of his widow, there is no authority of law for the issuance of final certificate and patent thereon in the name of the widow.

It therefore follows that in the present case neither the widow nor the heir is entitled to complete the entry and receive a patent for the land, the former because of her default in complying with the law within the time limit allowed by the statute and the heir because the entryman left a widow who had a prior right to complete the entry.

The final proof submitted in behalf of the heir of William Mann, deceased, will therefore be rejected and the final certificate and entry canceled.

The decision appealed from is hereby reversed.

COAL LAND REGULATIONS AMENDED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, May 23, 1913.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Paragraphs 20, 21, and 25 of the coal-land regulations of April 12, 1907 (35 L. D., 665), are hereby vacated, for the reason that the provisions thereof have been superseded and are covered by other regulations. The provisions of paragraph 20, as to examination of proofs and time of payment, have been displaced and are covered by the requirements of paragraph 18, as amended November 30, 1907 (36 L. D., 192), and as further amended December 30, 1912 (41 L. D., 417). The provisions of paragraphs 21 and 25, as to the issuance of receipt and the manner of making returns to the General Land Office are covered by circular 105 of May 4, 1912, while the provision of paragraph 21, as to the delivery of patents, is covered by the general circular of January 25, 1904 (pages 85 and 86).

You will promptly give notice hereof to registers and receivers.

Respectfully,

LEWIS C. LAYLIN,
Assistant Secretary.

ARTHUR K. ADAMS.

Decided May 24, 1913.

WITNESSES—FEES—EXPERT TESTIMONY.

A witness subpoenaed under the act of January 31, 1903, to appear before the register and receiver to testify in a proceeding involving public lands, is entitled to the same fees and mileage allowances as are allowed by law to witnesses in the District Court of the United States in the district in which the land office is situated; and where called in more than one cause

between different parties, or wherein only one of the parties is the same, he is entitled to his fee for each day's attendance in each case in which he attends; but no extra allowances for expert testimony can be allowed under said act.

LAYLIN, *Assistant Secretary*:

Arthur K. Adams has appealed from the decision of April 8, 1913, of the Commissioner of the General Land Office denying his claim for witness fees as an expert witness in certain land cases.

The hearings grew out of Government proceedings against three timber and stone entries and one homestead entry involving land in the Lewistown, Montana, land district. Adams testified in four cases by deposition in New Mexico. The disbursing officer held that he was only entitled to pay for two days at \$3 per day, total \$6. The Commissioner held that he was entitled to \$3 per day in each of the four cases, making a total of \$12. Adams claims that in the three timber and stone cases he testified as an expert and insists that he should be paid \$25 for testifying in each of the three cases and \$3 for the other case making a total of \$78 for witness fees.

In his appeal the claimant states that his testimony involved considerable preparation with a view to qualifying as an expert witness in geological and mining matters in response to introductory questions by the Government, expert geological testimony, many geological inferences and opinions.

The Commissioner states that the witness was subpoenaed to appear and testify as a witness on behalf of the Government in the usual manner under the act of January 31, 1903 (32 Stat., 790), and he holds that the witness must be paid only the fees provided by that act. Said act provides that witnesses in land hearings before the registers and receivers are entitled to the same fees and mileage provided by law for witnesses in the district court of the United States in which the land office is situated. Said act also provides that whenever the witness resides outside the county in which the hearing occurs, his testimony may be taken by deposition and that the fee and mileage shall be the same as that allowed in the district where the land office is located. According to a decision by the Comptroller of the Treasury the fees in this case should be governed by the allowances permitted in the State of Montana where the land office is situated. See decisions of the Comptroller, Vol. 16, page 153.

The act of May 27, 1908 (35 Stat., 377), provides that witnesses in the United States Courts in the State of Montana, and certain other Western States named in the act, shall be entitled to receive \$3 a day for attendance as witnesses and also mileage allowances therein stated.

A witness is entitled to his fee for each day's attendance in each suit in which he attends, where he attends in more than one cause

between different parties or where only one of the parties is the same. See *Archer v. Hartford Fire Ins. Co.* (31 Fed. Rep., 660). Inasmuch as Adams appears to have testified in four cases he was entitled to claim witness fees in each of the four cases of \$3 each, although he was so engaged only two days. No question has been presented to the Department concerning any claim for mileage allowances. The Department is of the opinion that the view of the Commissioner is correct.

Extra allowances for expert testimony cannot be allowed in a United States District Court but the costs must be taxed according to the statute. Any extra allowances to "experts" is a matter of personal or private contract between the parties (96 Fed. Rep., 604). It is not alleged that there was any agreement upon the part of the representative of the Government to pay for witness fees as expert testimony, and even if there had been the Department is of the opinion that the fees claimed herein could not properly be allowed under the provisions of the act of January 31, 1903, *supra*.

The decision appealed from is affirmed.

EDWARDS v. BODKIN.

Decided May 27, 1913.

CONTEST—PREFERENCE RIGHT OF ENTRY.

The preference right of entry conferred by the act of May 14, 1880, upon one who "has contested, paid the land office fees, and procured the cancellation" of a homestead entry, is a statutory right which the land department is without authority to deny or disregard, by regulation or otherwise.

RECLAMATION—FIRST-FORM WITHDRAWAL—CONTESTANT'S PREFERENCE RIGHT.

Where after the initiation of a contest against a homestead entry the lands are included within a first-form withdrawal under the reclamation act, but are subsequently relieved from the withdrawal and restored to entry, the contestant, upon the successful termination of the contest subsequent to the order of restoration, is entitled to exercise his preference right of entry for the land.

LAYLIN, *Assistant Secretary*:

William B. Edwards has appealed from the decision of the Commissioner of the General Land Office, dated November 21, 1912, rejecting his homestead application for the NE. $\frac{1}{4}$, Sec. 11, T. 7 S., R. 22 E., S. B. M., Los Angeles, California, land district, under the act of February 8, 1908 (35 Stat., 6).

The material facts in the case, as disclosed by the record, are as follows:

On December 1, 1902, said Edwards made homestead entry of the land above described. On September 8, 1903, the tract was with-

drawn under the first form of the Reclamation Act. On January 31, 1908, Bodkin filed a contest against Edwards's entry, based upon the charge of abandonment. On January 19, 1909, the Department issued the regulations (37 L. D., 365) which provided as follows:

No contest will be allowed against any entry embracing land included within the area of any first form withdrawal, and in all cases where contest has been allowed prior to such withdrawal, the withdrawal, if made before the termination of the contest, or before entry by the successful contestant, will, *ipso facto*, terminate all right that was acquired by reason of such contest.

On January 10, 1910, the land was restored to settlement on April 18, 1910, and to entry on May 18, 1910. On April 19, 1910, Edwards's entry was canceled as the result of Bodkin's contest. On May 18, 1910, Edwards filed his homestead application for the land, alleging settlement on April 18, 1910, and, on the same day, Bodkin filed his homestead application for the tract in the exercise of his preference right of entry under the act of May 14, 1880 (21 Stat., 140). Both applications were suspended by the local officers at the request of the surveyor general of California, pending an examination as to the character of the land. On May 22, 1912, the suspension was relieved, on June 1, 1912, the local officers allowed Bodkin's application, and on June 3, 1912, they rejected Edwards's application, from which action Edwards appealed to the Commissioner of the General Land Office who affirmed the action of the register and receiver, and it is from the Commissioner's decision that this appeal is prosecuted to the Department.

The preference right of entry conferred by the act of May 14, 1880, *supra*, upon any person who "has contested, paid the land office fees, and procured the cancellation" of a homestead entry is a statutory right which the land department is without authority to deny or disregard, by regulation or otherwise. See *Beach v. Hanson* (40 L. D., 607). The regulations of January 17, 1909, *supra*, were intended to apply to lands under proper withdrawals for public use and for the protection of public interests. But where, as in this case, it is found that a withdrawal was made under a misapprehension of fact, said regulations could have no further effect than to postpone the exercise of the preference right until the lands were restored to entry. It is true that, in the case cited, the entry contested was canceled prior to the promulgation of the instructions of January 19, 1909, whereas, in the case under consideration, the preference was not earned until April 19, 1910; but it will be observed that the latter date was subsequent to the date of the order restoring the lands from the first form withdrawal.

The Department has given careful consideration to the claims made on behalf of Edwards, that he has made *bona fide* settlement upon the

land and has largely reclaimed the same from its desert state. As has been stated, this Department is without authority, as well as without disposition, to disregard the preference right of entry, duly earned by Bodkin under the law.

The decisions of the Commissioner and the local officers were proper and must be and are hereby affirmed.

EDWARDS v. BODKIN.

Motion for rehearing of departmental decision of May 27, 1913, 42 L. D., 172, denied by First Assistant Secretary Jones, August 21, 1913.

**RECLAMATION—LOWER YELLOWSTONE PROJECT—OPERATION
AND MAINTENANCE CHARGES.**

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., May 28, 1913.

In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), notice is hereby given as follows for the lands under the Lower Yellowstone project, Montana-North Dakota, viz:

1. The portion of instalment for operation and maintenance due December 1, 1912, which must be paid before water is furnished for the irrigation season of 1913, and the portion of the instalment for operation and maintenance which falls due on December 1 of 1913, and of each year thereafter, is hereby fixed at \$1.50 per acre of irrigable land, until further notice; and such payment shall entitle the applicant to a maximum water supply of not to exceed 1.5 acre-feet per acre of irrigable land per annum; in no event, however, in excess of the amount needed on the land for beneficial use.

2. Should the quantity of water stated be found to be insufficient for the proper irrigation of any tract, additional water may be obtained on application therefor by the land owner or entryman, and payment for same at the rate of \$1.00 per acre-foot shall become due on December 1 of the year in which the water is used, and such sum must be paid before water is furnished to such tract in the following year.

LEWIS C. LAYLIN,

Assistant Secretary of the Interior.

BENTON v. LYNES.

Decided June 3, 1913.

NATIONAL FOREST LANDS—LISTING BY SECRETARY OF AGRICULTURE.

The Secretary of Agriculture has authority, on his own motion, to list lands for entry under the act of June 11, 1906; and where lands are so listed by him, no preference right is awarded by the statute nor can be claimed except by settlers who were actually occupying the lands prior to January 1, 1906.

LANDS SUBJECT TO LISTING BY SECRETARY OF AGRICULTURE.

The act of June 11, 1906, contemplates that the lands which the Secretary of Agriculture may, in his discretion, list with the Secretary of the Interior with request that they be opened to entry under the homestead laws, shall be lands which are subject to homestead entry.

APPLICATION FOR LISTING—PRIOR EXISTING ENTRY.

No rights are acquired by the filing of an application for the listing of lands under the act of June 11, 1906, while such lands are embraced in a prior uncanceled homestead entry.

WEISER NATIONAL FOREST—PROCLAMATION—EXCEPTIONS.

The provision in the proclamation of March 2, 1907, creating the Weiser National Forest, that lands embraced in any legal entry, lawful filing or selection, shall be excepted therefrom, provided the entryman or claimant continues to comply with the law, contemplates a determination by the appropriate tribunal, after notice and opportunity to be heard, as to whether there has been such compliance; and until an entry, filing or selection has been so finally adjudicated and canceled, the land is not subject to listing or entry under the act of June 11, 1906.

LAYLIN, Assistant Secretary:

Motion for rehearing of departmental decision of December 17, 1912, which affirmed the decision of the Commissioner of the General Land Office, dismissing protest of Bert M. Benton against homestead application of Charles S. Lynes, has been filed in the Department and the parties in interest heard through both oral and written arguments. The facts in the case are substantially as follows:

June 1, 1906, one Arthur O. Huntley made homestead entry for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 29, and lot 2, Sec. 30, T. 21 N., R. 3 W., Boise, Idaho, land district, alleging settlement in January, 1901. Plat of survey of the land was filed May 28, 1906, and final proof upon the entry offered June 26, 1908. By proclamation of March 2, 1907 (34 Stat., 3294), the land was included within the exterior limits of the Weiser National Forest.

December 10, 1908, Charles S. Lynes filed in the Department of Agriculture his application for the listing of the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 29, and lots 1 and 2, Sec. 30, act June 11, 1906 (34 Stat., 233).

March 9, 1909, the Commissioner of the General Land Office directed proceedings against the Huntley entry, on the charge that

entryman had not resided upon the land. At the hearing Lynes appeared as a witness for the Government. By decision of July 20, 1910, the Commissioner of the General Land Office held Huntley's entry for cancellation, on the ground that he had never established a *bona fide* residence on the land. November 24, 1910, the Department affirmed that decision, and on January 23, 1911, denied Huntley's motion for review.

January 27, 1911, Benton filed in the local land office Huntley's relinquishment and the entry was noted as canceled. On the same day Benton filed with the Department of Agriculture his application for listing of the lands. In the meantime, on January 7, 1911, the Secretary of Agriculture requested the opening to settlement and entry, act June 11, 1906, *supra*, of the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W $\frac{1}{2}$ SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 29, and lots 1 and 2, Sec. 30, said T. 21 N., R. 3 W., stating that "Charles S. Lynes, Cuprum, Idaho, applied for this tract on December 12, 1908, subject to final result of the contest of the Government against H. E. 9185 of A. O. Huntley, recently canceled by the General Land Office."

February 17, 1911, the Secretary of Agriculture, referring to his previous communication, stated that it now appears Bert M. Benton made application to have listed a portion of the lands hereinbefore described, after the cancellation of the Huntley entry, the letter of the Secretary of Agriculture concluding as follows:

You are informed of this fact in connection with the opening of the land for entry and settlement under the act of June 11, 1906. I will be very glad to be informed of any action taken by you in the premises, particularly whether the application for listing by Mr. Lynes, filed while the tract was covered by the homestead entry of another, can operate to give him a preference right of entry.

March 30, 1911, the Secretary of Agriculture was advised that in view of the circumstances the names of both Lynes and Benton had been entered in the notice of opening, but that until an application to enter is actually presented, and the Interior Department possessed of all the facts, it did not feel justified in expressing any further opinion as to the rights of the respective parties.

Notice was issued from the General Land Office declaring the lands open to homestead entry May 31, 1911, subject, for sixty days prior thereto, to the preference right of settlers and applicants for listing, as provided in the act of June 11, 1906, *supra*.

April 10, 1911, Lynes filed in the local land office his homestead application to enter the land, and on April 26, 1911, a similar application was filed by Benton, both applications being suspended to await the expiration of the sixty-day preference right period prior to date of opening.

May 31, 1911, Benton filed protest against the allowance of Lynes's application, which protest was dismissed by the register and re-

ceiver, who held Lynes to be entitled to a preference right of entry. Appeal from that decision finally resulted in the bringing of the case before this Department, and the rendition of its decision of December 17, 1912, of which rehearing is asked.

From the foregoing recital it will appear—

(1) That when Lynes, on December 12, 1908, applied for listing of the land, it was embraced in the pending uncanceled entry of Arthur O. Huntley.

(2) That when the Secretary of Agriculture, January 7, 1911, requested that the lands be opened to agricultural entry under the act of June 11, 1906, the Huntley entry had not been canceled, though by departmental decision of November 24, 1910, it had been found that Huntley had not complied with the requirements of the homestead law as to residence.

(3) That Benton's application for listing was filed subsequent to the cancellation of the Huntley entry, but that the Secretary of Agriculture's prior recommendation for the opening of the lands could not have been based upon that application.

(4) That the Secretary of Agriculture at time of his request of January 7, 1911, for opening of the lands believed that the homestead entry of Huntley had been finally canceled.

The proclamation of March 2, 1907, *supra*, creating the Weiser National Forest, contained the following clause:

Excepting from the force and effect of this proclamation all lands which are at this date embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States land office, or upon which any valid settlement had been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired. . . . *Provided*, that these exceptions shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made.

The departmental decision of December 17, 1912, was based upon the assumption that the Secretary of Agriculture listed the lands involved upon the application of Lynes, and that this Department can not review the action of the Secretary of Agriculture taken within the scope of his authority, and upon the further finding that as it has now been determined that Huntley never maintained a *bona fide* residence upon the land, the forestry withdrawal of March 2, 1907, attached upon that date, the lands then becoming a part of the national forest, subject to the operation of the act of June 11, 1906, *supra*.

Under the law the Secretary of Agriculture is not required to await the filing of an application before designating lands for entry under the act of 1906, but, on the contrary, may, and frequently does, list such areas upon his own motion. In that event

no preference right is awarded by the statute nor can be claimed except by settlers who are actually occupying the lands prior to January 1, 1906. In the opinion of this Department, Lynes could not and did not acquire any right by filing the application for listing of the lands on December 12, 1908, while same were included in the prior and existing homestead entry of Huntley, nor was the request of the Secretary of Agriculture, dated January 7, 1911, prior to the cancellation of the Huntley entry, operative until after the records had been cleared of said entry by the cancellation effected January 27, 1911. Good administration requires and the law evidently contemplates that the lands which the Secretary of Agriculture may, in his discretion, list with the Secretary of the Interior with request that they be opened to entry under the homestead laws, shall be lands which are subject to homestead entry. So long as they are covered by prior uncanceled entries they are not subject to entry by another and the law evidently did not contemplate the opening of the land, the award of preference rights, or the allowance of entries upon tracts which still remain segregated upon the records of the General Land Office by prior uncanceled entries.

It is true that the proclamation in excepting from its force and effect land embraced in "any legal entry . . . lawful filing or selection" provided that the exception should not continue unless the entryman or claimant continued to comply with the law. But this must, and evidently does, contemplate a determination by an appropriate tribunal, and after full opportunity has been accorded the party or parties in interest to be heard as to whether or not the entryman or claimant has continued to comply with the law under which his entry or filing was made. It was not intended that the officers charged with the administration of the forest reserves or any other officers of the United States should arbitrarily and without hearing determine that entrymen or claimants had forfeited their lands or that such officers should, without notice to the entrymen or claimants, award the lands or the right of possession thereto to others. Until an entry or selection has been finally adjudicated and canceled it can not be said that the exception contained in the proclamation is or is not applicable to any particular case. Nor does the law contemplate or authorize that same shall be listed for or entered by another.

Up to January 23, 1911, Huntley's entry for these lands was pending and uncanceled and it was not until that date that Huntley had exhausted all the rights of appeal and rehearing allowed him under the then existing Rules of Practice.

The Department therefore concludes that the lands in question were not subject to listing under the act of June 11, 1906, *supra*, or

to applications therefor prior to cancellation of Huntley's entry; that consequently Lynes secured no preference right by his application filed in 1908; that Benton secured no preference right by his application filed January 27, 1911, after the Secretary of Agriculture had filed his request for opening of the land; that the action of the Secretary of Agriculture should and must be treated as a listing not based upon the application of either party, and that consequently the lands listed did not become subject to homestead entry until May 31, 1911, the date fixed for such opening and entry in the notice given by this Department. The applications of Lynes and Benton might be rejected because improperly received, but having been received and suspended by the local officers will be regarded as having been simultaneously filed on May 31, 1911. Various allegations having been made under oath by both parties with respect to their relative equities and as to the motives which actuated them in the premises, such as Benton's allegation that he paid \$10,000 for the improvements placed by Huntley upon the land and the charge by Lynes that Benton is prosecuting the application in the interest of Huntley and the charge that Lynes has been moved by other motives than the desire to acquire a home, the Department believes that in justice to the parties in interest and for its own information a hearing should be had. Departmental decision of December 17, 1912, is accordingly hereby vacated and the decision of the Commissioner of the General Land Office, dated December 15, 1911, reversed and the case remanded, with directions that a hearing be ordered to determine the rights and equities of Benton and Lynes with respect to the land involved, and particularly whether one or both of them has established and is maintaining residence upon the land, what improvements, if any, have been placed thereupon by the respective parties, what consideration was paid by Benton for the improvements placed thereon by the prior entryman, whether Benton's application is presented in good faith, or in behalf of the former entryman, and whether Lynes is presenting his application in good faith for a home. Evidence upon any other points material to a determination of the respective rights or equities of the parties may also be submitted at the hearing when had.

KARL GOLDSMITH.

Decided June 5, 1913.

ISOLATED TRACT—SALE OF PART OF TRACT.

Where two or more contiguous legal subdivisions, aggregating less than a quarter section, comprise one isolated or disconnected tract, they should, as a matter of good administration, be ordered into market and sold to

gether as one piece of land; but the sale of part only of the legal subdivisions comprising an isolated tract is within the discretionary power conferred upon the Commissioner of the General Land Office by the statute and may be permitted to stand.

LAYLEN, *Assistant Secretary*:

Karl Goldsmith and Ida Hayden, his transferee, appealed from decision of the Commissioner of the General Land Office of September 4, 1912, holding for cancellation certificate of sale as isolated tracts lots 6 and 7, Sec. 6, T. 4 N., R. 30 E., B. H. M., Pierre, South Dakota.

February 14, 1911, Charles Newquist filed in the local office application under act of June 27, 1906 (34 Stat., 517), for sale of lots 6 and 7, Sec. 6, T. 4 N., R. 30 E., B. H. M., which the Commissioner, October 4, 1911, ordered into market, and on due and regular proceedings sale was made, December 18, 1911, to Karl Goldsmith, who made payment and cash certificate issued to him. On examination of his office records, the Commissioner found the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, T. 4 N., R. 29 E., was vacant and unappropriated land from date of Newquist's application to date of sale, wherefore the Commissioner held that lots 6 and 7, Sec. 6, T. 4 N., R. 30 E., did not constitute an isolated tract at time of Newquist's application within meaning of the law, that the sale must be set aside, and be held for cancellation.

Ida Hayden, to whom Goldsmith sold the land, joins in the appeal and, admitting the facts, asks the Secretary of the Interior:

to allow said sale to stand of record and to allow Ida Hayden to apply for sale of NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, T. 4 N., R. 29 E., B. H. M., as an isolated tract, or to apply for and advertise as an isolated tract lots 6 and 7 and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1 . . . and to order refund the sum paid as purchase price for said lots 6 and 7 . . . provided the sale as made of said lots 6 and 7 be not allowed to stand.

In view of the Department, the sale made may and should stand. Lots 6 and 7, Sec. 6, 70.18 acres, with NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, constituted one isolated tract of 110.18 acres. It was error of the local office and of the Commissioner not to have noted the contiguity of these three tracts lying in two townships, constituting in fact one isolated tract. The applicant for sale necessarily had to rely on information furnished by officers of the Land Department as to description and area of the isolated tract. The fault was that of the Land Department, and not that of the applicant nor of the purchaser. The Commissioner declared the two lots to be an isolated tract, and relying upon it the applicant paid the fee for publication of the notice furnished by the Land Department, for which he can not be reimbursed. The bidders attended and the successful bidder made payment, received his evidence of purchase, and then sold the land to another, for value, equally innocent.

On all principles of fair dealing, the Government should abide the sale as any private party would be compelled to do by the courts under like circumstances.

This case is not one of lack of power of the Land Department to make the sale. Had the property sold, taken with the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, together exceeded "one quarter section," a different question would arise. But in this case there was power and the sale was fairly made. By an oversight, part of the land over which the power extended was omitted. This was an irregularity, for, as matter of good administration, all governmental subdivisions comprising an isolated tract should be sold together, but the statute does not in terms require that procedure. The statute merely grants authority to sell, and whether the whole tract shall be sold as a unit or shall be sold by single subdivisions, is within discretion of the Commissioner, who orders the sale. While the order in the present case for lots 6 and 7 appears to have been an inadvertence, it was nevertheless an order within discretion of the Commissioner, and having been fully executed, innocent parties, who have accepted and acted upon it, should not be punished by loss for errors not due to their own acts.

The decision is therefore reversed, and, if no other objection appears, the sale will be consummated by patent.

As to remainder of the isolated tract, the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 1, the petition filed has not been acted upon by the Commissioner, whose province is first to act upon it. No action can properly be taken thereon at this time by the Department, and that matter is left to consideration of the Commissioner.

TOLLEF OAKLAND ET AL.

Decided June 7, 1913.

REPAYMENT—TIMBER AND STONE SWORN STATEMENT—ASSIGNEE.

Money paid to the receiver in connection with a timber and stone sworn statement should be deposited, under paragraph 46 of the instructions of June 10, 1908, to the receiver's official account, and so held until earned by submission of satisfactory proof or returned to the claimant, and should not be covered into the Treasury of the United States until due and payable under the law; and where money so deposited with the receiver is erroneously covered into the Treasury before it is earned, and the timber and stone claim is not consummated, an assignee of the timber and stone claimant is not entitled, in view of the provisions of section 3477 of the Revised Statutes, prohibiting the transfer and assignment of claims against the United States, to repayment of the money so paid into the Treasury.

LAYLIN, *Assistant Secretary:*

Appeal is filed herein by Bengt Hansen as assignee of Tollef Oakland from decision of June 10, 1912, of the Commissioner of the

General Land Office, denying said Hansen's application as such assignee for repayment of purchase moneys and fees paid in connection with said Oakland's timber and stone sworn statement filed January 3, 1911, for lots 3 and 4, Sec. 6, T. 63 N., R. 22 W., Duluth, Minnesota, land district, which failed for want of proof to support its allowance, for the stated reason that such assignee cannot be considered as a legal representative qualified to make such application for and receive repayment under the act of March 26, 1908 (35 Stat., 48).

The record shows that Oakland paid with his sworn statement the required filing fee of \$10 and on October 5, 1911, in accordance with paragraph 19 of the regulations governing such applications for entry (37 L. D., 289), \$95 purchase money, and published notice for the submission of proof January 18, 1912. It appears said Oakland then became sick and not expecting to live he executed November 28, 1911, a formal assignment and transfer to said Hansen of his claim for repayment of the purchase money and fees above stated, authorizing said Hansen to receive and receipt for the same upon repayment thereof, "to indemnify said Bengt Hansen for the money loaned to me without security to pay the purchase price for said above described land." On January 29, 1912, Hansen presented this assignment for filing with his application as such assignee for repayment, which the local officers returned stating they had no authority to accept such assignment, and on January 31, 1912, they presented the case for instructions to the Commissioner, who directed, March 7, 1912, that said application for repayment be forwarded to his office. The case as to the sworn statement was closed, for failure to submit proof, on March 20, 1912. Oakland died March 21, 1912, and on March 23, 1912, Hansen filed a new application for repayment, with said assignment, which the Commissioner denied in the decision appealed from.

Said purchase money, paid October 5, 1911, on which date receipt duly issued, appears to have been covered into the Treasury of the United States on the same day, prior to the required sixty days notice of and the day for the submission of proof.

This money, however, was not due and payable, under the terms and within the contemplation of the timber and stone law, in completion of the entry, until the proof was submitted. Its payment prior thereto, required by the regulations (40 L. D., 238) for administrative reasons, was only made as an earnest and was a deposit, merely, which was not legally applicable to the sworn statement in completion thereof under the law, as above stated, until proof was submitted.

In accordance with paragraph 46 of the instructions to receivers (37 L. D., 46), this money should have been deposited to the receiver's

official account until “‘applied’ (earned) or ‘returned,’” and, by paragraph 47 of said instructions, “as soon as APPLIED, . . . deposited to the credit of the Treasurer of the United States.” Said money was not properly applicable as “earned” within the purview of these instructions until, as stated, it was due and payable by the terms and within the contemplation of the timber and stone law, or when proof was submitted, and until that time it was not properly coverable into the Treasury of the United States under either the law or said instructions.

Whether moneys so advanced and deposited and properly credited to the receiver’s account and not covered into the Treasury are repayable to the applicant or to his assignee, as his “legal representative” within the purview of said act of March 26, 1908, is a question not here presented. This purchase money was in fact, although contrary to said instructions to receivers, covered into the Treasury as soon as it was paid and before it was legally applicable in completion of Oakland’s timber and stone statement, and a claim for repayment thereof is a claim upon the United States within the purview of section 3477, Revised Statutes, prohibiting “all transfers and assignments made of any claim upon the United States.”

It appears, however, from Hansen’s statements, uncorroborated, that Oakland died leaving as his only heirs in the United States six minor children, the issue of his sister, the deceased wife of said Hansen, who as their natural guardian now claims the right of repayment. In view of such statement Hansen should be called upon to file proper application in behalf of said heirs, with corroborated showing in support thereof, upon filing which, the case should be further considered and adjudicated in accordance with the facts then presented.

The filing fee of \$10 is not repayable, as the timber and stone application failed for want of proof and the fee was earned. Instructions (40 L. D., 131).

The case is remanded for action in accordance with the foregoing, and the decision herein of April 16, 1913, not promulgated, is hereby vacated and set aside.

RENSEELAER N. PHIPPS.

Decided June 11, 1913.

SOLDIERS’ ADDITIONAL—RIGHT OF WIDOW.

The right of the widow of a deceased homestead entryman to make homestead entry in her own name is entirely separate and distinct from her right to the soldiers’ additional right of her deceased husband; and the fact that she makes a homestead entry in her own right in no wise affects her right to locate or dispose of the soldiers’ additional right of her deceased husband.

LAYLIN, *Assistant Secretary:*

February 25, 1911, the above entitled application [of Renseelaer N. Phipps, assignee of Recta A. Becker, widow of Martin A. Becker] was filed in the local office to enter under sections 2306 and 2307, Revised Statutes, the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, T. 20 N., R. 33 E., M. M., 40 acres, Lewistown, Montana, land district.

The application is based on an assignment of 40 acres of the right of Martin A. Becker, alleged to have served in Company "D," 13th Regiment, Wisconsin Infantry Volunteers, from October 17, 1861, to July 22, 1865, and to have made homestead entry 4991, at Ionia, Michigan, October 20, 1870, for the N. fractional $\frac{1}{2}$ NW. fractional $\frac{1}{4}$, Sec. 2, T. 16 N., R. 8 E., Michigan Meridian, 81.32 acres, which was canceled on relinquishment February 3, 1873.

The Commissioner finds that said original entry and military service constitute a base for additional right of 78.68 acres, and that if Recta A. Becker had not made any other entry, she would appear to be entitled under section 2307, Revised Statutes, to additional right for that area, the military service and the evidence of the identity of Martin A. Becker as the soldier and entryman being satisfactory. The application, however, is held for rejection because it appears that Recta A. Becker, after the death of her husband, made homestead entry 23533, at Watertown, South Dakota, October 27, 1897, for lot 1, and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 1, T. 128 N., R. 51 W., 5th P. M., embracing 116.12 acres, upon which she made final five year proof, and which was patented to her under final certificate 12212, March 1, 1904, and because of such entry she is entitled to additional right of only 43.88 acres, or the difference between the area of her entry, 116.12 acres, and a full homestead of 160 acres, and for this reason only holds that her two assignments of 40 acres each to B. A. Mason on November 17, 1910, one of which was filed with the present application, does not constitute a proper basis for the right claimed. From this decision Renseelaer N. Phipps has appealed to the Department.

The question presented is, the soldier, Martin A. Becker, having died, the owner and holder of a soldiers' additional right of 78.68 acres, which upon his death became the property of his widow, was such right decreased or curtailed in any way because of her entry, while a widow, of 116.12 acres as heretofore set forth.

This question has had careful consideration, and the Department holds that the right of the widow to make homestead entry in her own right under section 2289, Revised Statutes, for 160 acres of land, is entirely separate and distinct from her right to the soldiers' additional granted to her deceased husband because of his military service and entry of less than 160 acres under the homestead law. The exhaustion of *her* homestead right by the entry of 160 acres or less

area could in nowise affect her right to locate or dispose of the soldiers' additional right allowed her by statute.

It follows that the decision appealed from must be and it is hereby reversed, and the case is remanded to the General Land Office, with direction that the application of Phipps be allowed, if no other sufficient reason is found for the rejection thereof, this one question only being considered by the Department upon this appeal.

RECLAMATION—TIETON UNIT, YAKIMA PROJECT—WATER SERVICE.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, June 16, 1913.

1. In pursuance of the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat., 388), and of the acts amendatory thereof and supplementary thereto, notice is hereby given that water will be furnished from the Tieton Unit for the irrigable land in the Northwest quarter of Northeast quarter, Northeast quarter of Northwest quarter, Southeast quarter of Northwest quarter, Southwest quarter of Northeast quarter, being respectively farm units "E," "F," "G," and "H" of Sec. 30, T. 13 N., R. 17 E., W. M., as shown on amended plat approved May 28, 1913, and on file in the local land office and the project office, both in North Yakima, Washington.

2. The charges, times, and the manner of making payments shall be governed by the terms of the public notice of April 18, 1912 [40 L. D., 579], as amended by public notice of May 10, 1912, except that for lands covered by this public notice the first installment of charges for building, operation and maintenance shall be due and payable at the time of filing applications, as hereinafter provided; the second installments shall be due on April 1, 1914, and subsequent installments shall become due on April 1 of each year thereafter. All installments of charges shall become due and payable as herein provided, whether or not water-right application is made therefor or water is used thereon.

3. All water-right charges are payable to the special fiscal agent, U. S. Reclamation Service, North Yakima, Washington.

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 is as shown on the plat.

5. Homestead entries, accompanied by applications for water rights and the first installment of the charges for building, operation and maintenance, may be made under the provisions of said act for

the farm units covered by this notice. in the manner hereinafter provided.

6. Homestead applications for the said farm units shall be made only in the manner following: Any person qualified to make homestead entry may execute such application on and after June 25, 1913, up to and including June 30, 1913, 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 post office money order, drawn to the order of the special fiscal agent, U. S. Reclamation Service, for the amount of the first installment of the water-right charges for building, operation and maintenance, viz., \$10.80 per acre of irrigable land, and also by a certified check on a national bank or post office money order, drawn to the order of the receiver, U. S. Land Office, for the amount of the fees and commissions, amounting to \$6.50 per entry.

7. The homestead application, the water-right application and the certified checks or money orders, and all papers necessary to show the applicant to be qualified to make homestead entry, shall be enclosed in a sealed envelope, addressed to the register and receiver of the United States Land Office, 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 June 30, 1913, between the hours of 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 a. m. of that day will be returned without opening, and all applications filed after 4.30 o'clock p. m. of that day will be held until all applications filed between 9 a. m. and 4.30 p. m. have been disposed of, when, if there are any vacant farm units for which delayed applications are filed, they will then be considered in the order of their filing.

8. Warning is hereby expressly given that no rights can be obtained by settlement made on the land since the date of its 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.

9. 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 July 2, 1913, at the United States Land Office at North Yakima, Washington.

10. 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. If any person presents applications for more than one farm unit, none of his several applications will be considered.

11. It shall be the duty of the register and receiver and the project manager of the said Tieton unit to arrange all envelopes containing applications presented hereunder in alphabetical order, according to the names of the several 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 representing applications for one particular farm unit shall be assembled.

12. 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 officers 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 water-right application, 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 the regulations thereunder, they will be given a serial number, and upon approval of the water-right application by the project manager, the homestead application will be allowed by the local land officers, but no receipt will be issued until the certified checks, where such accompanied the application, have been paid. While applicants may be present at the 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.

13. 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 water-right application, 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 water-right application and who 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.

14. 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.

15. 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 June 25, 1913.

16. 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. Where payments have been duly made by the prior applicants and credits therefor duly assigned in writing the entryman shall continue the payment thus begun. In other cases the entryman shall pay the first installment in full at the time of his entry; the second installment shall become due on April 1 of the calendar year following the date of entry; and subsequent installments shall become due on April 1 of each year thereafter until fully paid.

17. Entry-men of lands for which acceptable water-right applications shall be filed in accordance with the terms of this notice may secure the benefits of the public notices of March 21 and April 25, 1913, and make their payments according to the schedule therein by complying with the terms thereof, as to reclamation and cultivation.

18. The regulation is hereby established that no water will be furnished in any year until all operation and maintenance charges which have become due shall have been paid in full.

19. Failure to pay any two installments of the charges when due shall render the entry and the corresponding water-right application subject to cancellation, with forfeiture of all rights under the Reclamation Act, as well as of any moneys already paid.

LEWIS C. LAYLIN,
Assistant Secretary of the Interior.

RECLAMATION—OKANOGAN PROJECT—WATER CHARGE.

ORDER.

DEPARTMENT OF THE INTERIOR,
Washington, June 16, 1913.

In pursuance of the acts of Congress approved June 17, 1902 (32 Stat., 388), and February 13, 1911 (36 Stat., 902), and other acts applicable thereto, the following order is hereby promulgated for the Okanogan project, viz.:

1. For all entry-men and water-right applicants who availed themselves of the stay of proceedings offered by order of April 29, 1912, the water rental charge for the irrigation season of 1913, and annually thereafter until further notice, shall be three dollars per acre of irrigable land; such rental shall be due on May 1 of each year, and no water will be furnished in any year until payment thereof shall have been made.

2. The payment of such rental charge annually until further notice shall operate to continue in effect the stay of proceedings duly accepted in pursuance of order of April 29, 1912.

LEWIS C. LAYLIN,
Assistant Secretary of the Interior.

RECLAMATION—SUNNYSIDE UNIT, YAKIMA PROJECT—WATER SERVICE.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

Washington, June 16, 1913.

In pursuance of the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, 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, upon the filing of proper water-right application* for the following lands shown on farm unit plats of T. 8 N., R. 22 E., T. 9 N., R. 22 E., T. 11 N., R. 20 E., and T. 9 N., R. 24 E., approved by the Secretary of the Interior February 28, 1911, T. 8 N., Rs. 23 and 24 E., approved by the Secretary of the Interior February 19, 1912, Ts. 10 and 11 N., R. 21 E., and T. 9 N., R. 25 E., approved by the Secretary of the Interior May 22, 1912, as amended May 21, 1913, viz:

Willamette Meridian.

	Added irrigable area, acres.
<i>T. 8 N., R. 22 E.</i>	
Sec. 2, Lot 4	38
SW. $\frac{1}{4}$ NW. $\frac{1}{4}$	40
SW. $\frac{1}{4}$ SW. $\frac{1}{4}$	40
Lot 3	25
SE. $\frac{1}{4}$ NW. $\frac{1}{4}$	24
SW. $\frac{1}{4}$ NE. $\frac{1}{4}$	19
SE. $\frac{1}{4}$ NE. $\frac{1}{4}$	2
NW. $\frac{1}{4}$ SW. $\frac{1}{4}$	40
<i>T. 8 N., R. 23 E.</i>	
Sec. 2, Lot 1	22
<i>T. 8 N., R. 24 E.</i>	
Sec. 1, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$	3
SE. $\frac{1}{4}$ SW. $\frac{1}{4}$	4
NW. $\frac{1}{4}$ SE. $\frac{1}{4}$	1
<i>T. 9 N., R. 22 E.</i>	
Sec. 36, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$	26
SW. $\frac{1}{4}$ NE. $\frac{1}{4}$	23
NE. $\frac{1}{4}$ SE. $\frac{1}{4}$	40
NW. $\frac{1}{4}$ SE. $\frac{1}{4}$	23
SE. $\frac{1}{4}$ SE. $\frac{1}{4}$	40
<i>T. 9 N., R. 24 E.</i>	
Sec. 25, NE. $\frac{1}{4}$ NE. $\frac{1}{4}$	10
SE. $\frac{1}{4}$ NE. $\frac{1}{4}$	10
Sec. 30, Lot 3	1
" 4	1
Sec. 34, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$	10
<i>T. 9 N., R. 25 E.</i>	

Sec. 32, Lot 5 -----	7.6
" 6 -----	1
<i>T. 10 N., R. 21 E.</i>	
Sec. 9, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ -----	9
SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ -----	1
<i>T. 11 N., R. 20 E.</i>	
Sec. 36, Lot 1 -----	15
NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ -----	8
<i>T. 11 N., R. 21 E.</i>	
Sec. 29, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ -----	39

2. A supplementary list showing all lands now ready for irrigation in the Sunnyside Unit has been filed in the project office at Sunnyside, Washington, showing in separate columns the area in each regular subdivision or farm unit opened to irrigation in 1909, 1910, 1911, 1912, and 1913, and the additional lands for which water will be furnished in 1914 and subsequent years will be shown on further supplementary lists to be duly filed in the said project office.

3. In all other respects applications for water rights, including the charges and the times and manner of payments shall be governed by the terms of the public notices of March 15, 1911, and February 29, 1912 [40·L. D., 437], and public notices and orders supplemental thereto or amendatory thereof, except that the instalment of the charges for the lands covered by this notice, and for the additional acreage for which water will be furnished in 1913, as shown by the list on file at the project office at Sunnyside, Washington, referred to in Article 2 hereof, shall be due on June 15, 1913, and subsequent instalments on March 1 of each year thereafter, until fully paid.

LEWIS C. LAYLIN,
Assistant Secretary.

ELIZABETH MORTON.

SOLDIERS' ADDITIONAL—RIGHTS OF MINORS.

The rights of minor children in the soldier's additional right of their deceased father, under sections 2306 and 2307 of the Revised Statutes, in event of the remarriage of his widow, are determined as of the date of such remarriage; and only such of the children as are minors at that date have any interest in the additional right.

Assistant Secretary Laylin to D. N. Clark, Washington, D. C., June 20, 1913.

Referring to your letter of June 11, 1913, concerning the soldiers' additional application based upon assignment of Elizabeth Morton, as administratrix of the estate of William Morton, wherein you request extension of time for 30 days, you are advised that the record

was transmitted to the Commissioner May 23, 1913, and therefore your letter and the accompanying papers have been transmitted to the Commissioner with direction that extension be granted if no objection appear.

With reference to your question, whether the rights of the minors are to be governed by the date of the death of the soldier, or by the date of the remarriage of the soldier's widow, you are advised that those persons who were minor children of the soldier at the date of the widow's remarriage have an interest in the additional right claimed.

FRANCIS FRAZIER.

Decided June 21, 1913.

SANTEE SIOUX INDIAN ALLOTMENT—HOMESTEAD RIGHT.

A Santee Sioux Indian by taking an allotment of lands settled upon by him within the area set apart for the Santee Sioux tribe by executive proclamation of July 20, 1866, does not exhaust or in anywise affect his right, as a citizen of the United States by virtue of section 6 of the act of February 8, 1887, to make a homestead entry of public lands.

LAYLIN, Assistant Secretary:

This case involves homestead entry No. 06318, made March 29, 1910, for the SE. $\frac{1}{4}$, Sec. 32, T. 10 N., R. 74 W., Gregory, South Dakota. Commutation proof was submitted October 19, 1911, and cash certificate issued thereon November 2d of that year.

January 28, 1912, the Commissioner of the General Land Office held the entry for cancellation on the ground that Frazier was a disqualified entryman because he had made a prior entry and had received patent therefor. An appeal brings the case here.

Frazier, appellant herein, is a member of the Santee Sioux Tribe of Indians. In decision appealed from it is stated that he made Indian allotment No. 50, on September 29, 1885, for 160 acres of land, and that patent issued therefor December 29th of that year. The entry herein was canceled substantially for the stated reason that Frazier's former entry of 1885 was made under article 6 of the treaty of April 29, 1868 (15 Stat., 635-7), which required improvements and occupancy for three years as a condition precedent to patent, that the land occupied and later patented to him was not in the class of lands previously held in common and owned by his tribe but was a part of the land "not included in the tract reserved for the Indians."

Special exception is made to this finding, it being contended that Frazier's so-called entry of 1885 was not a technical entry but an allotment; that the allotment was made of lands then reserved for his tribe of Indians, which lands were held in common, and in mak-

ing the allotment, he took lands previously assigned to and then belonging to his tribe; that such allotment did not, as held, exhaust his homestead right.

According to an affidavit dated July 27, 1912, made by E. F. McIntyre, superintendent in charge of the Santee Agency in Nebraska, affiant has custody and control of general schedule of allotments under which the Santee Sioux Indians were allotted lands on their Santee Reservation in Nebraska. That the allotment schedule bears date April 11, 1885, and that the schedules and allotments were approved by the President May 11, 1885; that Frazier (appellant) was designated as allottee No. 616 and was allotted the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 17, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 20, T. 32 N., R. 5 W., 6th P. M., Nebraska.

It appears from a book compiled and published in 1902, by the Indian Office, entitled "Executive Orders Relating to Indian Reserves from May 14, 1855, to July 1, 1902," and made under authority of law, that T. 32 N., R. 5 W., was, with other lands, by Executive order of February 27, 1866, withdrawn and reserved—

Until the action of Congress be had with a view to the setting apart of these townships as reservation for the Santee Sioux Indians now at Crow Creek, Dakota.

July 13, 1866, the Commissioner of Indian Affairs recommended the reservation of three other adjoining townships stating:

I deem it important that immediate action should be had upon this subject in order that the minds of the Indians may be quieted upon the subject of their permanent home, and that thereby they may be induced to settle down and engage in the pursuits of civilized life.

The President, July 20, 1866, acting on said recommendation, stated:

Let the townships embraced within the lines shaded red on the within diagram be, in addition to those heretofore withdrawn from sale by my order of 27th February last, reserved from sale and set apart as an Indian Reservation for the use of Sioux Indians, as recommended by the Secretary of the Interior in letter of July 19, 1866.

Later certain lands so reserved were restored and other lands were added to said reservation, which with the changes thus embraced, August 31, 1869, 115,075.92 acres.

All the lands in the reservation save those allotted to or selected by the Indians under the act of March 3, 1863 (12 Stat., 819), and the Sioux Treaty of April 29, 1868 (15 Stat., 635), and those occupied for agency, school, and missionary purposes, were by Executive order dated February 9, 1885, restored to the public domain on and after May 15, 1885.

The land allotted to Frazier had thus been "set apart as an Indian reservation for the use of Sioux Indians," of which tribe Frazier was a member.

Allotments to and selections by the Indians were made under the act of March 3, 1863, *supra*, and under the Sioux treaty of April 29, 1868, *supra*. The first section of the act of 1863 "authorized and directed" the President to assign to and set apart for certain tribes of Indians, including the Sioux—

a tract of unoccupied land outside of the limits of any state, sufficient in extent to enable him to assign to each member of said bands (who are willing to adopt the pursuit of agriculture) eighty acres of good agricultural lands, the same to be well adapted to agricultural purposes.

The sixth section of said treaty, *supra*, reads in part as follows:

And it is further stipulated that any male Indians over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or shall hereafter become a resident or occupant of any reservation or territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians, which is not mineral land, nor reserved by the United States for special purposes other than Indian occupation, and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands. Upon application in writing, sustained by the proof of two disinterested witnesses, made to the register of the local land office when the land sought to be entered is within a land district, and when the tract sought to be entered is not in any land district, then upon said application and proof being made to the commissioner of the general land office, and the right of such Indian or Indians to enter such tract or tracts of land shall accrue and be perfect from the date of his first improvements thereon, and shall continue as long as he continues his residence and improvements, and no longer. And any Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all privileges and immunities of such citizens, and shall, at the same time, retain all his rights to benefits accruing to Indians under this treaty.

The act of March 1, 1883 (22 Stat., 433, 444), specifically directed that patents authorized by the concluding paragraph of the treaty just quoted be issued to the Indians and is to the effect that the United States will hold the land "thus allotted" for a period of twenty-five years in trust for the benefit of the allottees and would then issue a patent in fee, etc. Frazier still holds his trust patent.

It is found in this case that Frazier was located upon a reservation created by Executive order for the use of his tribe. Under the first section of the act of February 8, 1887 (24 Stat., 388), power is given to allot in severalty to Indians who had been located on Government lands. The fourth section of that act provides for allotments of public lands to Indians not residing upon a reservation or for whose tribe no reservation has been provided. In such case an allotment of 160 acres clearly exhausts the Indian's right.

But in this case Frazier settled upon lands duly "set apart" for his tribe. In taking his allotment he took from tribal lands, not from the United States, which, for good reasons, had reserved lands from certain townships from all forms of disposal and for the exclusive benefit of the Santee Sioux Indians. In taking the allotment Frazier did not make an entry of Government lands and, therefore, did not exhaust his homestead right. He became a citizen of the United States when he took his share of the tribal lands (section six of the act of February 8, 1887, *supra*).

A recognition of the rights of the Santee Sioux Indians on said reservation in Nebraska, the validity of the reservation, confirmation of the allotments made to the tribe, and rights in and to lands in the Nebraska reservation equal to rights of Sioux Indians in their reservation in Dakota as described in the treaty of April 29, 1868, *supra*, are set forth in the seventh section of the act of March 2, 1889 (25 Stat., 890), which act reads in part as follows:

That each member of the Santee Sioux Tribe of Indians now occupying a reservation in the State of Nebraska not having already taken allotments shall be entitled to allotments upon said reserve in Nebraska as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years, one-eighth of a section; to each other person under eighteen years of age now living, one-sixteenth of a section; with title thereto, in accordance with the provisions of article six of the treaty concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with said Santee Sioux approved February twenty-eighth, eighteen hundred and seventy-seven, and rights under the same in all other respects conforming to this act. And said Santee Sioux shall be entitled to all other benefits under this act in the same manner and with the same conditions as if they were residents upon said Sioux Reservation, receiving rations at one of the agencies herein named.

For reasons hereinbefore set forth the action appealed from is reversed.

DON L. WAKEMAN.

Decided June 23, 1913.

FEES—DEPOSITION—SECTION 2294, R. S.

The term "deposition" as used in section 2294, R. S., as amended by the act of March 4, 1904, prescribing the fees that may be charged for each "deposition of claimant or witness," refers to final proofs generally and annual proofs on desert land entries.

EXECUTION OF AFFIDAVITS.

An affidavit is "made before" an officer within the meaning of section 2294, R. S., as amended March 4, 1904, when it is subscribed and sworn to before him; and the statute does not contemplate that that term shall include the preparation or drafting of the affidavit.

FEES—ACKNOWLEDGMENT TO A RELINQUISHMENT.

A relinquishment of an entry is not required to be acknowledged, and there is no federal statute establishing the fee for such an acknowledgment; but in case a relinquishment is acknowledged, the maximum charge therefor should be the same as the fee fixed by the statutes of the State for taking the acknowledgment to a deed.

FEES AND CHARGES OF UNITED STATES COMMISSIONERS.

Where a United States Commissioner renders services for applicants or entrymen under the public land laws beyond his official duties under the law, such as the preparation or drafting of papers, furnishing information as to the description of lands, the status of entries, etc., he is entitled to receive such compensation therefor as may be agreed upon by the parties, or, in the absence of agreement, as the work is reasonably worth, provided it is clearly understood by the applicant or entryman that such charges are separate and distinct from the charges for official services under the law.

LAYLIN, Assistant Secretary:

This is an appeal by Don L. Wakeman, United States Commissioner for the District of Wyoming, from the order of the Commissioner of the General Land Office requiring him to return certain alleged overcharges to public land applicants and directing that no more final proofs or contest hearings be set before him unless such returns were made.

The charges in question are, as taken from the Commissioner's statement of fees:

In the homestead application of Oliver Marshall, Sundance, Wyoming, No. 08573:

Homestead application—preparing application, relinquishment, looking up numbers of land, etc.-----	\$2. 00
Or a claimed overcharge of-----	1. 00
Desert land entry 03234 of Erik Halverson:	
Preparing notices of final proof-----	2. 00
Or a claimed overcharge of-----	2. 00

June 28, 1912, Oliver Marshall filed his application (Form 4-004), serial number 08573, to make homestead entry under the act of February 19, 1909 (35 Stat., 639), for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 24, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 25, T. 50 N., R. 74 W., 6th P. M., as additional to his homestead entry for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 25, T. 50 N., R. 74 W., and lot 2, Sec. 30, T. 50 N., R. 73 W., 6th P. M. The land so applied for was formerly embraced in desert land entry 07525 of Marshall, a relinquishment of which was filed concurrently with the homestead application. The record discloses that the additional homestead application and affidavit combined into one form and the affidavits of the two corroborating witnesses were executed before Wakeman as United States Commissioner. The information required by such form, however, was drafted and inserted by the

United States Commissioner. The relinquishment of the desert entry was also drafted by the United States Commissioner, on the regular form No. 4-621, and was acknowledged before him. It is the contention of the Commissioner of the General Land Office that the United States Commissioner was entitled to a charge of 75¢ for preparing the homestead application and taking the affidavit of the entryman and the two corroborating witnesses and 25¢ for the preparation and acknowledgment of the desert land relinquishment.

Halverson made final proof upon his desert land entry July 15, 1912, before Wakeman, stating in his final proof:

This proof was started by sending notice to the United States Land Office at Sundance, Wyoming, in time to be made within the 4 years.

The notice of intention to make final proof (Form 4-348) is dated "Sundance, Wyoming, June 1st, 1912," but was not filed in the land office until June 5, 1912. This notice was undoubtedly prepared by the United States Commissioner who also appears to have prepared the notice for publication. (Form 4-348a). For this service, the United States Commissioner charged \$2.00.

United States Commissioners are appointed by the United States District Courts, under authority of the act of May 28, 1896 (29 Stat., 184), for a term of four years, subject to removal by such court. Section 2294, R. S.; as amended by the act of March 4, 1904 (33 Stat., 59), provides:

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. . . . 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.

The act of June 28, 1906 (34 Stat., 546), provides:

That each United States Commissioner shall provide himself with an official impression seal, . . . which said seal shall be affixed to each jurat or certificate of the official acts of said commissioner, but no increase of fees shall be allowed by reason thereof.

The act of March 4, 1904, relates to "proofs, affidavits, or oaths" in connection with the homestead, preemption, timber culture, desert land, and timber and stone acts. It makes a distinction between an affidavit and a deposition, and as to the latter, permits a charge

varying according to its preparation or non-preparation by the United States Commissioner. Bouvier defines an affidavit as:

A statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath or affirmation.

And a deposition as:

The testimony of a witness reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial of some question of fact in a court of justice.

Section 2291, R. S., requires the issuance of final certificate to a homestead entryman when he "proves by two credible witnesses" the required residence and cultivation. Section 5 of the act of March 3, 1891 (26 Stat., 1095), requires the desert land entryman to file "during each year with the register, proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended." Section 7 of that act directs the issuance of patent to a desert land entryman "upon making satisfactory proof to the register and receiver of the reclamation and cultivation." Section 3 of the act of June 3, 1878 (20 Stat., 89), requires the person desiring to purchase under the timber and stone law to "furnish to the register of the land office satisfactory evidence" of the publication of notice, the character of the land, etc. Paragraph 5 of the regulations of March 24, 1905 (33 L. D., 480), requires all final proofs to be reduced to writing by or in the presence of and under the supervision of the officer taking them.

It should be noted that the act of March 4, 1904, speaks of the deposition of the claimant or witness. While the distinction between an affidavit and a deposition may not in all cases be clearly defined, the Department is of the opinion that taking into consideration the requirements of the laws and regulations concerning final proofs and also annual proofs in case of desert entries and the general definitions of the two terms above quoted, the term deposition as used in the act of March 4, 1904, refers to such final or annual proofs. This was evidently the view of the Department as expressed in the regulations of March 24, 1905, *supra*, par. 9:

No fee in excess of twenty-five cents can be lawfully charged or received for administering the oath to and preparing any affidavit, application, proof or any other written statement affecting public lands, except that where the officer prepares and writes the final proof testimony of any claimant or witness, he will be entitled to charge and receive the sum of one dollar for writing and preparing such testimony and for administering the oath thereto. Any officer demanding or receiving a greater sum than is here specified for such services will be subject to indictment and punishment under amended section 2294 of the United States Revised Statutes.

The act of March 4, 1904, has been construed by the United States District Court of Montana *In re James*, 195 Fed. Rep., 981. The

court there held that when a United States Commissioner both drafted a homestead or desert land application and also swore the applicant, he was not limited to the charge of 25¢ for each oath, but that the drafting of the affidavit, not being a part of his official duty, was an extra service as an employe and could be charged for as agreed between the parties or at its reasonable worth. The court said at page 983:

The affidavit is "made before" the officer when subscribed and sworn to before him, by whomever drafted, and it is "made before" the officer when so subscribed and sworn to before him, though theretofore drafted by the officer. It is no part of the officer's duty to draft affidavits in whole or in part, as by completing the skeleton form thereof with matter of substance. Such drafting of the affidavit may be done by anybody, and needs be done before nobody, and such drafting is no part of the ceremony wherein the affidavit is "made before" the Commissioner. If the officer actually drafts the affidavit or any portion thereof, it is a service rendered beyond his official duty; and this statute does not forbid making a charge therefor and any charge upon which the parties agree, or, in the absence of agreement, that the service is reasonably worth. For completing the application part of such combined applications and affidavits, the Commissioner may likewise legally charge and receive compensation, as for services beyond his official duty and in the capacity of employe. United States Commissioners are located through the states where settlers are entering public lands, and for their convenience. They usually are supplied with information in reference to vacant lands, impart it to and otherwise advise settlers, keep a supply of such printed and prescribed blank applications, affidavits, or forms as the Land Department insists upon, prepare them for applicants, draft necessary affidavits for which there are no prescribed and printed forms and some of which may extend to many pages and require much skill and ability, secure needed copies of records, transmit the settler's application and money to the proper land office, and well serve the settlers in many ways, often saving them much time, labor and money. In many places there is no one conveniently at hand to render such services but the Commissioner. These services are rendered as an employe, and not as an officer, and it is not the intent of the statute that they may not be charged and compensated for. With them the statute has naught to do. Let it be noted, however, that the charges for services in the line of official duty and the charges for services in the line of an employe should not be confused, but be made separate and distinct to the settler's understanding and knowledge that the latter may not serve as a cloak for excess in the former and mask a violation of the statute involved.

The Department concurs in the above holding.

The charge as made by the United States Commissioner in the Marshall case did not distinguish between its different items. Under the act of March 4, 1904, he was undoubtedly entitled to a fee of 25¢ for each of the oaths administered. Under the decision in the James case, the drafting of the affidavits and the relinquishment was not a part of the duties of the United States Commissioner, and need not necessarily be performed by him. His service in this respect was accordingly to be compensated as might be agreed upon by the parties. There is no Federal law, as far as the Department

is informed, establishing a fee for the taking of the acknowledgment to a relinquishment. Such an instrument need not necessarily be acknowledged. (*Johnson v. Montgomery*, 17 L. D., 396.) Under the law of the State of Wyoming, the fee for taking the acknowledgment to a deed, an instrument similar in character, is 50¢ (sections 935 and 3974, Wyoming Compiled Stats., 1910), and the Department is of the opinion that there should be the same maximum charge for the taking of an acknowledgment to a relinquishment in that State. The record here discloses that the United States Commissioner kept a set of records showing the status of lands and entries, and a supply of the necessary blanks for the convenience of public land claimants. In furnishing information as to the description of land, status of entries, etc., the United States Commissioner was performing a service beyond his official duties, for which he may receive compensation. In the Marshall case the United States Commissioner, under the act of March 4, 1904, was entitled to the sum of 75¢ for the three oaths administered and for extra compensation as an employe or attorney of the applicant for drafting the affidavits and relinquishment, taking the acknowledgment to the relinquishment and furnishing the applicant information as to the description of the land from his records. The Department is of the opinion that \$1.25 cannot be considered an excessive charge for this service. The United States Commissioner's attention should, however, be called to the last sentence in the above quotation from the James case.

In the Halverson case, the proof notices prepared by the United States Commissioner were not sworn papers. One was a notice to the land office of the entryman's intention to make final proof, and the other a notice for publication prepared for the signature of the register and apparently as a matter of convenience for that officer. A fee of \$2.00 was charged and collected by the United States Commissioner for this service. The General Land Office apparently was under the erroneous impression that this charge was for the proof of publication which was not made before the United States Commissioner but another officer, and accordingly held that the entire sum was an overcharge.

It is not part of the official duties of the United States Commissioner to prepare such notices, and in doing so he was acting as the employe of the desert land entryman and his charges therefor were a matter of agreement between the parties.

The action of the Commissioner of the General Land Office is accordingly reversed. Appropriate directions for the modification of paragraph 9 of the regulations of March 24, 1905, will be issued by the Department.

FEEES FOR ADMINISTERING OATHS, ETC.

DEPARTMENT OF THE INTERIOR,

Washington, June 23, 1913.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: In accordance with the Department's decision in *Ex parte* Don L. Wakeman, "P" 63103 [42 L. D., 195], paragraph 9, regulations of March 24, 1905 (33 L. D., 480), is amended to read as follows:

No fee in excess of twenty-five cents can be lawfully charged or received for administering the oath to any affidavit, application, proof or any other written statement affecting public lands, except that where the officer prepares and writes the final proof testimony of any claimant or witness, he will be entitled to charge and receive the sum of one dollar for writing and preparing such testimony and for administering the oath thereto. Any officer demanding or receiving a greater sum than is here specified for such services will be subject to indictment and punishment under amended section 2294 of the United States Revised Statutes.

Respectfully,

LEWIS C. LAYLEN,

*Assistant Secretary.***RECLAMATION—COLLECTION OF OPERATION AND MAINTENANCE CHARGES.**

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., June 23, 1913.

1. On February 26, 1913 [42 L. D., 203], the Secretary of the Interior, acting under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, issued an order suspending for the time being the requirement that no water would be furnished under the several projects as provided by existing public notices and orders until payment had been made of the charges for operation and maintenance.

2. This order was issued because of the pendency in the United States Supreme Court of the case of *Swigart v. Baker* in which was called in question the right of the Secretary of the Interior to collect charges for operation and maintenance under the terms of the said acts.

3. Said order provided that in case the United States Supreme Court sustains the authority of the Secretary to require such payments, the water user shall make prompt payment of the portions of instalments for operation and maintenance which should have been paid under public notices and orders before the furnishing of

water, and in case of failure of any water user to make such payment within ten days after public notice of a decision of the Supreme Court of the United States in said case sustaining the right to to make such collections, the water supply for his land shall be promptly shut off and so remain until payment has been made of said charges.

4. On May 26, 1913, the Supreme Court of the United States decided the case of *Swigart v. Baker*, holding that the Secretary of the Interior was authorized by the law to require payment of the charges for operation and maintenance.

5. Notice is accordingly hereby given that the charges for operation and maintenance on every project shall be paid as required by the public notices and orders issued thereunder, and in case of failure to make such payment on or before July 21, 1913, such action shall be taken in each case as is provided by law and by the public notices and orders applicable to the project.

6. The said date of July 21, 1913, hereby fixed is intended to give not less than ten days' notice from the date of publication of this order in some newspaper of local circulation on each project affected.

7. The building charge on the several projects due December 1, 1912, or March 1, 1913, April 1, 1913, or May 1, 1913, as the case may be, is hereby reduced to one-third of the amount due on the said dates (taking the nearest tenth of a dollar), but not less than 50 cents per acre, subject to the conditions hereafter stated. The remainder of such instalment of said building charge shall in each case be added to the last instalment due under the corresponding water right application.

8. All water right applicants who have already paid the building charge due December 1, 1912, or March 1, 1913, April 1, 1913, or May 1, 1913, as the case may be, shall be credited with payment made in excess of the amount herein provided, to be applied on their next unpaid annual building charge, or they may have the credit applied to the charges for operation and maintenance now due.

9. No water right applicant shall be entitled to the above reduction in the building charge unless he has paid the charges for operation and maintenance now due and has prepared for irrigation and has irrigated in good faith for the purpose of raising agricultural crops, one half the entire irrigable area of his tract or not less than 5 acres for each full irrigation season since water was available therefor.

10. As a matter of further relief to the water user who is delinquent in his payments to such extent as to be subject to cancellation, it is hereby ordered that no proceedings looking toward cancellation will be taken before December 1, 1913, on account of said delin-

quency; provided, that the said water user has paid the charges for operation and maintenance now due and has prepared his land for irrigation and has irrigated to the extent described in the preceding paragraph.

FRANKLIN K. LANE.

RECLAMATION—OPERATION AND MAINTENANCE CHARGES.

ORDER.¹

DEPARTMENT OF THE INTERIOR,
Washington, February 26, 1913.

1. The duty of the Secretary of the Interior under the Reclamation Law to require payment of the portion of the instalment for operation and maintenance as covered by the several public notices on the Reclamation Projects has been called into question. In two cases United States District Courts have held that the Secretary had authority to require such payments. On appeal to the Circuit Court of Appeals for the 9th Circuit in the case of *Baker v. Swigart* (199 Fed., 865), the Court held that the Reclamation Act did not authorize the collection of such payments.

2. An appeal from said decision was filed in the Supreme Court of the United States and, on motion made by the Attorney-General, the case is now set for hearing on April 7, 1913.

3. The law officers of the Government and of this Department do not acquiesce in the decision in this case, but in order to avoid litigation and in view of the complications which will arise in case the Government refuses to furnish water pending consideration of the case by the Supreme Court, the following order is hereby promulgated:

4. The engineers of the Reclamation Service are hereby authorized to deliver water to any water user without payment of the portions of the instalment on account of operation and maintenance, as required by public notices and orders heretofore issued and pending action by the Supreme Court of the United States, upon the condition that the water user shall promptly pay all portions of the instalments for operation and maintenance which should have been paid under such public notices and orders before the furnishing of water, unless the Supreme Court in the case now pending renders such judgment as to prevent the Secretary of the Interior from collecting said instalments for operation and maintenance.

5. In case of failure of any water user to make payment as provided above within ten days after public notice of decision by the Supreme Court of the United States in the case above noted, the

¹ See page 201.

water supply for his land shall be promptly shut off and so remain until payment has been made of said charges, and also of any other charges due at that time in excess of one full instalment of the charge for building, operation and maintenance.

6. The shutting off of water hereunder shall not preclude the United States from following any other remedy which may be available to it.

7. The furnishing of water hereunder is not to be considered as in any way relieving the water user from any other payments required by the public notices and orders in the time and manner therein specified.

8. This order applies only to the charges on account of operation and maintenance as required by public notices and orders. It does not apply to water rental or water carriage charges and no water shall be furnished in such cases unless the payments required by contract or order are duly made.

WALTER L. FISHER,
Secretary.

AMENDMENT OF PARAGRAPH 89 OF MINING REGULATIONS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, June 23, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Paragraph 89 of the mining regulations, approved March 29 1909 (37 L. D., 775), is hereby amended to read as follows:

89. Section 2334 provides for the appointment of surveyors to survey mining claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications in mining cases. Under this authority of law, the following rates have been established as the maximum charges for newspaper publications:

(1) The charge for the publication of notice of application for patent in a mining case, in all districts, exclusive of Alaska, shall not exceed the legal rates allowed by the laws of the State, wherein the notice is published, for the publication of legal notices, and in no case shall the charge exceed \$7 for each 10 lines of space occupied, where publication is had in a daily newspaper, and where a weekly newspaper is used as a medium of publication \$5 shall be the maximum charge for the same space. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates are established upon the understanding that they are to be in the usual body type used for legal notices.

(2) For the publication of citations in contests or hearings, involving the character of lands, the charges may not exceed the rates provided for similar notices by the law of the State, and shall not exceed \$8 for 5 publications in a weekly newspaper, or \$10 for publication in a daily newspaper for 30 days.

Very respectfully,

S. V. PROUDFIT,
Assistant Commissioner.

Approved, July 1, 1913:

A. A. JONES,
First Assistant Secretary.

STARRS ET AL. v. STATE OF OREGON.

Decided June 26, 1913.

CONTEST—CAREY ACT SEGREGATION—EXTENSION OF TIME.

There is no statutory right of contest against a Carey Act segregation list; and the filing of a contest against such a list will not prevent the Secretary of the Interior granting the State an extension of time, under section 3 of the act of March 3, 1901, within which to effect reclamation of the land involved.

JONES, *First Assistant Secretary:*

February 13, 1913, the Department approved the application of the State of Oregon for the segregation, under the act of August 18, 1894 (28 Stat., 372), and amendatory acts, of list No. 6, involving approximately 84,707 acres of land.

December 30, 1911, the register and receiver, The Dalles, Oregon, forwarded the applications to contest of Henry Starrs, Ray F. Pierce, Mary E. Knotts, and Flora E. Wiese, it being in substance alleged that the State and its contracting company, the Central Oregon Irrigation Company, have wholly failed to irrigate and reclaim the lands described in the affidavits of contest, being portions of sections 10, 11, 14, and 15, T. 18 S., R. 12 E., Oregon, and that the company last named has abandoned the reclamation of the tracts involved. It is further alleged that the tracts described can not be reclaimed from the irrigation structures of the Central Oregon Irrigation Company by gravity flow. The applicants to contest allege that they are qualified entrymen, and if the land be restored to the public domain intend to enter and reclaim the same.

In affidavits attached to brief filed in the Department in January, 1913, it is contended that the lands can be more cheaply irrigated from the canals of another irrigation company. The State and the Central Oregon Irrigation Company filed answer to the affidavits of contest, averring that the reclamation of the land is feasible from the works of the Central Oregon Company; that neither the State nor the company has abandoned its plan to irrigate same, but, on the

contrary, intends to irrigate and reclaim practically all thereof by gravity flow of water from the Central Oregon canal.

October 3, 1912, the Commissioner of the General Land Office rendered decision denying the applications to contest, at the same time rejecting the subsequently filed application of Charles R. Lowe to contest the segregation list for the same reason alleged in the prior applications.

February 27, 1913, upon the recommendation of the Commissioner of the General Land Office and the Director of the Geological Survey, the Department granted the application of the State for an extension of time, under section 3 of the act of Congress approved March 3, 1901 (31 Stat., 1188), within which to reclaim a portion of the lands involved in said list No. 6, it appearing that the State had theretofore accomplished the reclamation of, and secured patent for, 38,403 acres of the lands segregated, and expended more than \$1,000,000 in construction of irrigation works. The lands involved in the applications to contest herein described were excepted from said order of extension, pending consideration of appeal.

The allegations of the applicants to contest and those of the State of Oregon and its contracting company, the Central Oregon Irrigation Company, are diametrically opposed upon the question as to whether the lands described in the applications to contest can be reclaimed at a reasonable cost from the canals of the Central Oregon Irrigation Company.

Both the Director of the Geological Survey and the Field Service of the General Land Office are of the opinion that sufficient water is available under the appropriation of the Central Oregon Irrigation Company for their reclamation, and it would appear from evidence submitted by and on behalf of the State, and from report of special agent of the General Land Office, that there is under construction an additional canal, which will cost from \$600,000 to \$1,000,000, designed to furnish an additional water supply to the selected lands. This is necessary because the canal already constructed is not large enough to carry sufficient volume of water for all the lands. It is emphatically contended by the State and by the Central Oregon Irrigation Company that they will be able and intend to reclaim the lands here involved.

The applications to contest are not based upon any law authorizing the filing and prosecution of such contests, and are only considered by the Department in furtherance and aid of the duty placed upon it to determine the character of the land and the feasibility of the project. The lands had been selected for at least eight years prior to the offer of the affidavits of contest, and applicants had due knowledge thereof. The United States, through reports of its field officers, is fully cognizant of the fact that all segregated lands have

not been reclaimed, but the Secretary of the Interior is vested with authority, act of March 3, 1901, *supra*, to continue the segregation for a period of not exceeding five years.

In view of the large expenditures heretofore made and the reclamation of a considerable portion of the area segregated, the Department has, as above stated, extended the period for reclamation as to all of the lands, except those covered by the applications to contest. No good reason appears, either from the standpoint of the State or of the public interest, why the lands involved in this appeal should be removed from the segregation heretofore made. On the contrary, the irrigation works already constructed and under construction being undertaken upon the strength of the segregation of the entire 84,707 acres, it is but fair that the State be accorded opportunity to reclaim the entire area, if possible, and this Department would not be justified in refusing to continue the segregation merely in order to afford the applicants to contest an opportunity to make entries therefor under the public-land laws.

The decision of the Commissioner of the General Land Office is accordingly affirmed, and should this decision become final, the application of the State for extension of time within which to reclaim the lands will be granted.

WILLIAM E. BORAH.

RECLAMATION ENTRIES—SECTION 1, ACT OF AUGUST 9, 1912.

The terms "water-right certificate" and "certificate," as used in section 1 of the act of August 9, 1912, providing for patents on reclamation entries, relate to final water-right certificates issued in connection with water rights for lands held in private ownership.

RECLAMATION ENTRIES—PROVISO TO SECTION 1, ACT OF AUGUST 9, 1912.

The proviso to section 1 of the act of August 9, 1912, requires "that no patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid;" and in view of this specific provision there is no room for application of the doctrine of relation and holding payment of the charges due at the time of making final proof as meeting the requirements of the act.

*Secretary Lane to Hon. William E. Borah, United States Senate,
June 28, 1913.*

Referring to your letter of May 27 relative to the construction which has been placed upon a clause in section 1 of the act of August 9, 1912 [37 Stat., 265], which reads as follows:

Provided, That no such patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid.

You are advised that it is the view of the Department that the terms "water-right certificate" and "certificate," as used in section 1 of said act, relate to the final water-right certificates issued in connection with water rights for lands in private ownership. One of the conditions precedent to final action of patenting the lands or issuing the water-right certificate, as the case may be, provided for in the proviso of said section, is that all sums due the United States at the time of this final action must be paid. The wording of the act does not appear to warrant the construction that it is sufficient that all charges due at the time of making the proof must be paid, and that the wording of this act does not permit the doctrine of relation to be invoked.

There is no objection, however, on the part of the Department to an amendment of said act, providing that patent shall issue, or final water-right certificate, as the case may be, upon payment of all charges due at the time of making final proof rather than on condition payment of all charges due at the issuing of patent or certificate, as the act now reads.

SOLDIERS' ADDITIONAL—APPROXIMATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., July 2, 1913.

REGISTERS AND RECEIVERS,

United States Land Offices.

GENTLEMEN: March 8, 1913 [41 L. D., 489], the department, upon motions for rehearing of departmental decision dated November 23, 1912 (41 L. D., 487), in the case of Ernest P. Spaeth, Sundance 05045, holding that "hereafter no approximation will be allowed in the matter of the location of soldiers' additional rights," and recalling and vacating the rule announced in the case of George E. Lemon (37 L. D., 28), stated, after denying said motions, that—

It will be noted that in this case the claim is based upon assignment of two separate additional rights; that is, it is a consolidated entry, and under those conditions it is believed that no unreasonable hardship was imposed in requiring the locator to furnish additional right or rights sufficient in area, with that heretofore given, to equal the tract selected.

It is not intended hereby to hold that, in the location of a single additional right, where the area of the tract located is but a fraction greater than the right proffered, the same may not be passed under the general rule respecting disposition of such tracts under other laws. Neither is it intended to recognize a practice wherein the additional right is sought to be used in a manner to acquire practically twice its area, as, for instance, where the location is made of a 40-acre tract upon a right calling for but 20 acres and a fraction of an acre.

It will be observed that under said decision no approximation will be allowed where combined soldiers' additional rights are used, and that areas of the rights in such cases must equal the area of the land applied for. But where a single additional right is involved an application will be permitted where the area of the tract located is but a fraction greater than the right proffered.

Circular No. 211, approved March 8, 1913 [41 L. D., 490], is accordingly modified, and you will be guided by the ruling above set forth.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

A. A. JONES,
First Assistant Secretary.

EASTMAN v. NORTHERN PACIFIC RY. CO.

Decided July 3, 1913.

INDIAN LANDS—RAILROAD INDEMNITY SELECTION.

The act of March 3, 1911, declaring the lands within the ceded portion of the Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Indian Reservation to be part of the public domain, and that no patent should be denied to entries of such lands theretofore made in good faith under any laws regulating the entry, sale, or disposal of public lands, did not have the effect to validate, in the presence of an intervening adverse claim, an unapproved indemnity selection by the Northern Pacific Railway Company, theretofore proffered, rejected, and held suspended at the date of the act.

JONES, *First Assistant Secretary:*

This is the appeal of the Northern Pacific Railway Company from a decision of the Commissioner of the General Land Office, November 16, 1912, rejecting an application by that company to select as second indemnity the SE. $\frac{1}{4}$ of Sec. 23, T. 24 N., R. 56 E., Glasgow land district, Montana.

The admitted facts material to the inquiry may be stated as follows:

The land in question lies within second indemnity limits of the grant made to the company by joint resolution of May 31, 1870 (16 Stat., 378), and within that portion of the ceded Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Indian Reservation, established by executive order of April 13, 1875, which was restored to the public domain by the act of May 1, 1888 (25 Stat., 113, 133). The plat of survey of the township was filed in the district land

office May 3, 1903, and on that day the railway selection was proffered. May 8, 1909, Royal B. Eastman filed his homestead application (04848) for the same land. The local officers rejected Eastman's application because of the prior railway selection, and the railway application upon authority of a decision of this Department, July 10, 1907, in *Bradley v. Northern Pacific Railway Company* (36 L. D., 7), that lands occupying the same status are not subject to railway indemnity selection. October 15, 1910, the Commissioner suspended both applications pending certain court proceedings which will be adverted to further on. Upon the company's appeal from the action of the local officers, the Commissioner of the General Land Office affirmed that action, resting his decision upon the same ground, and it is from this decision that the company's further appeal is prosecuted to the Department.

It is urged that, admitting for the sake of the argument, though not conceding, the correctness of the Department's position in *Bradley v. Northern Pacific Railway Company*, *supra*, the selection here in question is nevertheless validated by the act of March 3, 1911 (36 Stat., 1080), and this is the sole question presented by this record.

In the *Bradley* case, *supra*, it was decided that the provision in said act of May 1, 1888, limiting the disposal of lands in said Indian reservation "to the operation of laws regulating homestead entry. . . . and to entry under the townsite laws and the laws governing the disposal of coal lands, desert lands and mineral lands," and declaring that such lands "are not open to entry under any other laws regulating the sale or disposal of the public domain," by necessary intentment and in plain terms reserves such lands from selection as indemnity by the Northern Pacific Railway Company. At page 8 of that decision, which was addressed to the Commissioner of the General Land Office, it was said:

There is little force in the suggestion of your office, upon which the decision appealed from apparently rests, that inasmuch as the act making the grant to this company in terms commits the United States to the extinguishment of the Indian title to lands within the limits of the grant, therefore it was not the purpose of Congress in extinguishing the Indian title to these lands to deny the company the right to select them in satisfaction of its grant. The obligation of the government to preserve a railway right of selection in indemnity lands would seem to be more fanciful than real. But, however this may be, that Congress had the power to exclude the railway company from participating in the benefits arising from the disposition of these lands can not be successfully questioned. That it has done so may not be reasonably disputed.

That decision was adhered to on review January 23, 1909 (37 L. D., 410), and upon further consideration of the question then presented this Department finds no reason which would justify reopening it for any purpose.

The act of March 3, 1911, *supra*, amending section 3 of the act of May 1, 1888, 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.

At the time this amendatory act was passed there was pending in the Circuit Court of the United States, Ninth Circuit, District of Montana, an action brought by the United States against the Northern Pacific Railway Company *et al.*, to recover certain lands lying within this same reservation, patent to which had inadvertently issued to the company upon its indemnity selections, notwithstanding and overlooking the Department's said decision in the Bradley case. The railway company had been called on to reconvey to the United States such patented lands but had refused to do so and the action was brought primarily as a test case of the question involved in the Bradley case, whether such lands were subject to indemnity selection under the act.

In the meantime, the act of 1911 had intervened and when the case was submitted upon an agreed statement of facts the court found it was unnecessary to decide the question upon which the case was submitted, but held that the railway selections were by said act validated *pendente lite*. In the course of a memorandum-opinion by the court it was said:

Under the law as originally enacted, the ceded portions of the reservations were made "a part of the public domain" and opened "to the operation of the laws regulating homestead entry, except sec. 2301 of the Revised Statutes, and to entry under the townsite laws, and the laws governing the disposal of coal lands, desert lands, and mineral lands," but not "to entry under any other laws regulating the sale or disposal of the public domain." By the amendment they are opened to the operation of all of the laws regulating the entry, sale, or disposal of the public domain, and "no patent shall be denied to entries heretofore made in good faith under any of the laws regulating the entry, sale, or disposal of public lands, if said entries are in other respects regular and the laws relating thereto have been complied with." That the patents could not be successfully assailed if the selections had been made under the law as amended, and that no valid objections to the making and filing of such selections of the same lands and to their approval could now be urged if made and filed under the law as it now stands, is conceded. So that, if it were to be held that the amendment did not cure the alleged defects of defendant's title to the lands in question, the effect of such holding would simply be to require the defendant railway company to do over again what it did once before, that is, again file in the local land office its selection of the lands which were patented to it upon the selections made in 1908. A construction which would deny to the amended statute any curative effect as regards selections made and approved

prior to its enactment, when, at the same time, the right to acquire the lands thereafter by the very means of such identical selection is unmistakably conferred, thus imposing a burden, which it does not seem reasonable to assume as having been intended by the law-making body, should obviously not be adopted, unless the words of the statute clearly demand it.

It was further held by the court that the selections of lieu lands made and filed by the railway company came within the meaning of the term "entry" as used in the act of March 3, 1911, notwithstanding such selections had not been approved. This decision is not binding upon the Department and it is not persuasive of the question here presented. Under the facts of this case it is not necessary to decide whether an unapproved railway indemnity selection is an "entry" within the meaning of said act; that an approved and patented indemnity selection in such an entry, is not doubted, and to this extent the Department finds no fault with said decision or with the conclusion therein reached, that the approved selections were validated. In such a case the approval takes effect by relation as of the date of the proffer. But a mere proffer of selection of land at the time not subject thereto raises a different question. Without deciding this question in the abstract, it will be enough to say for the purpose of this case that the rejected and subsequently suspended indemnity selection did not take the land here involved out of the operation of the homestead law. That selection was for land not subject thereto, had no segregative effect, and did not prevent acquirement by another of right in the land sought in selection. Manifestly, whatever the effect of the act of March 3, 1911, as between the United States and the company, it did not and was not intended to divest another right which had been lawfully initiated prior thereto.

The court may well have held in *United States v. Northern Pacific Railway Company et al., supra*, that the lands there involved had been entered and that such entries had been validated. It may or may not be true, as held by the court, that if said patents had been set aside the company might have reselected the lands under the amendatory legislation. This would have depended mainly upon whether adverse claims had intervened. The lands by that act were declared open to the operation of laws regulating the entry, sale, or disposal of the public lands. Upon this question it is immaterial as to the meaning of the words "entry" and "sale," because the term "disposal" is comprehensive enough to cover any sort of proceeding under which title of the United States may be derived. But it does not follow, and is not true, that the act of March 3, 1911, validates unapproved railway selections theretofore proffered, in instances where claims had been asserted to the lands under the public land laws prior to the passage of said act. That the Land Department might recognize such selections in the absence of an intervening ad-

verse claim, is not doubted. This would be a question purely between the railway company and the government, and no good purpose would be served by requiring the company to reselect the land; but such selections, being of lands not subject thereto, interposed no bar to their legal appropriation under other laws. As against such appropriation they were a nullity, and the subsequent legislation making the land subject to railway indemnity selection did not operate retroactively to give vitality to unapproved selections theretofore made.

The company took nothing as against intervening valid adverse claims by its selection proffered prior to March 3, 1911. In disposing of these lands the Commissioner of the General Land Office will be governed accordingly.

The decision appealed from is affirmed.

**ALASKAN LANDS—RESERVED AREAS BETWEEN CLAIMS—
SOLDIERS' ADDITIONAL.**

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 7, 1913.

REGISTERS AND RECEIVERS AND SURVEYOR GENERAL,
Alaska.

GENTLEMEN: The regulations approved January 13, 1904 (32 L. D., 424), pursuant to the requirements of the act of May 14, 1898 (30 Stat., 409), as amended by the act of March 3, 1903 (32 Stat., 1028), provided that—

no entry of any kind in the district of Alaska can, however, be allowed for land extending more than one hundred and sixty rods along the shore of any navigable water, which is twice the extent originally permitted by the act of 1898, and along such shore a space of at least eighty rods is reserved between all claims.

In administering said acts in accordance with such regulations and the instructions herein contained, no survey will be approved and no application, selection, filing, or location will be allowed under any law for such reserved areas other than for landings or wharves as provided in section 10 of the aforesaid act of May 14, 1898.

The reservation between claims along navigable waters is absolute, except as to landings and wharves, and precludes all forms of appropriation under any law, but the inhibition in the reservation between claims along "other waters" applies only to scrip, land warrants, and soldiers' additional claims.

In order to carry into effect the will of Congress respecting limitation of claims along the shore line and the reservation of 80 rods between all such claims, it is directed that where any claim is so located as to approach within 80 rods of the actual shore line such claim will be considered as located on the shore for that purpose.

The term "navigable waters" is construed by the act of May 14, 1898, *supra*—

to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high water mark.

The limitation along the shore line is, however, extended by the act of March 3, 1903, *supra*, to "along any navigable or other waters." It becomes necessary, therefore, to define what is included in the expression "other waters." In the opinion of this department those words should be held to include all waters of sufficient magnitude to require meandering under the manual of surveys, or which are used as a passage way or for spawning purposes by salmon or other sea-going fish.

No more than 160 acres shall be entered in any single body by scrip, land warrant, or soldiers' additional right in any part of the District of Alaska, and between any of such claims aggregating more than 160 acres there must be a space of 80 rods.

Respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

NATIONAL FOREST LANDS—PUBLICATION OF NOTICE.

NOTICE TO PUBLISHERS.

DEPARTMENT OF INTERIOR,

Washington, July 8, 1913.

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 where 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.

ANDRIEUS A. JONES,
First Assistant Secretary.

CHARLES H. DEMPSEY.

Decided July 9, 1913.

SOLDIERS' ADDITIONAL RIGHT—SOLDIERS' DECLARATORY STATEMENT.

A homestead entry for less than 160 acres, made subsequent to June 22, 1874, the date of the adoption of the Revised Statutes, but based upon a soldiers' declaratory statement filed prior to that date, is a proper basis for soldiers' additional right under section 2306 of the Revised Statutes.

CONFLICTING DECISION OVERRULED.

Fred W. Ashton, 31 L. D., 356, overruled.

JONES, *First Assistant Secretary:*

November 6, 1911, Charles H. Dempsey, assignee of Jennie Peake, widow of Giles P. Peake, filed in the local office, Los Angeles, California, land district, his application to enter the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 14, T. 8 S., R. 8 E., as a soldiers' additional to the original homestead entry made by said Peake, on September 30, 1874, at the Crookston, Minnesota, office, under which patent issued for 120 acres, June 30, 1879.

January 19, 1912, the Commissioner of the General Land Office rejected said application upon the ground that Peake's original entry, not having been made prior to June 22, 1874, the date of the approval of the Revised Statutes, did not furnish a valid basis for a soldiers' additional entry under section 2306 thereof, from which Dempsey appealed.

It appears that the soldier had, on April 1, 1874, filed his declaratory statement for the NE. $\frac{1}{4}$ of Sec. 20, T. 138 N., R. 42 W., Minnesota, which was followed within six months, viz., on September 30, 1874, by his making the original homestead entry, hereinbefore referred to, therefor, upon which patent issued for 120 acres only, because the entry was canceled as to the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ on account of conflict with a swamp claim by the State.

The appeal herein is based upon the legal proposition that "the filing, of a soldiers' declaratory statement is such an entry of land

under the homestead laws as brings it within the purview of sections 2306 and 2307, Revised Statutes," and it is admitted that unless said proposition is true the appeal is without merit.

It is urged that the case of Fred W. Ashton (31 L. D., 356), wherein it was held that "the filing of a soldiers' declaratory statement is not the equivalent of an entry within the meaning of section 2306 of the Revised Statutes," should no longer be followed, in view of subsequent decisions of the Department.

The law as to soldiers' additional rights, found in section 2306 of the Revised Statutes, provides that:

Every person entitled, under the provisions of section 2304, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than 160 acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed 160 acres.

Departmental decision and instructions, also court decisions, were cited on behalf of the contention of claimant. See case of Webster *v.* Luther (163 U. S., 331), and that of *ex parte* John F. Butler (38 L. D., 172).

Attention is also called to the General Land Office circular of 1904, page 22, wherein it is said that "a soldier will be held to have exhausted his homestead right by the filing of his declaratory statement," which instructions have been uniformly followed by the Department; and it is urged, that such being the ruling, in justice and as a correlative proposition of law, the filing of such declaratory statement should be held to be the equivalent of a homestead entry, and to come within the purview of section 2306 of the Revised Statutes.

It will be noted that said section 2306 does not state that the soldier in order to avail himself of its provisions, in regard to making such additional entry, must theretofore have made "a homestead entry," but he must have made a former entry "under the homestead laws," using the plural.

In the case of Webster *v.* Luther, *supra*, the Supreme Court said, with reference to the act granting soldiers' additional entries, that—no residence on or cultivation of the land, as a condition of securing the additional right, was intended. It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of 160 acres by his first homestead entry. There is no reason to suppose it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee.

In the recent case of *ex parte* John F. Butler, *supra*, it was held that:

A soldiers' declaratory statement, of record at the date of the act of June 16, 1906, excepts the land covered thereby from the provisions of section 8 of that act, reserving sections 18 for the benefit of the future State of Oklahoma.

Moreover, it was said therein that "a soldiers' declaratory statement is in itself the initiation of a right under the homestead law," and that as it had been held that the soldier by filing the same exhausted his homestead right, "it would seem to necessarily follow that the filing of a declaratory statement constitutes the fullest possible assertion of a homestead right; otherwise it is not conceived how the homestead right could be exhausted by the filing of the declaratory statement."

It will be noted that in the foregoing and other recent decisions, both departmental and court, having a bearing upon the question at issue herein, a more liberal construction generally has been given to the soldiers' additional homestead law than formerly, finally resulting in the ruling in the Butler case.

That decision overruled departmental decision of May 12, 1908 (not reported), in the case of Lacy R. Foster, wherein it had been held that a soldiers' declaratory statement had never been accorded the segregative effect of an entry, and that the filing of such a declaratory statement did not operate to defeat the grant made to the State, by said act of June 16, 1906.

The logic of the situation, therefore, would seem to be that if a soldiers' declaratory statement is the equivalent of a homestead entry, or has such a standing and character within the meaning and intent of section 2306 of the Revised Statutes, as exhausts the soldier's right, then such a filing made for less than 160 acres prior to June 22, 1874, which was, as in this case, changed to a formal entry, subsequently to said date, should entitle the soldier to an additional entry of sufficient land to make his full quota of 160 acres.

In view of the conclusion thus reached, the decision appealed from is reversed, and Dempsey's application, if found satisfactory in other respects, will be allowed. The decision in the case of Fred W. Ashton, hereinbefore referred to, and like decisions in other cases are hereby overruled.

MANTI LIVESTOCK COMPANY.

Decided July 10, 1913.

RIGHT OF WAY—IRRIGATION PURPOSES—ACTS OF MARCH 3, 1891, MAY 11, 1898.

It is not necessary to entitle a company to a reservoir easement under the acts of March 3, 1891, and May 11, 1898, that it shall have been organized for the main purpose of irrigation of arid lands, provided it is authorized under its articles of incorporation to construct canals and ditches, and it is shown that the right of way applied for is in good faith sought for irrigation purposes and does not involve the use of the public domain for purposes not contemplated by the statute.

JONES, *First Assistant Secretary:*

This is the appeal of the Manti Livestock Company, by amendment of its articles of incorporation October 12, 1901, the "Ireland Land

and Cattle Company," from a decision of the Commissioner of the General Land Office, February 26, 1913, denying its application under the acts of March 3, 1891 (26 Stat., 1095), and May 11, 1898 (30 Stat., 404), for a reservoir easement on unsurveyed public lands in T. 24 S., R. 3 E., Salt Lake City land district, Utah.

The company's articles of incorporation permit it "to engage in a general livestock business within the State of Utah and to buy, sell, breed and run sheep, cattle, horses and swine, and to buy, own, rent, lease, sell and otherwise manage and control all necessary lands, water rights, ranges, and equipments thereon for the purpose of successfully conducting said livestock business."

The Commissioner's decision is put upon the ground that the irrigation of arid lands is not the main purpose for which the company was incorporated; that it is not, therefore, a canal or ditch company within the meaning of the act of March 3, 1891, and can not be recognized as a beneficiary thereunder.

The Department does not concur in this view. The grant made by the act of March 3, 1891, *supra*, is to "any canal or ditch company formed for the purpose of irrigation." It is believed that the Ireland Land and Cattle Company may be appropriately termed a canal or ditch company within the meaning of the statute. A company authorized by its articles of incorporation to buy, own, rent, lease and sell lands, and otherwise manage and control all necessary lands, water rights, ranges, and equipments thereon for the purpose of conducting a livestock business, may find it necessary to construct canals or ditches, and may surely do so under the implied powers of its incorporation. This company is, therefore, a potential beneficiary under said act.

Nor can the Department concur in the view of the Commissioner that the irrigation of arid lands must be shown to be the main purpose of such a company to entitle it to the benefits of said act. The company must have been authorized to construct canals and ditches; otherwise, it could not be appropriately termed a canal or ditch company, but being so authorized, it is of no consequence that it may engage in and is actually operating any other enterprises in connection with irrigation, or independently, of vastly more importance, so that it be shown the right of way is in good faith sought for irrigation purposes and does not involve a use of the public domain for purposes not contemplated by the statute.

Similar views were expressed by this Department in the case of American Securities Company, decided by this Department October 23, 1912, as follows:

It is clear that the acts of March 3, 1891, and May 11, 1898, *supra*, do not limit a potential beneficiary thereunder to the sole business of a canal or ditch company. It is true, that such grantee may, by its articles of incorporation, be

constituted a canal or ditch company within the meaning of said acts, but the fact that by these same articles it was engaged in other enterprises does not militate against its right to take the grant unless it be apparent that it is sought for a use other than that specified in the acts and that irrigation is not the company's main purpose in connection therewith.

In the case at bar, it is thought that the company's main purpose in connection with the right of way sought is the irrigation of arid lands, and the fact that these lands are to be used in promoting a live-stock business does not militate against this view. Indeed, it rather strengthens it, for the reason that irrigation is always to some such end.

The case is accordingly remanded for proceedings not inconsistent herewith. If the company's application is regular with respect to requirements not herein considered, and the showing of *bona fide* intention to irrigate the lands under the right of way be found sufficient, the Commissioner of the General Land Office will permit the company's maps to be filed for information, as in such cases made and provided with respect to unsurveyed lands.

EDWARD H. RIFE.

Decided July 10, 1913.

SOLDIERS' ADDITIONAL—ASSIGNMENT—POWER OF ATTORNEY.

Where a power of attorney to locate a soldiers' additional right and to sell the land so located is executed in blank without specifying the particular land to be located thereunder, the soldier is thereby estopped, as between himself and the claimant under the power, from claiming any further benefit from the additional right, regardless of whether or not the blank in the power has been filled in by inserting the description of a particular tract of land; but where delay on the part of the attorney in fact in pursuing his claim under the power, or apparent abandonment of the former claim thereunder, has resulted in a transfer of the right by the soldier and satisfaction thereof by the government, no further exercise and satisfaction thereof will be permitted.

JONES, First Assistant Secretary:

By departmental decision of October 12, 1912, the decision of April 28, 1911, by the Commissioner of the General Land Office was affirmed, and the application of Edward H. Rife, assignee of William Temple and others to enter under section 2306 R. S., the N. $\frac{1}{2}$ S. $\frac{1}{2}$, Sec. 7, T. 13 N., R. 101 W., Evanston, Wyoming, land district, was rejected. A motion for rehearing has been filed and oral argument heard in support of the motion.

The only questions raised for consideration are with reference to the alleged assignments by Temple and Harper. It has been repeatedly held in recent departmental decisions that a power of attorney giving authority to locate an additional right under section

2306 R. S., and to sell the land to be located, does not constitute evidence of a general assignment of the additional right, where the papers describe the land with reference to which the power is given. See case of H. B. Phillips (40 L. D., 448). The decision cited was followed in the former decision in this case, and it was further held that it would make no difference in the effect of the paper if, as alleged, the description of the land was inserted by the attorney in fact after the execution of the paper by the soldier.

It is represented in this case, and well supported by affidavits, that the powers under consideration were executed in blank as to the lands to be located, leaving it to the attorney in fact to fill in the description of any lands which he might desire to locate therewith. So long as the powers remained in force and in that condition, the attorney in fact could at any time fill in the powers and locate the right upon any land subject to such location, without any further authority from the soldier or any other act upon his part. In effect, therefore, the powers in that condition, while not in form an assignment of the right, enabled the attorney in fact to procure the benefit of the additional right. These papers were designed to circumvent rulings of the Department which obtained at that time against the privilege of the soldier to assign such additional right. It seems clear that the intentions of the parties were that the attorney in fact was to have the benefit of the right. Therefore, as between the soldier and the claimant under the powers, even if a description of the lands has subsequently been inserted therein, the soldier should be estopped from claiming any further benefit from the additional right. But, where delay by the attorney in fact in pursuing his claim under the powers, or apparent abandonment of a former claim thereunder, has resulted in a transfer of the right by the soldier and satisfaction of such right by the Government, no further exercise and satisfaction thereof will be permitted. In the case of Nellie J. Hennig, on review (38 L. D., 445), it was held (syllabus):

Where a soldier entitled to an additional right executed a power to locate the same, at a time when the assignability of such rights was not recognized, and no claim under the power was asserted, by application or other proper manner, within a reasonable time after the land department took action amounting to a recognition of such powers as equitable assignments, and the soldier subsequently executed an assignment of the right to another, under which entry was allowed, the land department is without authority to permit a further entry upon the same right, by one claiming under the power, notwithstanding the existence of the power might have been disclosed to the land department, prior to the allowance of entry under the subsequent assignment, by examination of its closed records in another case.

As to the Harper right, it appears that Harper assigned his additional right June 11, 1898, to E. M. Robords, which assignment was located by Oscar Stephens on 120 acres of land in Montana, under

assignment from Robords, which location was patented April 26, 1900. Therefore, the claim of Rife under the Harper powers cannot be recognized.

So far as shown by the record now before the Department, the additional right of Temple has not been satisfied by the Government, and, therefore, the claim of Rife thereto under the powers mentioned, and subsequent assignments thereunder, may be recognized, if no other objection appears.

The former decision in this case is modified as indicated, and the case is remanded to the General Land Office for appropriate action under the terms of this decision.

NORTHERN PACIFIC RY. CO.

Decided July 11, 1913.

NORTHERN PACIFIC ADJUSTMENT—LANDS SOLD OR CONTRACTED TO BE SOLD.

The Northern Pacific adjustment act of July 1, 1898, does not contemplate the relinquishment by the company of lands which have been sold or contracted to be sold by it; and while it may secure reconveyance of such lands with a view to adjustment under the act, it is not required to do so.

NORTHERN PACIFIC ADJUSTMENT—CONTROVERSIES ADJUDICATED BY COURTS.

The act of July 1, 1898, was designed to avert controversies involving conflicting claims of the Northern Pacific Railway Company and settlers; and where the company was offered an opportunity to adjust a conflicting claim between it and a settler, and refused to do so, and the matter was thereupon taken into court by the settler and finally adjudicated in his favor, the company will not thereafter be recognized as having any right or claim to the land in controversy subject to adjustment under the act.

ADJUSTMENT ACT OF JULY 1, 1898—"LAWFUL SUCCESSORS."

Purchasers of lands granted to the Northern Pacific Railroad Company are not "lawful successors" within the meaning of that term as used in the adjustment act of July 1, 1898.

JONES, *First Assistant Secretary:*

The Northern Pacific Railway Company has appealed from the decision of the Commissioner of the General Land Office, dated March 5, 1912, denying its request for adjustment under the act of July 1, 1898 (30 Stat., 597, 620), involving the SE. $\frac{1}{4}$ of Sec. 35, T. 15 N., R. 4 W., Helena, Montana, land district.

The facts relative to this proceeding are as follows: The land above described lies within the primary limits of the grant to the Northern Pacific Railroad (now Railway) Company, by the act of July 2, 1864 (13 Stat., 365), and opposite to that part of the road definitely located on July 6, 1882. The township plat of survey was filed in the local office on August 10, 1891, and the tract was listed by the company on September 21, 1892. On January 10, 1896, one John Trodrick ap-

plied to make homestead entry therefor, and the local officers rejected his application because of conflict with the railroad grant. Upon Trodrick's application a hearing was had on April 16, 1897, at which evidence was submitted that one Lemline settled on the land with his family in 1877, and resided thereon until his death in 1891, making improvements worth \$1000, and that Trodrick purchased these improvements, settled on the land in 1891, and continuously resided there to the day of the hearing.

On December 24, 1898, the Commissioner of the General Land Office rendered decision holding that though Lemline had a valid homestead claim which he could have perfected had he lived, Trodrick's claim had its inception subsequent to the definite location of the road and that, therefore, the land inured to the company. On November 25, 1899, the Department remanded the case to the Commissioner with direction to dispose of it under the act of July 1, 1898, *supra*. Thereupon Trodrick elected to retain the land and the railroad company was called upon to relinquish the same, but declined to do so for the reason that it had sold the tract to David Auchard on November 30, 1896, and conveyed the same to him on March 3, 1899. On January 31, 1900, Trodrick was notified to elect whether he would relinquish the land and transfer his claim to another tract or have the case decided upon the merits. He took no action under said notice, whereupon the case was closed and the land patented to the railroad company on January 10, 1903. A motion filed by Trodrick that the case be reopened was denied on September 15, 1903.

On May 15, 1911, the Supreme Court of the United States, in the case of Northern Pacific Railway Company *v.* Trodrick (221 U. S., 208), charged the railway company and its grantee as trustees of the title to the use of Trodrick and quieted title in him.

Upon the foregoing facts the Commissioner of the General Land Office, in the decision from which this appeal is prosecuted, held that the company having declined to accept the benefit of the act of July 1, 1898, *supra*, and brought the case to a final result adverse to it, could not claim the benefit of the act.

The act of July 1, 1898, deals only with the railroad company and its lawful successors, the company not being required to relinquish where it has sold or contracted to sell the land. In this case the land was sold two years before the passage of the act. It was, therefore, not within the operation of the act.

The meaning of the term "lawful successors" in the act of 1898, clearly appears from the proviso to the effect that the question whether the Northern Pacific Railway Company was the lawful successor of the Northern Pacific Railroad Company should be determined without reference to the provisions of the act, and even more conclusively from the proviso that selections of unsurveyed land

should be patented to the corporation surrendering the tracts claimed to have been granted. It is true that in some instances where the railway company has sold the land it has secured reconveyance thereof in order to permit of adjustment under the act of 1898, but in this case the company was offered the opportunity to make adjustment and refused to do so. The ground of its refusal was a sufficient one under the act, and while it might have induced Auchard to reconvey the land to the end that adjustment might be made, it was not bound so to do. The refusal forced Trodrick to assume the burden of an expensive controversy in the courts, the very thing the act of 1898 was intended to avert. Neither the letter nor the spirit of the law will now, as the controversy has been decided in favor of the settler, permit the railway company to secure adjustment of what is no longer a controversy. It will be observed that the act of 1898 offered the railway company, as a consideration for its relinquishment of claims in favor of settlers, a right of selection of much greater value than the indemnity provision in the granting act, in this, that the selected lands were not limited to odd numbered sections, nor to surveyed lands, and might be located anywhere within the State or Territory through which the line of the railroad extended.

The decision of the Commissioner is accordingly affirmed.

RECLAMATION—NORTH PLATTE PROJECT—ADDITIONAL CHARGES.

ORDER.

DEPARTMENT OF THE INTERIOR,

Washington, July 15, 1913.

In view of the exceptional requirements regarding operation and maintenance payments during the current year on the North Platte Project, Wyoming-Nebraska, constructed under the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), due to the postponement of payments in former years, it is hereby ordered that as a condition of the delivery of water during the current irrigation season without immediate payment of the charges due for operation and maintenance, there shall be an increase to said charges for operation and maintenance of one cent per acre for each month which elapses in whole or in part from July 21, 1913, to the date of payment. Such additional charge shall be separately added to each portion of an instalment for operation and maintenance remaining unpaid on and after July 21, 1913. That is to say, those who owe portions of instalments for operation and maintenance for two years shall be required to add the amount of two cents per acre per month or fraction of a month.

FRANKLIN K. LANE.

REVISED REGULATIONS UNDER THE KINKAID ACTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,*Washington, D. C., July 17, 1913.*

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 one dollar and twenty-five cents per acre for each acre included in his entry: *Provided*, That a former homestead 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 six hundred and forty acres: *Provided*, That any former homestead entryman who shall be entitled to an additional entry under section two 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 supplemental act of March 2, 1907 (34 Stat., 1224), including the circular of December 18, 1912 (41 L. D., 492), 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, 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 a 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. By the act of June 6, 1912 (37 Stat., 123), the period of residence necessary to be shown in order to entitle a person to patent under the homestead laws is reduced from five to three years, and the period within which a homestead entry may be completed is reduced from seven to five years. For information and instructions under that act reference is made to Circular No. 208, of February 13, 1913 [41 L. D., 479].

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.

GENERAL REGULATIONS.

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 acts of March 2, 1907, section 3 (34 Stat., 1224), and March 28, 1912 (37 Stat., 77),

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. 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:

(a) 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.

(b) 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 at once examine the records to see whether the tract, or any

part thereof, has been entered. If the examination of the record 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 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. The minimum price set by the order for sale should also be noted on the records. In the event no sale is had, the price so noted will be effective as provided by Circular No. 212, dated March 11, 1913.

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 instruction 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 oppor-

tunity 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, 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.

28. No lands will be sold at less than the price fixed by law, nor at less than \$1.25 per acre, but a minimum price will be set by the letter ordering the sale, based upon the report of the chief of field division. 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. In all cases where no sale is had the land will, in the absence of other objection, become subject to entry or filing at once, without action by this office.

ACT OF MARCH 28, 1912.

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.

REGULATIONS UNDER FIRST PROVISIO TO ACT OF MARCH 28, 1912.

The first proviso to the act of March 28, 1912, authorizes 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 Land Department 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 "General Regulations," except paragraph 22, which is not applicable, and no tract exceeding 160 acres in area will be ordered into the market under the proviso. Applications may be made upon the form provided (4-008c) and printed herein, properly modified as necessitated by the terms of the proviso. In addition the applicant or applicants must furnish proof of his or their ownership of the whole title in 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.

In the notices for publication and posting, where 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."

ISOLATED TRACTS OF COAL LAND.

The act of Congress approved April 30, 1912 (37 Stat., 105), provides:

That . . . 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 disposition . . . under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in all such lands so . . . sold, and of the right to prospect for, mine, and remove the same in accordance with the provisions of the act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said act.

In administering this act the foregoing regulations should be followed, in so far as they are applicable, and these additional instructions are prescribed:

An application to have coal land offered at public sale must bear across its face the notation provided by paragraph 7 (a) of the circular of September 8, 1910 (39 L. D., 179); in the printed and posted notice of sale will appear the statement:

This land will be sold in accordance with, and subject to, the provisions and reservations of the act of June 22, 1910 (36 Stat., 583).

The purchaser's consent to the reservation of the coal in the land to the United States will not be required, but the cash certificate and patent will contain, respectively, the provisions specified in paragraph 7 (b) of said circular of September 8, 1910.

In cases where offerings have been had, and sales made, of lands coming within the purview of the act of April 30, 1912, the purchasers may furnish their consent to receive patents, containing the limitation provided by said paragraph 7 (b), and, thereupon, the entries may be confirmed, and patents, limited as indicated, may issue.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

(Form 4-008c.)

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:

_____ of _____ requests that the _____ of section _____, township _____, range _____, be ordered into market and sold under the acts of March 2, 1907 (34 Stat., 1224), and March 28, 1912 (37 Stat., 77), 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 is a _____ (insert statement that affiant is a native-born or naturalized citizen, as the case may be) citizen of the United States; that this land contains no salines, coal, or other minerals, and no stone except _____ (state amount and character); 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 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 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, ----- (-----), being first duly sworn, upon oath state that
(Male or female)
my post-office address is -----; that I am the purchaser of -----
section -----, township -----, range -----, ----- meridian, containing
----- acres, in Nebraska, under the acts of March 2, 1907 (34 Stat., 1224),
and March 28, 1912 (37 Stat., 77); that I ----- (insert statement that
affiant is a native-born or naturalized citizen, as the case may be; record evi-
dence of naturalization 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 pur-
chased under the provisions of said acts, 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.)

Section 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.

(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 March 2, 1907 (34 Stat., 1224), and March 28, 1912 (37 Stat., 77), 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.

ISOLATED TRACTS—SEC. 2455, R. S., AS AMENDED MARCH 28, 1912.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 17, 1913.

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 Stat., 1224), is authorized by the provisions of the act of March 28, 1912 (37 Stat., 77), amending section 2455 of the Revised Statutes.

GENERAL REGULATIONS.

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. 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: (a) 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. (b) 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 at once examine the records to see whether the tract, or any part thereof, has been entered. If the examination of the record 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 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. The minimum price set by the order for sale should also be noted on the records. In the event no sale is had the price so noted will be effective, as provided by Circular No. 212, dated March 11, 1913.

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 5 consecutive weeks (or 30 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 10 days thereafter furnish evidence of citizenship, 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, but a minimum price will be set by the letter ordering the sale, based upon the report of the chief of field division. 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 Mar. 2, 1889, 25 Stat., 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. In all cases where no sale is had the land will, in the absence of other objection, become subject to entry or filing at once, without action by this office.

ACT OF MARCH 28, 1912.

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.

REGULATIONS UNDER FIRST PROVISIO TO ACT OF MARCH 28, 1912.

The first proviso to the act of March 28, 1912, authorizes 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 "General Regulations," except paragraph 7, which is not applicable. Applications may be made upon the form provided (4-008b) and printed herein, properly modified as necessitated by the terms of the proviso. In addition the applicant or applicants must furnish proof of his or their ownership of the whole title to 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.

In the notices for publication and posting, where 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."

ISOLATED TRACTS OF COAL LAND.

The act of Congress approved April 30, 1912 (37 Stat., 105), provides:

That . . . 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 disposition . . . under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in all such lands so . . . sold, and of the right to prospect for, mine, and remove the same in accordance with the provisions of the act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said act.

In administering this act the foregoing regulations should be followed, in so far as they are applicable, and these additional instructions are prescribed:

An application to have coal land offered at public sale must bear on its face the notation provided by paragraph 7 (a) of the circular of September 8, 1910 (39 L. D., 179); in the printed and posted notice of sale will appear the statement:

This land will be sold in accordance with, and subject to, the provisions and reservations of the act of June 22, 1910 (36 Stat., 583).

The purchaser's consent to the reservation of the coal in the land to the United States will not be required, but the cash certificate and patent will contain respectively the provisions specified in paragraph 7 (b) of said circular of September 8, 1910.

In cases where offerings have been had, and sales made, of lands coming within the purview of the act of April 30, 1912, the purchasers may furnish their consent to receive patents containing the limitation provided by said paragraph 7 (b); and thereupon the entries may be confirmed, and patents, limited as indicated, may issue.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

(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 March 28, 1912 (37 Stat., 77), 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 is a _____ (insert statement that affiant is a native-born or naturalized citizen, 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 approximately 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 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 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

date of entry, establishing by such evidence as is now required in homestead proofs, "three years' actual residence on the land."

March 4, 1911 (36 Stat., 1356), Congress passed an act relating to homestead entries in this reservation, providing that all pending entries upon which proofs had been made prior to December 31, 1906, should be passed to patent—

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.

A proviso stipulated that nothing in the act should prevent proceedings against any entry upon charge of fraud, and a second proviso required entrymen who were allowed to complete their claims under the act, to pay \$2.50 per acre for the land so applied for.

After the passage of the act last described a number of entrymen—including Benjamin P. Courtney, H. E. 0308; Albert N. Southwick, 0370; William R. Ellis, 0784; Harl Hocum, 01599; Ferris Lucas, 01603; Edith G. Halley, now Southwick, 0369; Lyman N. Lee, 025; Conrad Boeschen, 0847; Joseph Kosydar, 0782; Levi M. Gilbert, 0286; W. D. Coates, 0399; Amelia Wagner, 09; Thomas Holverson, 01957; Willis B. Morse, 01989; Ahijah Williams, 01594—applied for the reinstatement or confirmation of their entries.

The applications of the six persons first named were denied by the Department on appeal and upon petition for rehearing, at various dates in 1912 and 1913, on the ground that their reinstatement is precluded by the intervening entries of record of others. The applications of Lee and Boeschen were denied on the finding that entrymen had not entered into actual occupation of the land or cultivated the same, as required by the law. The application of Kosydar was denied because he had failed to cultivate the claim as required by law, there also being present in that case the pending and undisposed of application of Bertha N. Faude who claims a preference right of entry under the act of 1880, *supra*. The application of Gilbert was denied because of failure of applicant to cultivate the land and because of the contest of William P. King, instituted within two years after submission of final proof by the original entryman. The applications of Coates, Wagner and Holverson are pending before the

Department on appeal from the decisions rendered by the Commissioner of the General Land Office denying their applications. In the cases of Morse and Williams hearings were ordered by the Department to permit applicants to submit evidence in support of their claims, and in the case of Williams to permit an intervening claimant, Tracey Newman, to be heard.

There is now before the Department a petition addressed to the supervisory power of the Secretary of the Interior asking that the previous decisions of this Department canceling the entries hereinbefore described, as well as those of Hans M. Branson, 0368, and Howard H. Ragan, 0367, in which cases no petition for reinstatement has been received, and refusing to reinstate the entries under act of March 4, 1911, be vacated and set aside, and the cases considered *de novo*; or, as an alternative relief, that the cases be held in *statu quo* until entrymen can present their claims and secure action thereon by Congress.

I have not had time nor opportunity to consider the records in all of the cases described, but have given consideration to the general situation and to the provisions of the act of March 4, 1911, *supra*. I have also considered those departmental decisions, particularly that in the case of Conrad William Boeschen (41 L. D., 309), which deny the application for reinstatement upon the ground that entryman had not entered into actual occupation of the lands or cultivated same, as required by the homestead law.

It is clear that the act of 1911 does not authorize or permit reinstatement of an entry against which "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." Also, that it does not permit of the reinstatement of an entry in cases where another "entry is of record covering such land." This latter provision, I am satisfied, means a valid, pending entry. The other requirements of the act in question are:

1. The entry must have been made for the exclusive use and benefit of entryman.
2. He must have built a house on and improved the land.
3. He must have entered into actual occupation of the land.
4. He must have "cultivated a portion of said land for the period required by law."
5. He must not have sold, conveyed, or contracted to sell or convey the land.

So far as I am advised, there has been no allegation that the entries involved were made for the benefit of others than the entrymen or that any of them have sold, conveyed or contracted to sell or convey the lands entered. Furthermore, so far as I am advised,

the erection of houses on the claims and the improvement of the lands has not been questioned. Those decisions of the Department denying applications for reinstatement on the ground of insufficient occupation, or lack of cultivation, proceed upon the theory that the words "actual occupation," as used in the law, contemplate and require such residence as evidences *bona fide* intention to make a home upon the land; and cultivation, as requiring such an amount and character of cultivation as showed a purpose to develop the land as a farm.

In consideration of the subject it must be remembered that the general homestead law in force at the time these entries were made and at the time of the passage of the law of 1911, did not undertake to specify the amount or character of cultivation required to be made upon homestead claims. The general rule of administration was that the entryman must make the claim his home and utilize the land for agricultural purposes to an extent showing good faith. There can be no doubt of the purpose of Congress to excuse these entrymen from continuous residence upon their lands for the period mentioned in the Siletz homestead law. Nor does the act specify the manner or extent of the actual occupation. It requires actual occupation, but lays down no definite rule or time therefor.

With respect to cultivation, it must be borne in mind that during the period antecedent to March 4, 1911, rather liberal holdings had been made with respect to the requirements of the cultivation of homestead claims, the difficulties which entrymen met in cultivation of their claims, because of the physical or other conditions of the land, being given weight in determination of the question as to whether cultivation met the requirements of the law. Later, the Department adopted a more rigid rule of administration with respect to the showing required of homesteaders, both as to cultivation and as to residence, and the act of Congress of June 6, 1912 (37 Stat., 123), definitely prescribed the amount of residence required and the minimum area which must be cultivated during each year prior to final proof.

These cases should be adjudicated in the light of the law and practice in force prior to March 4, 1911, and I am convinced that the intention of Congress in enacting that law was to validate those claims which fell without the exceptions specified in the act, where there had been an actual occupation, though short or intermittent, and where there had been cultivation of the land, however small the area cultivated may have been, provided the entryman did actually cultivate "a portion of said land for the period required by law." In lieu of a more complete compliance with the law in these respects, Congress, in the remedial act, imposed upon entrymen the burden of paying \$2.50 per acre for lands they might otherwise have

acquired without cost by full compliance with the general homestead law.

I, therefore, conclude that those applications for reinstatement described in the petition, and other applications for reinstatement presented under the act of March 4, 1911, *supra*, where otherwise not barred by intervening contests or entries specified in the act, should not be denied because of the short or intermittent character of occupation or because of the limited area which the entrymen may have cultivated. Departmental decision in the Boeschen case, *supra*, and other decisions, so far as inconsistent herewith, are revoked or modified, and all cases involving applications for reinstatement under the act of 1911, whether pending in this Department, before the General Land Office, or the local land office, will be adjudicated in accordance with the views herein expressed. Where an intervening entry has been finally adjudicated to be valid and a bar to reinstatement of a former canceled entry, such adjudication will not be disturbed except upon specific instructions from me.

In arriving at the conclusions herein set forth I have sought for the mind and purpose of Congress expressed as to certain claimants. To say that there was no waiver of the law applicable to these claims would be tantamount to saying that Congress passed an act ostensibly giving relief but holding out a false hope, a hope which this office would dispel. I have no such view of this act. Congress in its judgment intended to relieve these claimants of certain obligations as to continuous residence and any considerable degree of cultivation because the claimants were pioneers who labored against great odds in getting to their lands and making them somewhat accessible. This is not the theory of our homestead law, but it is the theory upon which Congress acted as to these claims.

BUCKEYE MINING SMELTING CO.

Instructions, June 24, 1913.

NATIONAL FOREST LANDS—PERMITS—CHANGE OF JURISDICTION.

Where change of jurisdiction occurs from the Department of Agriculture to the Department of the Interior, over lands in national forests for which permits under the act of February 15, 1901, have been issued by the Secretary of Agriculture, by reason of the lands being eliminated from the national forest, no action by the permittee will be required nor will his status be in anywise affected thereby; but the permit papers transmitted to the Department of the Interior by the Department of Agriculture will be considered as constituting the complete application, notation thereof will be made on the records of the General Land Office, a blue-print of the map and copy of the field notes forwarded to the local land office for notation and filing, and the permittee advised that the Department of the Interior has assumed jurisdiction.

Secretary Lane to the Commissioner of the General Land Office.

Your letter of May 28, 1913, in the above-entitled case directs attention to regulations approved March 1, 1913, under the act of February 15, 1901 (31 Stat., 790), to the effect that "change of jurisdiction over lands from one executive department to another will not revoke, but will change the administrative jurisdiction over a permit for the occupancy and use of such lands."

In the matter of national forests it frequently happens that public lands upon which such permits have been issued, are included within forests, and the administrative jurisdiction over such licenses thereupon and under the act of February 1, 1905 (33 Stat., 628), vests in the Secretary of Agriculture, or where lands are eliminated from a national forest upon which permits have been previously issued by the Secretary of Agriculture jurisdiction vests in the Secretary of the Interior. You suggest that in such cases, in order to avoid confusion, annoyance and expense to the permittee, as well as to secure the proper notations upon your records, one of the two following courses should be followed, preferably suggestion No. 2:

1. When change of jurisdiction occurs permit papers transmitted to this Department by the Department of Agriculture be considered as constituting the complete application, the records of the General Land Office noted as subject to such right of way, a blue print of the map and copy of the field notes forwarded to the local land office for notation and filing, and the permittee advised that the Interior Department has assumed jurisdiction; or

2. That upon receipt of the papers from the Agricultural Department, they be retained in the General Land Office and the permittee called upon through the local land office to prepare and file a new application in conformity with the current regulations of the Department of the Interior, such application to supersede the permit granted by the Department of Agriculture and to be retained in the local land office.

The Department is inclined to the view that the first course of procedure outlined should be followed rather than the second. It will occasion a minimum of expense to the permittee, will permit the original permit issued to remain in full force and effect, and will be easier of administration. It will obviate one of the objections which have arisen to the transfer of jurisdiction over the lands, in that no action by the permittee will be required nor will his status be changed thereby.

You are, therefore, instructed to follow the course of procedure outlined in suggestion No. 1.

INSTRUCTIONS.

RECLAMATION—WATER RIGHTS—CORPORATIONS.

Applications hereafter presented by corporations for water rights on reclamation projects will not be allowed; but existing corporations to which water rights have heretofore been granted should be permitted to continue without interference, and in view of past departmental decisions applications by corporations pending at this date may be allowed.

Secretary Lane to the Director of the Reclamation Service, July 11, 1913.

In the matter of applications of corporations for water rights on reclamation projects, I am satisfied that Congress did not intend that these reclaimed lands, upon which the Government is expending the money of all the people, should be the subject of corporate control. These lands are to be the homes of families. This seems to be established conclusively by the fact that we are authorized to fix the farm unit on the basis of the amount of land that will support a family.

Those corporations which are in existence to which water rights have been granted should be allowed to continue without interference, and in view of past decisions it may be the wise policy to grant to corporations which have at this date made application, such right. No more such applications should be allowed, and this should be the rule of the Department.

HUMPHRIES v. BOYER.

Decided July 19, 1913.

PREFERENCE RIGHT OF CONTESTANT—RELINQUISHMENT—INTERVENING APPLICATION.

One who acts as agent in negotiating the sale of the relinquishment of an entry is in privity with the entryman and the purchaser, within the meaning of the regulations of September 15, 1910, providing that at a hearing between a contestant claiming a preference right and an intervening applicant for the land, "it shall be competent for the contestant to show that the former entryman, or some one in privity with him in the sale or purchase of the relinquishment, had knowledge of the filing of the affidavit of contest, in rebuttal of any showing made by the applicant."

CONTEST—CHARGE OF ABANDONMENT—SALE OF RELINQUISHMENT.

A charge of abandonment against a homestead entry is established by proof of the sale of a relinquishment of the entry.

JONES, First Assistant Secretary:

John H. Boyer has appealed from the decision of the Commissioner of the General Land Office, dated July 6, 1912, sustaining the action of the local officers who rejected his desert land application for the NW. $\frac{1}{4}$, Sec. 14, T. 6 N., R. 28 E., W. M., Walla Walla, Wash-

ington, land district, and allowed the desert land application filed by Henrietta Humphries for the same tract of land.

It is shown by the record that, on October 5, 1907, one Robinson made homestead entry for the land in contest, and that, on April 13, 1908, he applied for and was allowed leave of absence until December 6, 1908, upon the ground of physical disabilities that rendered him incapable of performing heavy manual labor. He afterward applied for and was allowed further leave of absence, the last of which was from October 8, 1910, to October 8, 1911. In support of his first application, Robinson alleged that he established residence upon the land on April 1, 1908.

On August 28, 1911, Boyer filed an application to contest the entry of Robinson, charging:

That the entryman within one week after establishing residence on said tract totally abandoned the same; that said entryman's wife has never at any time lived thereon; that his family at all times since entry have lived at Greenville, Illinois, at which place the entryman is living today, and at all times herein entryman has lived in Illinois since about one week after making entry; and, although this entryman has a leave of absence he has sold his relinquishment, duly executed, and received the money therefor.

The local officers suspended action upon the affidavit of contest until the expiration of the leave of absence granted the claimant, as hereinbefore stated, and, on September 13, 1911, a relinquishment of the entry, accompanied by Henrietta Humphries's desert land application, was received by mail. Robinson's entry was then canceled and Humphries's application suspended to await action by Boyer, who was notified of the cancellation of Robinson's entry.

On September 22, 1911, Boyer filed his desert land application, which was also suspended, and Humphries was notified of her right to apply for a hearing.

A hearing was duly had before the local officers in December, 1911, Boyer appearing with counsel and one Green appearing as the agent of Humphries, also with counsel.

It is shown by the testimony that Green, who was a brother-in-law of Henrietta Humphries, purchased the relinquishment of the Robinson entry through one Crossland, in April, 1911, for the sum of \$200. Green, his wife, and son, each had an entry of record, which disqualified them from making entry for the land in controversy. While the claim was advanced that Green purchased the relinquishment for Mrs. Humphries, he admitted that, without the knowledge or consent of Mrs. Humphries, he made an attempt to dispose of the relinquishment. Failing in this, he turned the relinquishment over to Mrs. Humphries, a widow without means, and she made the desert land application under consideration, without paying Green anything therefor. It is evident from the record that Mrs. Humphries has no

financial interest in the premises and she manifested little, if any, concern with reference to the outcome of the hearing.

Crossland, the agent of Robinson in the sale of the relinquishment to Green, was a corroborating witness to Boyer's affidavit of contest against Robinson's entry. There is no direct evidence that Robinson, Green, or Mrs. Humphries had actual knowledge of the filing of Boyer's contest, and, in the decision from which this appeal is prosecuted, the Commissioner of the General Land Office held that knowledge of the contest on the part of Crossland was an immaterial fact and that the charge made by Boyer did not state a cause of action against the Robinson entry, citing *Stubendordt v. Carpenter* (32 L. D., 139).

In the regulations of September 15, 1910 (39 L. D., 217), it is provided that, at a hearing between a preference right claimant and an intervening applicant for land, "it shall be competent for the contestant to show that the former entryman, or some one in privity with him in the sale or purchase of the relinquishment, had knowledge of the filing of the affidavit of contest, in rebuttal of any showing made by the applicant." Waiving, therefore, consideration of the strong circumstantial evidence with this record that the application of Humphries was filed for the purpose of defeating Boyer's contest, it is sufficient to say that Crossland was in privity with Robinson as to the sale, and with Green as to the purchase of the relinquishment, and that said Crossland had actual knowledge of the filing of the affidavit of contest.

If the facts charged by Boyer in his affidavit of contest were true, and the record clearly establishes that they were true, Robinson had wholly abandoned his claim to the land in controversy. The case of *Stubendordt v. Carpenter*, *supra*, has no application to the facts disclosed by this record. In the *Stubendordt-Carpenter* case, it was held that a *contract* to sell the relinquishment of a homestead entry is not in violation of the oath required by section 2290, Revised Statutes, and is no ground for the cancellation of an entry under a charge that the entry was made for purposes of speculation. The Department has never held, and can not hold under the law, that the sale of a relinquishment does not constitute an abandonment of a homestead entry. The sale of a relinquishment, in the absence of fraud in its procurement, irrevocably places the entry in the hands of the buyer and its cancellation necessarily follows the filing of the relinquishment in the local office. Irrespective, however, of that part of the charge relating to the sale of the relinquishment, Boyer's affidavit of contest contained a sufficient charge of abandonment for, if true, the conclusion is inevitable that Robinson had never abandoned his home at Greenville, Illinois.

The decision of the Commissioner of the General Land Office is, accordingly, reversed, the application of Boyer is allowed, and that of Humphries rejected.

PLEASANT VALLEY FARM CO.

Decided July 19, 1913.

RECLAMATION ENTRY—ASSIGNMENT—CORPORATION.

To entitle a corporation to take an assignment of a portion of a reclamation entry under the act of June 23, 1910, it must show that it is not claiming any other farm unit or entry under the reclamation act and that each of its stockholders is duly qualified to take an assignment under that act, notwithstanding the entryman from whom the corporation is seeking to take the assignment has complied with the provisions of the homestead law as to residence, improvement and cultivation upon the land involved.

RECLAMATION—WATER RIGHTS—CORPORATIONS.

Under instructions of July 11, 1913, applications thereafter presented by corporations for water rights on reclamation projects will not be allowed, but applications pending at that date may be allowed.

JONES, *First Assistant Secretary:*

July 12, 1904, Carl Jastafson made homestead entry 0152, Belle Fourche series, for the NW. $\frac{1}{4}$, Sec. 22, T. 9 N., R. 6 E., in the Belle Fourche reclamation project, and on July 27, 1911, submitted final proof of residence, cultivation and improvement, which proof was accepted by the Commissioner of the General Land Office. March 27, 1909, the Secretary of the Interior approved a preliminary farm-unit plat which divided the land entered by Jastafson into four farm units of 40 acres each. Jastafson was required to conform his entry to one of said farm units and authorized to assign the other farm units under the act of June 23, 1910 (36 Stat., 592). February 17, 1912, he assigned farm unit D, or the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 22, to the Pleasant Valley Farm Company, a corporation organized and existing under the laws of the State of South Dakota and having its place of business at Newell, South Dakota.

April 11, 1912, the Commissioner of the General Land Office required the assignee to file evidence that it is not claiming any other farm unit or entry under the reclamation act and that each of its stockholders submit showing in the form of an affidavit to the effect that he or she is duly qualified to take an assignment under the act of June 23, 1910, *supra*. Appeal from said decision brings the case before this Department, it being alleged, in substance, that final proofs have been made upon Jastafson's homestead entry and accepted, the land thereby becoming in legal effect the same as if held in private ownership, and that the only restriction which should be

imposed upon the assignee is it should not be the owner of more than 160 acres of land subject to the reclamation act.

This contention is not well founded. The purpose of the reclamation act was to divide lands irrigated under its provisions among the largest possible number of citizens in tracts sufficient for the support of a family, and while the assignor in this case has complied with the provisions of the homestead law as to residence, improvement and cultivation, his entry was and is subject to be reduced so far as he is concerned to such an area as the Secretary of the Interior may fix as sufficient for the support of a family. The act of June 23, 1910, designed to afford entrymen in such cases an opportunity to secure some return for improvements placed by them upon the lands which they are required to eliminate from their entries when same are conformed to farm units, does not relieve the assignee from the requirement that but one farm unit or entry shall be held and patented under the law as amended by said act of June 23, 1910. The regulations of the Department so require and such was the ruling in the case of Sarah S. Long, decided October 19, 1910 (39 L. D., 297). Furthermore, the act of August 9, 1912 (37 Stat., 265), expressly provides—

That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation act of June seventeenth, nineteen hundred and two, and acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased, respectively.

While it was held by the Department at time of presentation of this application that a corporation otherwise qualified might acquire a water right within a reclamation project, it has also been held in the administration of the public land laws that corporations seeking to acquire public lands under laws which fix a maximum of acreage which can be acquired by an individual or corporation, must show that each of their stockholders is qualified. In this connection reference is made to the ruling of the Secretary, July 11, 1913 [42 L. D., 250], to the effect that no more applications by corporations for water rights on reclamation projects will be allowed, but that "those corporations which are in existence to which water rights have been granted should be allowed to continue without interference, and in view of past decisions it may be wise policy to grant to corporations which have at this date made applications, such right."

The land involved was acquired by the Pleasant Valley Farm Company, and its application for a water right presented, while the departmental holding was to the effect that corporations otherwise qualified might acquire water rights. Under the foregoing rule,

therefore, its application may be allowed if otherwise regular; but, as hereinbefore indicated, it must furnish the evidence required by the Commissioner of the General Land Office before it can entitle itself to consideration under the rulings in force at the date of its application. The Commissioner's decision is accordingly affirmed and the record returned for appropriate action.

ALASKA MILDRED GOLD MINING CO.

Decided July 23, 1913.

MILL SITE—"MINING OR MILLING PURPOSES."

The use of a mill site as a location for a blacksmith shop and tool house, in which are stored tools, machinery, etc., necessary to run a tunnel upon the mining claim in connection with which the mill site was taken, and as a storage place for supplies needed in development work upon such mining claim, constitutes a use and occupation of the land for "mining and milling purposes," within the meaning of section 2337, Revised Statutes.

MILL SITE—ALASKA—SIXTY-FOOT ROADWAY.

Section 10 of the act of May 14, 1898, reserving a sixty-foot roadway along the shore line of navigable waters in Alaska, contemplates the reservation of only an easement for highway purposes, and is no bar to the location of claims to the water's edge, subject to the roadway easement.

CONFLICTING DECISION MODIFIED.

Alaska Copper Company, 32 L. D., 128, modified, in so far as it forbids the location of mill sites within sixty feet of the shore line of navigable waters.

JONES, *First Assistant Secretary:*

This is an appeal by the Alaska Mildred Gold Mining Company from the decision of the Commissioner of the General Land Office of December 13, 1911, holding for cancellation its mineral entry, No. 0497, made December 31, 1909, at Juneau, Alaska, for the Electro, Mildred, Vera, Lucy, May and Ethel lode claims, and the Mildred mill site, as to the mill site.

The proof of the use and occupancy of the mill site states that there was upon it a good and substantial tool house and blacksmith shop valued at \$250, which was used by the miners engaged in the work of driving and extending a tunnel upon the Mildred lode and which contained the necessary tools and machinery incident to such tunnel work; that the mill site is the only available nonmineral ground in that vicinity suitable for such purposes, and was essential to the economical development and working of the lodes. It is the intention of the company to erect suitable mills upon the mill site for the reduction of ores extracted from the lodes when their development has sufficiently progressed. The record also discloses that the mill site has been in use for storing materials and supplies used in connection with the development work done on the lode claims. It

is located upon the shore of Windham Bay, a navigable body of water. The Commissioner rejected the mill site upon two grounds:

1. That it had not been used or occupied for mining or milling purposes as contemplated by section 2337, R. S.

2. That its shoreward boundaries could not be lawfully located within sixty feet of the water's edge, the strip reserved by section 10 of the act of May 14, 1898 (30 Stat., 409, 413), for the use of the public as a highway.

Section 2337, R. S., provides:

Where nonmineral land noncontiguous 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.

In Alaska Copper Company (32 L. D., 128) the Department said (at page 131):

A mill site is required to be used or occupied distinctly and explicitly for *mining* or *milling* purposes in connection with the lode claim with which it is associated. This express requirement plainly contemplates a function or utility intimately associated with the removal, handling, or treatment of the ore from the vein or lode. Some step in or directly connected with the process of *mining* or some feature of *milling* must be performed upon, or some recognized agency of operative *mining* or *milling* must occupy, the mill site at the time patent thereto is applied for to come within the purview of the statute.

In Charles Lennig (5 L. D., 190), Secretary Lamar expressed the opinion that the use of a mill site for shops or houses for the lode claimant's workmen was a mining or a milling use. In Mint Lode and Mill Site (12 L. D., 624), a mill site, upon which were located a ditch conveying water to another mill site, and a frame house "to be used for a store house," was held not to be used for mining or milling purposes, it being stated, however, that the frame structure did not appear to have any connection with the mining operations, or that it was to be used in connection with the lode embraced in the same mineral entry.

In Satisfaction Extension Mill Site (14 L. D., 173) it was held that the erection and maintenance in good faith of dwelling houses for the occupancy of workmen employed for purposes in connection with a mill, is such a use and occupancy of the land as would justify the allowance of a mill site entry. In Eclipse Mill Site (22 L. D., 496), there were on the mill site an eight-room house used as an office and residence for the mining superintendent, a stable for four horses, a railroad switch that would hold ten railroad cars, and a small building for storage purposes, to be used in connection with the mine. Secretary Smith said (at page 497):

I think it may be conceded that it is shown here by affidavits that the applicant has in good faith improved, and used, the mill-site in connection with the mine; that is, the buildings erected thereon are used and occupied as a residence

and office by the superintendent; the stable for the horses used in connection with the mine; the product thereof is stored on the mill-site, and a railroad switch is maintained thereon for use in the transportation of the ores. In view of this showing, it may be safely assumed that, in contemplation of the statute, the mill-site is used for "mining" purposes.

The Supreme Court of Montana held in *Hartman v. Smith* (14 Pacific Reporter, 648), that a mill site upon which the owners had erected a cabin, used for storing tools and as an ore house for the ore taken from the mine, was used and occupied for mining or milling purposes, within the provisions of section 2337, R. S.

Taking into consideration the ruling in *Alaska Copper Company*, quoted above, and the above decisions, which present features quite similar to the case here under consideration, the Department is of the opinion that the use of this mill site as a location for the blacksmith shop and tool house, in which were stored tools, machinery, etc., necessary in running the tunnel upon the Mildred lode and as a storage place of supplies needed in the mining development work, is directly connected with the removal and handling of ore, and constitutes a use and occupation of land for "mining or milling purposes."

Section 10 of the act of May 14, 1898, *supra*, provides:

Provided further, That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings, and wharves, with the provision that the public shall have access to and proper use of such wharves, and landings, at reasonable rates of toll to be prescribed by said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway:

The circular of June 8, 1898 (27 L. D., 248, par. 41), construed this provision as follows:

A roadway 60 feet in width, parallel to the shore line as near as may be practicable, is reserved for the use of the public as a highway. "Shore line" here means high-water line. This reservation occurs in the proviso relating to the reservation between claims abutting on navigable waters; but since it is its purpose to reserve a roadway for public use as a highway along the shore line of navigable waters, it is held to relate to the lands entered or purchased under this act, as well as to the reserved lands; otherwise it would serve little or no purpose. *This reservation will not, however, prevent the location and survey of a claim up to the shore line, for in such case the claim will be subject to this servitude and the area in the highway will be computed as a part of the area entered and purchased.*

This was reiterated in the regulations of January 13, 1904 (32 L. D., 424, at page 442). In *Dalton v. Hazelet* (182 Fed. Rep., 561)

the Ninth Circuit Court of Appeals held that the roadway reservation 60 feet wide applied only to the space 80 rods in width reserved by the United States between tracts sold or disposed of under the act of May 14, 1898. This view is contrary to that expressed by the Department in its regulations.

Section 26 of the act of June 6, 1900 (31 Stat., 321), provides that this 60 foot roadway reservation shall not apply to mineral lands or townsites. In Alaska Copper Company, *supra*, the Department held that in Alaska the boundary lines of a mill site location could not be lawfully laid within 60 feet of the shore line of a navigable body of water, stating at page 131:

Being nonmineral lands, these mill-site claims do not fall within the exception of mineral lands from such reservation, provided by section 26 of the act of June 6, 1900 (31 Stat., 321, 330), and therefore their shoreward boundaries could not lawfully be laid within sixty feet of the water's edge.

This expression was probably not necessary to the decision of that case and is contrary to the view expressed in the regulations of June 8, 1898, and January 13, 1904, *supra*, the latter being subsequent to the Alaska Copper Company decision.

The reservation is of a roadway for the use of the public, the highway to be "parallel to the shore line as near as may be practicable." While the term "reserved" is employed, it seems apparent that the act contemplates the reservation of but an easement for highway purposes. Therefore, there is no apparent objection to permitting the location of claims to the water's edge, subject to the roadway easement. The locator would then be entitled to the use of the land for the purposes not inconsistent for its use as a highway, and the intent of Congress in its reservation of a roadway is fully effectuated. Further, in many instances, due to the precipitous character of parts of the Alaska shore line, it will be impossible to fix the location of the roadway "parallel to the shore line as near as may be practicable," until its actual use or construction and the reservation of the fee instead of an easement for roadway purposes would, in many instances, result in bisecting claims fronting upon a navigable water.

The decision in the Alaska Copper Company case, as far as it relates to the location of a mill site within 60 feet of the shore line to a navigable water, is modified and will no longer be followed in that respect.

The decision of the Commissioner is accordingly reversed and the mill site will be passed to patent in the absence of other objection.

HERBERT W. COFFIN.

Decided July 25, 1913.

FOREST LIEU SELECTION—UNSURVEYED LANDS—CONFORMATION.

Where a forest lieu selection of unsurveyed lands describes the selected lands as what will be when surveyed certain technical subdivisions of specified sections, and upon survey the lands are given the identical technical descriptions under which they were selected, failure of the selector to respond to a notice to "conform" his selection to the official survey, as required by paragraph 5 of the instructions of July 7, 1902, does not warrant rejection or cancellation of the selection.

FOREST LIEU SELECTION—DEFECTIVE IN PART.

A forest lieu selection should not be rejected or canceled in its entirety because of objection against part only of the several tracts involved, but should be allowed as to the tracts against which no objection exists.

JONES, *First Assistant Secretary*:

John A. Woodson appealed from decision of the Commissioner of the General Land Office of November 6, 1912, rejecting his application for reinstatement of selection 2922, under act of June 4, 1897 (30 Stat., 36), as to tract 1 therein described and for return to him of the evidences of title of unsatisfied base for selection of tracts 2 and 3, Miles City, Montana.

June 16, 1900, the selection was filed for four tracts of unsurveyed land designated by metes and bounds from sandstone monuments, tracts 1 and 2 supposed to be in T. 14 N., R. 45 E., tract 3 in T. 16 N., R. 45 E., and tract 4 "the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 26, in the unsurveyed township 7 N., R. 54 E., M. M." These four tracts of 40 acres each were based on relinquishment to the United States by H. W. Coffin of lots 1, 2, and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 4, T. 29 N., R. 13 W., W. M., in Olympic Forest Reserve, Washington, 144.37 acres.

April 7, 1900 (31 Stat., 1962), after relinquishment of the base to the United States, the President, by proclamation, changed boundary of the reserve so as to exclude the relinquished land. June 11, 1901, the Commissioner of the General Land Office for that reason rejected the selection, which decision was, December 19, 1901, reversed on authority of Mary E. Coffin (31 L. D., 175).

The abstract of title to the relinquished land showed that final receipt issued August 8, 1899, and patent September 7, 1900, to Inger M. Baunsgard, who, as widow, February 13, 1900, deeded to H. W. Coffin, who, with his wife, relinquished to the United States under act of 1897, *supra*, and both deeds were recorded March 5, 1900. The selection was filed June 16, 1900. The revenue law of Washington provided (Ballinger's Code, section 1740; Pierce's Code, section 6878) that the lien of tax attaches March 1 each year to all land on which final certificate is issued, so that tax lien under the State law attached for the year 1900, but was not yet payable. The

selection was approved by the Commissioner July 28, 1903, and waited survey of the selected land. June 13, 1905, the plat of survey of T. 7 N., R. 54 E., was filed in the local office, and March 19, 1909, the Commissioner directed the local office—

to require the selector to file an affidavit for conformation of his selection to the plat of survey as required by the circular of instructions of July 7, 1902 (31 L. D., 372).

The instructions of that date, paragraph 5, provide that—

selections filed prior to October 1, 1900, may embrace unsurveyed lands, but must within 30 days from notice by the local officers of the filing in their office of the township plat of survey, be made to conform to such survey.

March 8, 1908, the Commissioner called upon the selector within sixty days to conform that part of his selection supposed to be in T. 7 N., R. 54 E., to the plat of survey, and on failure to conform the entire selection would be canceled without further notice. November 12, 1912, the local officers reported that notice was served by registered mail on H. B. Wiley, attorney-in-fact for selector, receipted by him April 16, 1908, and no action had been taken. September 7, 1909, the selection was canceled by the Commissioner.

October 21, 1912, John A. Woodson, as transferee of the selector as to tracts 1, 2, and 3, applied for reinstatement as to those tracts 1, 2, and 3, showing he is transferee of the selector, and knew nothing of the rule of March 8, 1908, relating to land in which he had no interest and that he had no information of cancellation of the selection until he applied October 5, 1912, to adjust his part of the selection to lines of survey.

The Commissioner held:

The application to reinstate fails to set forth any reasons for not complying with the requirements above referred to, within the time allowed, and is, therefore, hereby rejected, . . . the application insofar as it requests the return of the papers relative to a portion of the base land is also hereby rejected, . . . because the selection was canceled by reason of default of the selector and there is now no law by which a reselection can be made, tendering the said base land in support thereof.

The necessity of the rule for conformation, instructions of July 7, 1902, *supra*, arises from the fact that until survey it can not be told what subdivisive descriptions will be given to particular tracts of unsurveyed land. This subject was discussed in F. A. Hyde (40 L. D., 284), upon a controversy between the transferee of a selector before survey and a later settler before survey. The selection had been made by expected or hypothetical descriptions by future Government surveys. The Department held:

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. . . . 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.

It thus appears that approval of the plat of survey made the prior hypothetical description definite. The only office that the requirement "to conform" could perform is to permit the selector to show that the land selected and intended to be claimed in the exchange was not that so described hypothetically in anticipation of survey and to apply for a change of description so as to describe the land intended. If the selector fails to claim right to patent for some other tract than that hypothetically described before survey the necessary inference is that he claims the tract by survey described is the same as that intended in the selection.

It follows that default of the selector to file an affidavit "to conform" is merely upon an admission that by coincidence—

the lines of 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. (40 L. D., 238.)

It was, moreover, error to cancel the entire selection for cause applying to only one Government subdivision. Each tract relinquished is a distinct base (paragraph 17, instructions July 7, 1902, 31 L. D., 374). The several subdivision tracts need not be contiguous. So, if there was material default or other defect as to one tract selected, that did not justify cancellation or rejection of the entire selection. *Cronan v. West* (34 L. D., 301; *Aztec Land and Cattle Co.*, 34 L. D., 122). The theory of the act of June 4, 1897, and proper practice thereunder is the exchange of equivalents, area for area, and the fact that there is defect as to one area does not justify refusal to exchange as to another area where no objection exists. The Commissioner, therefore, erred in cancelling the entire selection involving

four tracts because of supposed fault as to one tract had such fault in fact existed.

It is true Woodson is not wholly without fault. Had he filed notice in the selection of his claim of succession by transfer to the selector's right as provided by Rule 8½ of Practice, then in force (31 L. D., 529), he would have had notice before cancellation of the selection. Yet while he was neglectful of his own interest no reason exists to inflict an inequitable loss upon him where no adverse right had intervened. So far as the record discloses, no one has sought to acquire interest in the selected land. For all that appears the United States is the sole party in interest and it confessedly has received acre for acre consideration for the selected land at its request by act of June 4, 1897. Then what honest claim has the United States against reinstatement of the selection, and rendering of the agreed consideration? Having, so far as now appears, received full consideration for the selected land, the selection is reinstated.

As to the unsurveyed tracts 1, 2, and 3, while they must be adjusted to legal subdivisions returned by the Government survey before patents can issue therefor, the failure to adjust with respect to tract 4, fully disposed of herein, will not prevent appropriate action upon these selected tracts with due regard to the facts and consideration of possible rights of others in the premises.

Further, should the selection in any particular fail for cause not the fault of the selector, other selection will be permitted to that extent as provided for in the act of March 3, 1905 (33 Stat., 1264).

The decision appealed from is reversed, and the record remanded for further action in accordance with this opinion.

INSTRUCTIONS.

ENLARGED HOMESTEAD—DESIGNATION—DESERT ENTRY.

The fact that lands are embraced in a desert land entry will not preclude their designation under the enlarged homestead act, if in all other respects subject to such designation.

First Assistant Secretary Jones to the Director of the Geological Survey, July 25, 1913.

I have your communication of June 14, 1913, referring to departmental letters of August 16 and August 26, 1911, to you, with reference to designation of lands under the enlarged homestead acts.

In departmental letter of August 16, 1911, it was stated that the Department is desirous that, so far as practicable, lands not subject to entry under the enlarged homestead act shall not be so designated, and in letter of August 26, 1911, it was stated, in effect, that lands em-

braced in State selections with a view to reclamation under the Carey Act should not be designated under the enlarged act.

You state that acting under the spirit of said instructions you have not recommended designation of lands under the enlarged homestead acts where lands are included in existing desert land entries. You ask, however, for explicit instructions with reference to lands embraced in such entries. You point out the danger that, if such designation be made, without first requiring relinquishment of the desert land entry, desert land entries may be made simply for the purpose of segregating and holding lands under such entries until designation under the enlarged acts, and then relinquishing the desert land entries for the purpose of making entry under the enlarged homestead act. You state, on the other hand, that this practice would perhaps result in hardships in certain cases, where desert land entrymen have made entry in good faith expecting to obtain water for the irrigation of the lands, but have later found it impossible to obtain the necessary water for irrigation. You state that the practice has been to first require the desert land entryman to relinquish and that this practice places the entryman's occupation and improvements in jeopardy, inasmuch as the lands may be entered under the enlarged homestead law by another person before the desert land entryman can make homestead entry.

Your communication was referred to the Commissioner of the General Land Office, and he states that both sides of the question are properly set forth in your communication. After considering all phases of the question, he concludes that lands otherwise properly subject to designation under the enlarged homestead acts should not be barred from such designation because of the fact that the land may be embraced in a desert land entry.

After full consideration of the matter, the Department is inclined to the view that the danger of improper segregation of lands by desert land entrymen for the sole purpose of holding them awaiting designation under the enlarged homestead acts, is remote, and therefore this contingency will not be anticipated, but action will be taken upon the assumption of the good faith of such entrymen, unless it be found by experience that such a practice leads to abuse. It is therefore directed that, until further notice, lands will not be considered as barred from designation under the enlarged homestead acts simply because they may be embraced in desert land entries, if the lands be in all other respects subject to such designation.

OPENING OF LANDS IN THE FORT PECK INDIAN RESERVATION.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

I, WOODROW WILSON, President of the United States of America, by virtue of the power and authority vested in me by the act of Congress approved May 30, 1908 (35 Stat., 558), do hereby prescribe, proclaim and make known that all the nonmineral, unallotted, unreserved lands within the Fort Peck Indian Reservation, in the State of Montana, which have been classified under said act of Congress into agricultural lands, grazing lands, and arid lands, which are not designated for irrigation by the Government, shall be disposed of under the general provisions of the homestead and desert land 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 or desert land entry for said lands may, on and after September 1, 1913, and prior to and including September 20, 1913, but not thereafter, present to James W. Witten, Superintendent of the opening, in person, or to some person designated by him, at the cities of either Glasgow, Great Falls, Havre, or Miles City, Montana, 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 or 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 Glasgow, Havre, Great Falls or Miles City, Montana, before some notary public designated by the Superintendent, and not otherwise.

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 23, 1913, at the said City of Glasgow, and continuing thereafter from day to day, Sun-

days 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, 1914, 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 ten days following date of selection to complete entry at the proper local land office. During that period of ten days, he must file his homestead or desert land application at the proper local land office, accompanying the same with one-fifth of the appraised value of the tract selected, and, if a homestead application, the usual filing fees and commissions. 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 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 necessary payments. In that event, the payment must be made within the ten days following the date of selection. Payments can be made only in cash or by certified checks on national and state banks and trust companies, which can be cashed without cost to the Government, 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 or agency desired, but the applicant assumes all responsibility in the matter. He must see that the payments reach the local office within the ten days allowed, and where failure occurs in any instance where the application has been filed in the local land 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 ten

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. The remaining four-fifths of the purchase money may be paid in five equal installments, at the end of one, two, three, four, and five years after the date of entry, unless the entry is sooner commuted, or unless final proof is sooner made, under a desert land entry. If commutation or final desert land 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 under this proclamation shall become subject to settlement and entry prior to 9 o'clock a. m., on June 30, 1914, 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 June 30, 1914, all of the lands opened under this proclamation which have not been entered or filed upon in the manner herein provided will become subject to settlement and entry under the general provisions of the homestead and desert land 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-fifth day of July in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-eighth.

WOODROW WILSON.

[SEAL.]

By the President:

W. J. BRYAN,

Secretary of State.

OPENING OF FORT PECK INDIAN LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., July 25, 1913.

JAMES W. WITTEN,

Superintendent of Opening and Sale of Indian Lands.

SIR: Pursuant to the proclamation of the President, issued July 25, 1913 [42 L. D., 264], for the opening of the classified lands within the Fort Peck 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, 1913, 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," 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 presenting applications 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 1, 1913, and after that date from him at Glasgow, Montana.

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 23, 1913, 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 postoffice address given in their applications for registration, but no notice whatever will be sent to persons to whom numbers are not assigned.

12. *Time and method of making entries or filings and payments.*—All persons to whom numbers are assigned will be notified of the date on which they must appear at the United States land office at Glasgow, Montana, and select and designate the tracts they desire to enter. Their names will be called for that purpose as follows:

Those holding numbers from 1 to 500 at the rate of 100 daily beginning on May 1, 1914; those holding numbers from 501 to 1400 at the rate of 150 daily beginning May 7, 1914; those holding numbers from 1401 to 3200 at the rate of 200 daily beginning May 14, 1914; those holding numbers from 3201 to 6000 at the rate of 400 daily beginning May 25, 1914; and those holding numbers above 6000 at the rate of 550 daily beginning June 3, 1914; but no numbers will be called on Sundays or legal holidays. When a person's name is called, he must at once select the tract he desires to enter and will be allowed ten days following date of selection to complete entry at the proper local land office. During that period of ten days, he must file his homestead or desert land application at the proper local land office, accompanying the same with one-fifth of the appraised value of the tract selected, and, if a homestead application, the usual filing fees and commissions. 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 application for the tract selected within the proper land district and file same in the local land office, where it will be held awaiting the necessary payments. In that event, the payment must be made within the ten days following date of selection. Payments will be accepted only in cash, or by certified checks on national and state banks and trust companies, which can be cashed without cost to the Government, 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 or agency desired, but the applicant assumes all responsibility in the matter. He must see that the payments reach the local office within the ten days allowed, and where failure occurs in any instance where the application has been filed in the local land 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 the opening, the same course may be pursued, except that the filing fees must be paid within the ten 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 commission and purchase money as is required of other entrymen. The remaining four-fifths of the purchase money may be paid in five equal installments, at the end of one, two, three, four and five years after the date of entry, unless the entry is sooner commuted, or unless final proof is sooner submitted under a desert land entry. If commutation or final desert land 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 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.

13. 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 of these lands prior to June 30, 1914, but will not thereby exhaust his homestead or desert land rights.

14. 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 ten days.

15. *Proof required at time of filing.*—At the time of appearing to make entry, each applicant must, by affidavit, show his qualifications to make the entry applied for. 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.

16. *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 June 30, 1914, 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.

17. *Proceedings on contests and applications.*—Applications filed prior to June 30, 1914, to contest entries allowed for these lands, will 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, and this regulation will supersede, during the period between May 1, and June 30, 1914, all existing rules of practice or regulations relative to contests, in so far as they affect entries of these lands. The procedure relative to the presentation, amendment, allowance and rejection of applications to file soldiers' declaratory statements and applications to enter these lands, will be controlled by existing regulations and rules of practice.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved, July 25, 1913.

A. A. JONES,

First Assistant Secretary.

ACT OPENING FORT PECK LANDS.

AN ACT For the survey and allotment of lands now embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and the sale and disposal of all the surplus lands after allotment.

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 to be surveyed all the lands embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and to cause an examination of the lands within such reservation to be made by the Reclamation Service and by experts of the Geological Survey, and if there be found any lands which it may be deemed practicable to bring under an irrigation project, or any lands bearing lignite coal, the Secretary of the Interior is hereby authorized to construct such irrigation projects and reserve such lands as may be irrigable therefrom, or necessary for irrigation works, and also coal lands as may be necessary to the construction and maintenance of any such projects.

SEC. 2. That as soon as all the lands embraced within the said Fort Peck Indian Reservation shall have been surveyed the Commissioner of Indian Affairs shall cause allotments of the same to be made under the provisions of the allotment laws of the United States to all Indians belonging and having tribal rights on said reservation; and there shall be allotted to each such Indian three hundred and twenty acres of grazing land, and there shall also be made an additional allotment of not less than two and one-half acres nor more than twenty acres of timber land to heads of families and single adult members of the tribe over eighteen years of age: *Provided,* That should it be determined as feasible, after examination, to irrigate any of said lands, the irrigable land shall be allotted in equal proportions to such only of the members of said tribe as shall be living at the day of the beginning of the work

of allotment on said reservation by the special allotting agent, and such allotment of irrigable land shall be in addition to the allotments of grazing and timber lands aforesaid, but no member shall receive more than forty acres of such irrigable land; and to pay the costs of examination provided for herein and for the construction of irrigation systems to irrigate lands which may be found susceptible of irrigation, there is hereby appropriated two hundred thousand dollars to be immediately available, the said sum and any and all additional sums hereafter appropriated to pay the cost of such examination and irrigation systems to be reimbursed from proceeds of sales of lands within the said reservation: *Provided, however,* That any land irrigable by any system constructed under the provisions of this Act may be disposed of subject to the following conditions: The entryman or owner shall, in addition to the payments required by section eight of this Act, be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, with a view to the return of all moneys expended thereon, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

The entryman of lands to be irrigated by said system 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 the charges apportioned against such tract, nor shall any such lands be subject to mineral entry or location. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each.

A failure to make any two payments when due shall render the entry and water-right application subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys paid thereon. The funds arising hereunder shall be paid into the Treasury of the United States and be added to the proceeds derived from the sale of the lands. No right to the use of water for lands in private ownership shall be sold to any landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighborhood of such land, and no such right shall permanently attach until all payments therefor are made.

All applicants for water rights under the systems constructed in pursuance of this Act shall be required to pay such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the water-right application and the entry subject to cancellation, with the forfeiture of all rights under this Act as well as of any moneys already paid thereon.

The Secretary of the Interior is hereby authorized to fix the time for the beginning of such payments and to provide such rules and regulations in regard thereto as he may deem proper. Upon the cancellation of any entry or water-right application, as herein provided, such lands or water rights may be disposed of under the terms of this Act and at such price and on such conditions as the Secretary of the Interior may determine, but not less nor more than the cost as originally fixed.

In every case in which a forfeiture is enforced and the land and rights of an entryman are made the subject of resale then, after the payment of the balance due from the entryman and the cost and charges, if any attendant on the forfeiture and resale, any surplus remaining out of the proceeds of such sale shall be refunded to said entryman or his heirs.

The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such land without cost to the Indians for the construction of such irrigation systems. The purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of operation and maintenance of the irrigation system under which they lie; and the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share of any moneys subject to distribution to pay any charge assessed against land held in trust for him for operation and maintenance of the irrigation system.

When the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system, and subject to charges for construction thereof, 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.

All appropriations of the waters of the reservation shall be made under the provisions of the laws of the State of Montana.

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 are maintained thereon for the benefit of said Indians: *Provided, however,* 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 proper 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 herein provided for) as have been heretofore set apart to such organization for mission or school purposes: *And provided further,* That the Secretary of the Interior is hereby authorized and directed to reserve two and seven hundredths acres of land in the town of Poplar, on said reservation, now occupied for public school purposes, and issue patent in fee for the same to the school trustees of the school district in which said land is situated.

The Secretary of the Interior is hereby authorized and directed, when the said lands are surveyed, to issue to the Great Northern Railway Company a patent or patents conveying for railroad purposes such lands at such point or points as in the judgment of the said Secretary are necessary for the use of said railway company in the construction and maintenance of water reservoirs, dam sites, and for right of way for water pipe lines for use by said railway company in operating its line of railroad over and across said reservation; the said lands so to be conveyed not to exceed forty acres at any one point and not to exceed one tract for each ten miles of the main line of said railway as now constructed within said reservation, and said lands shall be selected in such manner as not to unnecessarily injure or interfere with the selection and location of town sites, hereinafter provided for; the said patent or patents to be delivered to said company upon payment by said company, within thirty days after notification of the issuance of patent, of the reasonable value of said lands, not less than two dollars and fifty cents per acre, and also upon payment by said company to said Secretary of any and all damages sustained by individual members of said tribe by reason of the appropriation of said lands for the purposes aforesaid; all moneys so paid for the value of said lands to be deposited in the Treasury of the United States to the credit of said Indians, and the moneys received by said Secretary

as damages sustained by individual members of said tribe shall be by him paid to the individuals sustaining said damages.

SEC. 4. That upon the completion of said allotments the President of the United States shall appoint a commission consisting of three persons to inspect, 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, said commission to be constituted as follows: One of said commissioners shall be a person holding tribal relations with said Indians, one a representative of the Indian Bureau, and one a resident citizen of the State of Montana.

SEC. 5. That within thirty days after their appointment said commissioners shall meet at some point within the Fort Peck Reservation and organize by election of one of their number as chairman. Said commission is hereby empowered to select, subject to the approval of the Secretary of the Interior, such clerks and assistants as may be necessary in the performance of their duties herein specified, the compensation of each such clerk and assistant to be fixed by said Secretary. In no case shall any such clerk or assistant receive a salary exceeding six dollars per day. In addition to the compensation of said clerks and assistants and in addition to the salaries hereinafter provided for the said commissioners, they shall each receive their actual necessary expenses incurred during such time only as they shall be engaged in the performance of their respective duties on said reservation.

SEC. 6. That said commissioners shall then proceed to personally inspect and classify and appraise by the smallest legal subdivisions of forty acres each all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land; second, grazing land; third, arid land; fourth, mineral land, the mineral land not to 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, such inspection and classification to be completed within nine months from the date of the organization of said commission.

SEC. 7. That when said commission shall have completed the classification and appraisement of said lands and the same shall have been approved by the Secretary of the Interior the lands shall be disposed of under the general provisions of the homestead, desert-land, mineral, and town-site laws of the United States, except sections sixteen and thirty-six of each township, or any part thereof, for which the State of Montana has not heretofore received indemnity lands under existing laws, which sections, or parts thereof, are hereby granted to the State of Montana for school purposes. And in case either of said sections, or parts thereof, is lost to the State by reason of allotment thereof to any Indian or Indians, or by reservation or withdrawal under the provisions of this Act or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral lands within said reservation, not exceeding two sections in any one township, which selections must be made within the sixty days immediately prior to the date fixed by the President's proclamation opening the surplus lands to settlement: *Provided*, 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 one dollar and twenty-five cents per acre.

SEC. 8. That the lands so classified and appraised as provided shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and 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 until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and Spanish wars and the 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, but no entry shall be allowed under section twenty-three hundred and six of the Revised Statutes: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by said commission, which in no case shall be less than one dollar and twenty-five cents per acre for agricultural, grazing, and arid land, and shall be paid as follows: Upon all lands entered or filed upon under the provisions of the homestead law, there shall be paid one-fifth of the appraised value of the land when entry or filing is made, and the remainder shall be paid in five equal annual installments in one, two, three, four, and five years, respectively, from and after date of entry or filing, and when an entryman shall have complied with all the requirements of the homestead law and shall have submitted final proof within seven years from date of entry and shall have made all required payments aforesaid, he shall be entitled to a patent for the lands entered: *Provided*, That aliens who have declared their intentions to become citizens of the United States may become such entrymen, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof: *And provided further*, That the fees and commissions at the time of commutation or final entry shall be the same as are now provided by law where the price of land is one dollar and twenty-five cents per acre: *Provided*, That nothing in this Act shall prevent a citizen of the United States from commuting his homestead entry under the provisions of section two thousand three hundred and one of the Revised Statutes by paying for the land entered the price fixed by said commission, receiving credits for payments previously made.

SEC. 9. That entrymen under the desert-land law shall be required to pay one-fifth of the appraised value of the land in cash at the time of entry, and the remainder in five equal annual installments, as provided in homestead entries; but any such entryman shall be required to pay the full appraised value of the land on or before submission of final proof: *Provided*, That if any person taking any oath required by the homestead or desert-land laws or the regulations thereunder, 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 land and all right and title to the same, and if any person making homestead or desert-land entry shall fail to comply with the law and the regulations under which his entry is made, or shall fail to make final proof within the time prescribed by law, or shall fail to make all payments or any of them required herein, he shall forfeit all money which he may have paid on the land and all right and title to the same, and the entry shall be canceled.

SEC. 10. That if, after the approval of the classification and appraisement, as provided herein, there shall be found lands within the limits of the reservation deemed practicable for irrigation projects deemed practicable under the provisions of the Act of Congress approved June seventeenth, nineteen hundred and two, known as the reclamation Act, said lands shall be subject to withdrawal and be disposed of under the provisions of said Act, and settlers shall pay, in addition to the cost of construction and maintenance provided therein, the appraised value as provided in this Act, to the proper officers, to be covered into the Treasury of the United States to the credit of the Indians.

Sec. 11. That all lands hereby opened to settlement remaining undisposed of at the end of five years from the date of President's proclamation to entry shall be sold to the highest bidder for cash at not less than one dollar and twenty-five cents per acre, under regulations to be prescribed by the Secretary of the Interior; and any lands remaining unsold ten years after said lands shall have been opened to entry shall be sold to the highest bidder for cash, without regard to the minimum limit above stated: *Provided*, That not more than six hundred and forty acres shall be sold to any one person or company.

Sec. 12. That the lands within said reservation however classified, shall, on and after sixty days from the date fixed by the President's proclamation opening said lands, be subject to exploration, location, and purchase under the general provisions of the United States mineral and coal land laws at not less than the price therein fixed and not less than the appraised value of the land, except that no mineral or coal exploration, location, or purchase shall be permitted upon any lands allotted to Indians or withdrawn under the provisions of this Act.

Sec. 13. That nothing in this Act contained shall in any manner bind the United States to purchase any part of the land herein described, except sections sixteen and thirty-six, or the equivalent in each township, that may be granted to the State of Montana, the reserved tracts hereinbefore mentioned for agency and school purposes, or to dispose of lands except as provided herein, or to guarantee to find purchasers for said lands, or any part 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.

Sec. 14. That the Secretary of the Interior is hereby authorized and directed to reserve and set aside for town-site purposes, and to survey, lay out, and plat into town lots, streets, alleys, and parks, not less than forty acres of said land at the present settlement of Poplar, and at such other places as the Secretary of the Interior may deem necessary or convenient for town sites, in such manner as will best subserve the present needs and the reasonable prospective growth of said settlement. That such town sites shall be surveyed, appraised, and disposed of as provided in section twenty-three hundred and eighty-one of the United States Revised Statutes: *Provided*, That any person who, at the date when the appraisers commence their work upon the land, shall be an actual resident upon any one such lot and the owner of substantial and permanent improvements thereon, and who shall maintain his or her residence and improvements on such lot to the date of his or her application to enter, shall be entitled to enter, at any time prior to the day fixed for the public sale and at the appraised value thereof, such lot and any four additional lots of which he or she may also be in possession and upon which he or she may have substantial and permanent improvements: *Provided further*, That before making entry of any such lot or lots the applicant shall make proof, to the satisfaction of the register and receiver of the land district in which the land lies, of such residence, possession, and ownership of improvements, under such regulations as to time, notice, manner, and character of proofs as may be prescribed by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior: *Provided further*, That in making their appraisal of the lots so surveyed, it shall be the duty of the appraisers to ascertain the names of the residents upon and occupants of any such lots, the character and extent of the improvements thereon, and the name of the reputed owner thereof, and to report their findings in connection with their report of appraisal, which report of findings shall be taken as prima facie evidence of the facts therein set out. All such lots not so entered prior to the

day fixed for the public sale shall be offered at public outcry, in their regular order, with the other unimproved and unoccupied lots. That no lot shall be sold for less than ten dollars: *And provided further*, That said lots, when surveyed, shall approximate fifty by one hundred and fifty feet in size.

SEC. 15. That after deducting the expenses of the commission of classification, appraisal, and sale of the lands, and such other incidental expenses as may necessarily be incurred, including the cost of survey of said lands, the balance realized from the proceeds of the sale of the lands in conformity with the provisions of this Act shall be paid into the Treasury of the United States and placed to the credit of said Indian tribe, to draw four per centum per annum, the principal and interest to be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in their education and civilization, the construction and maintenance of irrigation ditches, should such be determined as feasible and beneficial to said allottees, and suitable per capita cash payments. The remainder of all funds deposited in the Treasury, realized from such sale of lands herein authorized, together with the remainder of all other funds now placed to the credit of or that shall hereafter become due to said tribe of Indians, shall, within three years after the completion of the irrigation systems to be constructed under the provisions of section two hereof, be allotted in severalty to the members of the tribe, the persons entitled to share as members in such distribution to be determined by the Secretary of the Interior.

SEC. 16. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated in addition to the amount appropriated in section two, 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 Montana, and for lands reserved for agency and school purposes, at the rate of one dollar and twenty-five cents per acre; also the sum of one hundred thousand dollars, or so much thereof as may be necessary, to be immediately available, to enable the Secretary of the Interior to survey, allot, classify, and appraise the lands in said reservation as provided herein; and also to defray the expense of the appraisal and survey of town sites, the latter sums to be reimbursable out of the funds arising from the sales of said lands.

Approved, May 30, 1908 (35 Stat., 558).

OPENING OF EXCLUDED NEBRASKA NATIONAL FOREST LANDS.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas the President on March first, nineteen hundred and thirteen, made and issued a Proclamation providing that certain lands indicated upon a diagram thereto attached and forming a part thereof shall be excluded from the Nebraska National Forest within the State of Nebraska, to take effect October first, nineteen hundred and thirteen; and

Whereas it appears that the public good will be promoted by revoking said Proclamation and excluding the lands thereby affected in a manner authorized by the act approved September thirtieth, nineteen hundred and thirteen;

Now, therefore, I, Woodrow Wilson, President of the United States of America, do proclaim and make known that the said Proclamation of March first, nineteen hundred and thirteen, is hereby revoked and annulled and declared to be of no effect, and that in virtue of the authority in me vested by the act of Congress approved June fourth, eighteen hundred and ninety-seven, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," the areas indicated as eliminations on the diagram attached to and forming a part of said Proclamation of March first, nineteen hundred and thirteen, shall be excluded from the Nebraska National Forest to take effect October first, nineteen hundred and thirteen;

And I do further proclaim and make known that in my judgment it is proper and necessary in the interest of equal opportunity and good administration that for the period of ninety days from and including October first, nineteen hundred and thirteen, the public lands not otherwise withdrawn or reserved, and to which there is now no valid, subsisting right, to be excluded from the Nebraska National Forest by this Proclamation, shall, during such period and in the manner hereinafter provided, be disposed of to actual settlers only under the provisions of the homestead laws as amended by the act of April twenty-eighth, nineteen hundred and four (33 Stat., 547), and acts amendatory thereof, and pursuant to the authority conferred on me by the aforesaid act of September thirtieth, nineteen hundred and thirteen, I do hereby direct and provide that such lands shall, from and including October first, nineteen hundred and thirteen, and until and including December twenty-ninth, nineteen hundred and thirteen, be entered, settled upon and occupied in the following manner and not otherwise:

1. All persons qualified to make homestead entry for said lands under said act of April twenty-eighth, nineteen hundred and four, and acts amendatory thereof, may, on and after October thirteenth, nineteen hundred and thirteen, and prior to and including October twenty-fifth, nineteen hundred and thirteen, but not thereafter, present to James W. Witten, Superintendent of the Opening, in person or to someone designated by him, at any of the cities of North Platte, Broken Bow or Valentine, Nebraska, sealed envelopes containing their applications for registration to enter the lands in the former Fort Niobrara Military Reservation in Nebraska, and all such applications shall be treated as and shall have the effect of applications to enter the lands hereby excluded from the Nebraska National Forest, and all persons who apply to enter lands within the former Fort Niobrara Military Reservation, and who comply with the rules and regulations that have heretofore been adopted, or may hereafter be

prescribed, by the Secretary of the Interior for the disposition of the said lands in the former Fort Niobrara Military Reservation, and who draw numbers entitling them to make entry of the said lands in the former Fort Niobrara Military Reservation, may elect to enter the lands to be excluded October first, nineteen hundred and thirteen, from the Nebraska National Forest, and they shall, if properly qualified, be entitled to enter such lands in the order in which their applications to enter the lands within the former Fort Niobrara Military Reservation shall have been drawn and numbered: Provided, That no such person shall be required to make entry of the lands to be excluded from the Nebraska National Forest, but all those who do so elect and enter such lands under such drawing shall waive their rights to thereafter enter under such drawing the lands in the former Fort Niobrara Military Reservation, the purpose being to extend the privilege of entry gained by the drawing to either the former Fort Niobrara Military Reservation or the Nebraska National Forest exclusion, but to limit the right under the drawing to one right of entry: And Provided Further, That no formal notice of election to enter the Nebraska National Forest lands shall be required and no waiver of right to enter the lands within the former Fort Niobrara Military Reservation be exacted, the entry of one effecting a waiver of right to enter the other under the drawing.

2. No envelope shall contain more than one application for registration or any paper other 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, and no person can present more than one application in his own behalf and one as the agent for a soldier or sailor, or for the widow or minor orphan children of a soldier or sailor, as hereinafter provided.

3. Each application for registration must be on a blank form prescribed by the Superintendent and show the applicant's name, post office address, age, height and weight, and be sworn to by him at North Platte, Broken Bow or Valentine, Nebraska, before some notary public designated by the Superintendent and not otherwise.

4. 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.

5. Beginning at ten o'clock, a. m., on October twenty-eight, nineteen hundred and thirteen, at the said city of North Platte, Nebraska, 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.

6. 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, informing him of the place and date he must appear to make his selection in the event he elects to enter the land restored by this Proclamation, and advising him that if he prefers to enter the lands within the former Fort Niobrara Military Reservation and fails to appear at the time and place designated to make his selection for the lands to be excluded by this Proclamation from the Nebraska National Forest, a further notice will be given him of his right to enter the lands within the former Fort Niobrara Military Reservation on or after April first, nineteen hundred and fourteen.

7. Beginning at nine o'clock, a. m., on November seventeenth, nineteen hundred and thirteen, at the place to be fixed by the Secretary of the Interior and continuing thereafter until all the numbers drawn are called as hereinafter provided for, persons holding numbers assigned to them under the drawing for the lands in the former Fort Niobrara Military Reservation, which shall constitute their right to make entries for the lands to be excluded October first, nineteen hundred and thirteen, by this Proclamation from the Nebraska National Forest, will be permitted to designate, in the following manner, the tracts desired:

When a person's name is called he must at once select the tract he desires to enter and will be allowed ten days following date of selection to complete entry at the proper local land office. All entries made under this drawing must, as far as possible, embrace only lands listed as one tract and no applicant will be permitted to omit any unentered part of a listed tract from his application for the purpose of including therein a part of another or different listed tract. An applicant may, if he desires to enter less than six hundred and forty acres, apply for any legal subdivision or subdivisions, compact in form, of a listed tract. Where entries have been made for portions of

listed tracts the fractions remaining may be embraced in a single entry, if it conforms to the requirement of the act of April twenty-eighth, nineteen hundred and four. During the said period of ten days the applicant must file his homestead application at the proper local land office, accompanying the same with the proper filing fees and commissions. In case of declaratory statements allowable under this Proclamation the filing fees must be paid within the ten 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 payment of fees and commissions as is required of other entrymen. 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.

8. 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 the drawing fixing the order of entry under this Proclamation.

9. Persons having valid, subsisting rights to enter any portion of the lands in that part of the Nebraska National Forest to be excluded October first, nineteen hundred and thirteen under this Proclamation, and those who have preferential rights to make additional entries within such areas under the provisions of the second section of the act of April twenty-eighth, nineteen hundred and four (33 Stat., 547), may file their applications on or after October first, nineteen hundred and thirteen, and should make such applications as promptly after such date as they can conveniently do so. Such applications will be received by the Register and Receiver of the proper local land office and at once forwarded to the Commissioner of the General Land Office with their recommendations. Proper notation shall be made on the records of the local land offices of the receipt of such applications, but no such application shall be placed of record except upon the order of the Commissioner of the General Land Office. An application to enter by one claiming the right under the drawing provided for in this Proclamation including land previously applied for but prior to the disposition of such prior application will be suspended and the applicant notified of the conflict and that he may, within ten days, enter another and different tract.

10. None of the lands opened under this Proclamation shall become subject to settlement and entry prior to nine o'clock, a. m., on December thirtieth, nineteen hundred and thirteen, 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 nine o'clock, a. m., on December thirtieth, nineteen hundred and thirteen, all of the lands opened under this Proclamation not otherwise withdrawn or reserved and which have not been entered or filed upon in the manner herein provided will become subject to settlement and entry under the provisions of the land laws applicable thereto.

11. The Secretary of the Interior shall make and prescribe such rules and regulations as may be necessary and proper to carry this Proclamation 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 thirtieth day of
 [SEAL.] September, in the year of our Lord one thousand nine
 hundred and thirteen, and of the Independence of the
 United States the one hundred and thirty-eighth.

WOODROW WILSON.

By the President:

W. J. BRYAN,
Secretary of State.

OPENING OF LANDS IN FORMER FORT NIobrARA MILITARY RESERVATION.

REGULATIONS.

Regulations of July 25, 1913, as amended October 4, 1913, in conformity with the President's proclamation of September 30, 1913.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., October 4, 1913.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Pursuant to the act of Congress approved January 27, 1913 (37 Stat., 651), and under the provisions of the proclamation of the President dated September 30, 1913 (42 L. D., 277), excluding certain lands from the Nebraska National Forest, Nebraska, on October 1, 1913, it is hereby directed that the lands mentioned in said act which are not reserved or otherwise disposed of be opened to entry and settlement and be entered and settled upon in the following manner and not otherwise:

1. All persons qualified to make entry under the general provisions of the homestead laws or the act of April 28, 1904 (33 Stat., 547), as amended, may, on and after October 13, 1913, and prior to and including October 25, 1913, but not thereafter, present to James W. Witten, superintendent of the opening, in person, or to some per-

son designated by him, at Broken Bow, North Platte, or Valentine, Nebraska, 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 or sailor or for the widow or minor orphan child of a soldier or sailor.

2. Each application for registration must be on a blank form prescribed by the superintendent, and show the applicant's name, post-office address, age, height, and weight, and be sworn to by him at Broken Bow, North Platte, or Valentine, Nebraska, before some notary public designated by the superintendent for that purpose.

3. No notary public shall be designated for the purpose of administering oaths to applicants for registration who was not appointed prior to August 1, 1913, 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.

4. Envelopes used in presenting applications for registration should be $3\frac{1}{2}$ inches wide and 6 inches long, and they must all be plainly addressed to "James W. Witten, superintendent, and the words "Registration Application" must be plainly written or printed across the front and at the left end of the envelope.

5. Blank forms of application for registration and addressed envelopes to be used in presenting applications 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 October 10, 1913, and after that date from him at North Platte, Nebraska.

6. 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.

7. *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" indorsed 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.

8. Persons who were honorably discharged after 90 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.

9. Beginning at 10 o'clock a. m. on October 28, 1913, at the city of North Platte, and continuing thereafter from day to day, Sundays excepted, the cans containing the applications will be publicly opened, and after the envelopes therein have been thoroughly mixed and distributed 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 these regulations; 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 No. 1, and the number 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.

10. 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.

11. Numbers will be assigned to a sufficient number of persons to induce the entry of all the lands subject to entry under these regulations as amended. 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 these regulations, he will be denied the right to make entry under any number assigned him.

12. When an application for registration has been selected and numbered the name and address of the applicant and the number assigned him will be publicly announced, and the application will be filed in the order in which it was numbered.

13. 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.

14. 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.

15. *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:

Beginning April 1, 1914, and continuing thereafter until all the numbers assigned under the drawing provided for herein are called, persons holding numbers entitling them to make entry or filing must appear on the date and at the place prescribed in the notice that will be given them on or about March 1, 1914. All entries made under the provisions of the act approved April 28, 1904 (33 Stat., 547), and acts amendatory, must, as far as possible, embrace only lands listed as one tract, and no applicant will be permitted to omit any unentered part of a listed tract from his application for the purpose of including therein a part of another or different listed tract. An applicant may, if he desires to enter less than 640 acres, apply for any legal subdivision or subdivisions, compact in form, of a listed tract. Where entries have been made for portions of listed tracts, the fractions remaining may be embraced in a single entry, if it conforms to the requirement of the act of April 28, 1904. When a person's name is called he must at once select the tract he desires to enter and will be allowed 10 days following date of selection to complete entry at the proper local land office. During that period of 10 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-third of the appraised value of the tract selected, if the tract selected has been appraised. 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 necessary payments. In that event the payment must be made within the 10 days following date of selection. Payments can be made only in cash or by certified check on National and State banks

and trust companies which can be cashed without cost to the Government, 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 or agency desired, but the applicant assumes all responsibility in the matter. He must see that the payments reach the local office within the 10 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 10 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, which have been appraised, must pay the remaining two-thirds of the purchase money in two equal installments. These payments will become due at the end of two and three years after the date of entry. Entries of these lands will not be subject to commutation. 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 as one tract, where the lands have been appraised, 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.

16. 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 June 1, 1914, but will not thereby exhaust his homestead rights. All of said lands which are not

entered under these regulations prior to June 1, 1914, will on that date become subject to entry under the said act of Congress by any qualified person.

17. 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 10 days.

18. *Proof required at time of filing.*—At the time of appearing to make entry each applicant must by affidavit show his qualifications to make the entry applied for. 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 21 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.

19. *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 June 1, 1914, 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.

20. *Proceedings on contests and applications.*—Applications filed prior to June 30, 1914, to contest entries allowed for these lands will 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; and this regulation will supersede during the period between April 1 and June 30, 1914, all existing rules of practice or regulations relative to contests, in so far as they affect entries of these lands. The procedure relative to the presentation, amendment, allowance, and rejection of applications to file soldiers' declaratory statements and applications to enter these lands will be controlled by existing regulations and rules of practice.

21. All applications to enter lands in the former Fort Niobrara Military Reservation will be treated as and have the effect of applications to enter the lands excluded October 1, 1913, from the Nebraska National Forest, and all persons drawing numbers entitling them to enter lands in said former military reservation shall have the privilege of electing to enter either the former Fort Niobrara

lands or the lands excluded from the Nebraska National Forest, and if properly qualified shall be entitled to enter such lands under regulations to be hereafter prescribed therefor in the order in which their applications to enter lands in the former Fort Niobrara Military Reservation shall have been drawn and numbered. Those drawing numbers entitling them to enter the former Fort Niobrara lands will be informed of the time and place at which they must appear to make their selections in case they elect to enter the lands excluded from the Nebraska National Forest. No such person is required to make entry of the lands excluded from the Nebraska National Forest, but all those who do so elect and enter such lands will thereby waive their rights to enter lands in the former Fort Niobrara Military Reservation. No formal notice of election to enter the Nebraska National Forest lands shall be required and no waiver of right to enter the lands within the former Fort Niobrara Military Reservation shall be exacted, the entry of one effecting a waiver of right to enter the other under the drawing. Persons who do not enter under the numbers assigned them the lands excluded from the Nebraska National Forest will be notified in the manner provided in Sec. 15 of their right to enter the lands within the former Fort Niobrara Military Reservation.

Respectfully,

ANDRIEUS A. JONES,
Acting Secretary.

DISPOSITION OF LANDS EXCLUDED FROM NEBRASKA NATIONAL FOREST BY PROCLAMATION OF SEPTEMBER 30, 1913.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, October 4, 1913.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: In conformity with the proclamation of the President made and issued September 30, 1913 [42 L. D., 277], under the authority of the act of Congress approved September 30, 1913, it is hereby directed that the public lands not otherwise withdrawn or reserved, and to which on September 30, 1913, there was no valid, subsisting right, excluded October 1, 1913, from the Nebraska National Forest, Nebraska, by the aforesaid proclamation of the President, shall, from and including October 1, 1913, and until and including December 29, 1913, be entered, settled upon, and occupied by actual settlers only under the provisions of the homestead laws, as amended by the act of April 28, 1904 (33 Stat., 547), and acts amendatory, in the following manner, and not otherwise:

1. Beginning at 9 o'clock a. m. on November 17, 1913, at the place to be hereafter fixed by the Secretary of the Interior, and con-

tinuing thereafter until all the numbers assigned to applicants under the drawing for the lands in the former Fort Niobrara Military Reservation, in Nebraska, are called, persons holding numbers entitling them to enter under such drawing, which shall constitute their right to make entries for the lands excluded October 1, 1913, from the Nebraska National Forest, and who are qualified to make homestead entry for said lands under the act approved April 28, 1904 (33 Stat., 547), and acts amendatory, will be permitted to designate in the following manner the tracts desired in the area so excluded from the Nebraska National Forest:

When a person's name is called he must at once select the tract he desires to enter and will be allowed 10 days following the date of selection to complete entry at the proper local land office. All entries made under this drawing must, as far as possible, embrace only lands listed as one tract and no applicant will be permitted to omit any unentered part of a listed tract from his application for the purpose of including therein a part of another or different listed tract. An applicant may, if he desires to enter less than 640 acres, apply for any legal subdivision or subdivisions, compact in form, of a listed tract. Where entries have been made for portions of listed tracts, the fractions remaining may be embraced in a single entry, if it conforms to the requirement of the act of April 28, 1904, and acts amendatory. During the said period of 10 days the applicant must file his homestead application at the proper local land office, accompanying the same with the proper filing fees and commissions. In case of declaratory statements allowable under these regulations, the filing fees must be paid within the 10 days following the 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 payment of fees and commissions as is required of other entrymen. No person can select more than one tract or file more than one declaratory statement in his own behalf.

2. 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 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 the drawing fixing the order of entry under these regulations.

3. 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. Any person failing to make his selection on the date assigned will be deemed to have abandoned his right to make entry for the lands excluded from the Nebraska National Forest prior to December 30, 1913, but will not by such failure lose his right to thereafter enter the lands within the former Fort Niobrara Military Reservation or otherwise exhaust his homestead rights.

4. 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 10 days.

5. *Proof required at the time of filing.*—At the time of appearing to make entry each applicant must, by affidavit, show his qualifications to make the entry applied for. 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 properly certified copies of their declarations of intention to become citizens, or the original or properly certified copies of the order of 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 21 years of age, they must furnish a properly certified copy of the order of the court admitting their fathers to full citizenship and the evidence of their minority at that time.

6. 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 December 30, 1913, but evidence of the nonmineral and nonsaline character of the land entered before that date must be furnished by the entrymen before their final proofs are accepted.

7. *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 soldiers' declaratory statements or to make homestead entries of these lands must, on presentation in accordance with these regulations, be at once accepted, rejected, or suspended, 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 will be suspended and held subject to the disposition of the prior application.

(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 recommendations, when the matter will be promptly decided and closed.

(e) Applications filed prior to December 30, 1913, to contest entries allowed for these lands will also 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 proper recommendations, when the matter will be promptly decided.

(f) These regulations will supersede during the period between October 1, 1913, and December 29, 1913, both dates inclusive, 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.

8. Persons having valid, subsisting rights to enter any portion of the land excluded October 1, 1913, from the Nebraska National Forest and those who have preferential rights to make additional entries within such areas under the provisions of the second section of the act of April 28, 1904, may file their applications on or before December 29, 1913, and all such parties are requested to promptly file their applications. Such applications will be received by the register and receiver of the proper local land office and at once forwarded to the Commissioner of the General Land Office with their recommendations. Proper notation shall be made on the records of the local land office of the receipt of such applications, but no such application shall be placed of record except upon the order of the Commissioner of the General Land Office. An application to enter by one claiming the right under the drawing provided for in these regulations, including the land previously applied for, but prior to the disposition of such prior application, will be suspended and the appli-

cant notified of the conflict and that he may, within one day, appeal from such adverse action, or within ten days enter another and different tract. None of the lands opened under these regulations shall become subject to settlement and entry prior to 9 o'clock a. m., on December 30, 1913, 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 under these regulations. At 9 o'clock a. m., on December 30, 1913, all of the lands excluded from the Nebraska National Forest on October 1, 1913, not otherwise withdrawn or reserved, and which have not been entered or filed upon in the manner herein provided, will become subject to settlement and entry under the provisions of the land laws applicable thereto.

9. The regulations of July 25, 1913, as this day amended, for the opening of the lands within the former Fort Niobrara Military Reservation, in so far as they are applicable, are adopted and made a part hereof.

Respectfully,

ANDRIEUS A. JONES,
Acting Secretary.

ROSEBUD INDIAN LANDS—TRIPP COUNTY, S. D.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, July 25, 1913.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: It is directed that all that part of the Rosebud Indian Reservation in Tripp County, South Dakota, opened to settlement and entry by the act of March 2, 1907 (34 Stat., 1230), which had not been disposed of on April 1, 1913, will be offered for sale at public auction at not less than \$2.50 per acre, for cash, at the town of Gregory, in the State of South Dakota, under the supervision of James W. Witten, Superintendent of the Opening and Sale of Indian Lands, beginning on October 8, 1913, and continuing thereafter from day to day, Sundays excepted, so long as may be necessary to the offering of all of said lands.

2. *Area in which lands will be offered.* All contiguous quarter-quarter sections or fractional lots situated in the same technical quarter-section or otherwise conveniently situated will be listed as one tract and offered for sale at the same time.

3. *Qualifications and restrictions.* Purchasers will not be required to show any qualifications as to age, citizenship, or otherwise, and no person will be required to reside upon or improve or cultivate lands sold to him.

4. *Bids by agents, etc.* Bids and payments may be made either through agents or in person, but no bid of less than \$2.50 per acre from the first bidder on any tract, or of less than \$0.10 an acre more than the last highest bid, after the first bid has been made, will be considered or accepted; and no bids can be made through the mails or at any time or place other than the time and place at which said tracts are offered for sale.

5. *Payments and forfeitures.* All successful bidders to whom tracts are awarded must, before 4.30 o'clock p. m., on the day succeeding the date on which awards were made to them, Sundays excepted, pay to the receiver of the United States land office at Gregory, South Dakota, the full amount bid by them for such tracts; and, if any bidder fails to make payment within that time, he will not thereafter be permitted to pay for the tract or to bid on any other tract.

6. *Lands re-offered.* All tracts awarded to persons who fail to make payment therefor, and all tracts which shall not be sold when first offered because the amount bid therefor is deemed too low, will be re-offered for sale after all of said lands have been once offered, or at any other time during the sale which the Superintendent shall think best.

7. *Combinations in restraint of the sale are forbidden* by section 2375 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 lands 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.

8. *Suspension or postponement of sale.* If at any time it becomes evident to the Superintendent of the sale that there is a combination among bidders, or any other cause which effectually suppresses competition, or if for any other cause it shall seem best to the Superintendent to do so, he may suspend such sale temporarily or postpone it indefinitely; and, if in his judgment the highest bid offered for any tract is below its reasonable cash value, the Superintendent may reject all bids then offered and again re-offer the tract for sale as herein provided.

9. *Fees and commissions.* All persons purchasing any of said lands will be required to pay a commission of two per cent on all payments made by them up to and including \$1.25 per acre, but no commissions will be collected on moneys paid in excess of \$1.25 per acre.

10. *Public notice.* The Superintendent will cause notice of the time, terms, and place of sale to be published in a newspaper published in Norfolk and Omaha, Nebraska, Des Moines and Sioux City, Iowa, and Sioux Falls and Winner, South Dakota; and he will at the close of sale for each day conspicuously post the description of the tracts to be offered on the following day.

Very respectfully,

A. A. JONES,
First Assistant Secretary.

STATE OF ARIZONA.

Decided July 26, 1913.

FEES—UNIVERSITY SELECTIONS—STATE OF ARIZONA.

Section 29 of the act of June 20, 1910, contemplates the payment by the State of Arizona of a fee of \$1 to the register and receiver for each final location or selection of 160 acres under its grants for university or other purposes, but does not contemplate the payment by the State of \$1 to each of such officers.

JONES, *First Assistant Secretary:*

The State of Arizona appealed from decision of the Commissioner of the General Land Office of May 9, 1913, requiring it to pay the additional sum of \$40 upon its selection, under grant for university purposes, made by the act of June 20, 1910 (36 Stat., 557), Phoenix, Arizona.

The selections amount to an aggregate of 6,399.9 acres. The State of Arizona paid \$40 fees to the local land office. Section 29 of the act of June 20, 1910, *supra*, referring to lands granted in quantity to the State of Arizona, provided that "the fees to be paid to the register and receiver for each final location or selection of 160 acres made thereunder shall be one dollar." The Commissioner held that "this is construed as one dollar each to the register and receiver or two dollars for each 160 acres."

The appeal contends that:

While it is true that former laws passed by Congress provided that a fee of \$1 *each* to be paid to the register and receiver, the enabling act of June 20, 1910, which specifically fixes a fee of \$1 to the register and receiver, is the only law applicable to our case, and therefore should govern and control it.

A similar ruling was made in *Newhall v. Sanger* (92 U. S., 761). In that case, the law excluded from preemption and sale all lands claimed under any foregoing title or grant. It was contended that such provision meant "lawfully" claimed. The court held "there is no authority to import a word into a statute in order to change its meaning."

So in this case it was within the sole power of Congress to fix the fees of its officers, the register and receiver, for services in the local land office. When Congress provided that a fee of \$1 was to be paid to the register and receiver for each final location or selection of 160 acres, the natural import of the words was that a fee of \$1 was to be paid for each 160 acres and the words "register and receiver" merely indicated the officers to whom such payment was to be made. Had Congress intended that each of these officers should receive a fee of \$1, such intent could have been indicated only by insertion of the word "each", or some equivalent word, which it failed to do but, instead, made a fee of \$1 for each final location or selection of 160 acres. By plain construction of the words, the sum of \$1 was made to apply to each selection or location and not to the officers to whom the \$1 should be paid.

It is true that in former statutes Congress has given a fee to each officer of this amount, but the present statute was a new grant and Congress had full power to fix all the requirements necessary to effect the grant. As Congress fixed the fee of \$1 for each location, it can not be held that such fee can be doubled by construction of the Department in changing location of the word "each" or inserting another "each" to have that effect.

The decision is reversed and, if no other objection appears, the selection will be approved.

DESERT LAND ENTRY—ANNUAL EXPENDITURE—STOCK.

INSTRUCTIONS.

DEPARTMENT OF INTERIOR,

GENERAL LAND OFFICE,

Washington, July 28, 1913.

The SECRETARY OF THE INTERIOR,

SIR: Reference is respectfully made to paragraph 18 of the circular approved September 30, 1910 (39 L. D., 253), wherein it is stated:

No expenditure for stock or interest in an irrigating company, through which water is to be secured for irrigating the land, will be accepted as satisfactory annual expenditure until a special agent, or other authorized officer, has submitted a report as to the resources and reliability of the company, including its actual water right, and such report has been favorably acted upon by the department.

Under the existing practice, this office transmits the reports on irrigation projects to you for consideration, and approval if the facts presented warrant such action.

I have carefully considered this method of procedure and am of the opinion that the practice results in delay and is not justified when viewed from an administrative standpoint.

The conclusions reached by this office are subject to appeal to you, and no hardship would be inflicted on a claimant of public land by changing the existing practice; in fact, definite conclusions could be reached more readily without unnecessary delay.

I have the honor to recommend that this office be authorized to take action on these reports without submitting them to your Department for consideration and approval.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, August 5, 1913:

A. A. JONES,
First Assistant Secretary.

HALLENGREN v. MITCHELL.

Decided July 30, 1913.

CALIFORNIA SELECTIONS—CONFIRMATION—ACT OF JULY 23, 1866.

Section 1 of the act of July 23, 1866, confirming to the State of California lands selected in satisfaction of its grants and disposed of to purchasers in good faith, is by its terms applicable only to lands theretofore selected and sold by the State.

SCHOOL INDEMNITY SELECTIONS—CONFIRMATION—ACT OF MARCH 1, 1877.

The confirmation of indemnity school selections to the State of California by sections 1 and 2 of the act of March 1, 1877, is limited to selections certified to the State prior to the date of the act.

SCHOOL INDEMNITY SELECTION—PURCHASER OF BASE LAND.

Where the State of California made school indemnity selection in lieu of a tract supposed to be lost to its grant by reason of inclusion within the out-boundaries of a Mexican grant, but which upon survey was excluded from such grant, the subsequent erroneous approval of the selection and certification of the land to the State, after sale of the base by the State to a *bona fide* purchaser, in no wise affected the right of such purchaser nor re-vested the United States with title to the base land; and a homestead entry allowed therefor is void, and upon protest by the purchaser from the State will be canceled.

JONES, *First Assistant Secretary:*

James H. Mitchell has appealed from the decision of the Commissioner of the General Land Office of June 1, 1911, rejecting his final proof and holding for cancellation his homestead entry covering the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 16, T. 10 N., R. 11 W., San Francisco land district, California.

Mitchell was permitted to make homestead entry of this land September 6, 1904, on which he offered final proof April 26, 1910, against

the acceptance of which Lottie Hallengren protested and in said protest set up that she was the holder of the legal title to the premises involved under patent given by the State of California.

It appears that the entire NE. $\frac{1}{4}$ of said Sec. 16, was included within the claimed outboundaries of a Mexican grant. Because of this fact the State of California, by what is known as List No. 4, Humboldt series, on June 7, 1861, selected the NE. $\frac{1}{4}$ of Sec. 11, T. 21 N., R. 15 W., in lieu of said NE. $\frac{1}{4}$ of Sec. 16, supposed to be lost to its grant in aid of common schools by reason of such Mexican grant.

T. 10 N., R. 11 W., was surveyed in 1873, when it was shown that said Sec. 16 was without the boundaries of the Mexican grant and thus remained in place to be taken by the State under its school grant, and on March 19, 1873, Moses C. Hendricks applied to the State for the purchase of the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said Sec. 16, which application was approved by the surveyor-general of the State November 24, 1874. Certificate of purchase showing payment of 20 per cent. of the purchase price of said land was issued in the name of the applicant January 17, 1875, and payment in full for said land was made on January 3, 1879, the State patent issuing to Moses C. Hendricks February 6, 1880.

It will thus be seen that notwithstanding its indemnity selection filed June 7, 1861, which yet remained unacted upon in the General Land Office, the State, as early as 1874, contracted with one Hendricks for the sale of the base land on which said selection depended, which base land was shown to be in place as a part of the school grant by the survey of the township in the year 1873. No action was taken upon the pending indemnity school selection of 1861 until January 4, 1878, when the Commissioner of the General Land Office held said selection confirmed by section 1 of the act of July 23, 1866 (14 Stat., 218), and the selected land was thereupon embraced in what is denominated as clear list No. 45, which received the approval of this Department, and the selected land was certified to the State January 10, 1878.

The act of 1866, under which the Commissioner of the General Land Office held the pending indemnity school selection confirmed, provides—

That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith, under her laws, the lands so selected shall be, and hereby are, confirmed to said State. . . . *And provided further*, That the State of California shall not receive under this act a greater quantity of land for school or improvement purposes than she is entitled to by law.

In the report of the surveyor-general of the State of California, dated December 24, 1912, with the record, he states that the records

of his office show that on January 21, 1877, one J. G. Wilson filed application to purchase the NE. $\frac{1}{4}$ of Sec. 11, T. 21 N., R. 15 W., M. D. M., being the tract selected by the State in 1861; that on January 21, 1878, said application was approved by the State surveyor-general, and on April 12, 1878, certificate of purchase was issued in the name of the applicant, and on June 21, 1879, a patent for said land was issued to said J. C. Wilson by the State of California.

It will thus be seen that the act of July 23, 1866, *supra*, in nowise operated to confirm the selection of 1861 for the reason that the selected land had not been disposed of by the State.

These facts render it unnecessary to consider the question raised by the Commissioner of the General Land Office, namely, whether, assuming that the act of 1866 confirmed the selection of 1861, its provisions operate to reinvest in the United States title to the base land.

In the Commissioner's decision it was further held that this selection was unaffected by the act of March 1, 1877 (19 Stat., 267). With this holding the Department concurs. That act related to indemnity school selections in the State of California, but by its plain terms was limited to those selections which had been, prior to the date of its passage, certified to the State of California. True, until survey of the Mexican grant, it could not be determined whether the school section would remain to the United States, and the occurrence of this event, even after passage of the act, would not prevent adjustment thereunder. Section 1 thereof provides:

That the title to the land certified to the State of California, known as indemnity school selections, . . . is hereby confirmed to said State *in lieu of the sixteenth and thirty-sixth sections*, for which the selections were made.

And section 2—

That where indemnity school selections have been made and certified to said State, and said selection shall fail . . . the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States.

Further, this act was considered by the Supreme Court in *Durant v. Martin* (120 U. S., 366, 372), wherein it was said:

This statute was, in our opinion, a full and complete ratification by Congress, according to its terms, of the lists of indemnity school selections, which had been before that time certified to the State of California by the United States as indemnity school selections, no matter how defective or insufficient such certificates might originally have been.

It thus appears, not only by the terms of the statute but by adjudication, that its operation has been limited to those selections "which had been before that time (March 1, 1877) certified to the State of California by the United States as indemnity school selections." This selection, as before stated, was not certified to the State until

January 10, 1878. It results that no error was committed in the decision appealed from in holding that the act of March 1, 1877, did not operate thereon.

The case presented, therefore, is simply that of a selection made by the State in 1861 in lieu of the tract supposed to have been lost to the grant by reason of its inclusion within a Mexican grant. The State had not disposed of the selected land prior to July 23, 1866, so that the act passed on that date did not affect the selection. In 1873 the base land was shown not to have been lost to the State but to have inured to the State under its grant in place, it being, by the survey made in that year, excluded from the Mexican grant. Thereupon application was made to the State for the purchase of the portion of the base, which the State accepted. The selection not having been certified prior to March 1, 1877, it was not affected by the act passed on that date. It may be admitted that in the absence of a *bona fide* sale of the base lands on which the selection of 1861 depended, the approval of 1878 was binding and that the State could not now be heard to question the sufficiency or legality of the selection and necessary exchange which its approval worked. But can the sale to Hendricks be repudiated on this record? The law not requiring the selection or listing of school lands in place, the local records, in all probability, bore no notation of the selection or proposed exchange, if, indeed, notice could be imputed by such a notation, and there is nothing to suggest actual notice of the pending selection on the part of the purchaser. On the other hand, it is shown that it was well known that the land was claimed under patent from the State at and long prior to the allowance of Mitchell's homestead.

It would seem that, due to the fact that in 1873 the government survey had excluded the base land from the limits of the Mexican grant, a fact of which the government had full knowledge, approval of the selection should not have been made at a later date without at least an inquiry as to whether the State had made disposition of the lands. This does not appear to have been done.

Upon the present record, therefore, it must be held that the approval in 1878 of the selection made in 1861 was unwarranted; that the purchase from the State of the base lands, made prior to said approval, was not affected thereby; and that thereunder the United States did not acquire a title to said base lands. It follows that Mitchell's entry was absolutely void, the United States having no title to or jurisdiction over the land entered at the date of its allowance, and said entry must, therefore, be canceled, and it is so ordered.

This renders unnecessary the consideration of the question as to whether, admitting that the tract here in question was a part of the public domain, it was removed from settlement by reason of the claim being asserted thereto by those claiming under the State. The

decision appealed from is, for the reasons herein given and not those assigned in the decision appealed from, affirmed.

SALE OF FIRE-KILLED OR DAMAGED TIMBER.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 1, 1913.

TO CHIEFS OF FIELD DIVISIONS:

SIRS: During the year 1910 destructive forest fires occurred on large areas of the public domain and valuable timber thereon was killed or permanently or seriously damaged by the fires. The Secretary of the Interior suggested the advisability of legislation authorizing disposition of such timber and the following act of Congress was approved March 4, 1913 (Public, No. 450; 37 Stat., 1015):

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, under such rules as he may prescribe, to sell and dispose of to the highest bidder at public auction, or through sealed bids, the timber on any lands of the United States, outside the boundaries of national forests, including those embraced in unperfected claims under any of the public land laws, also upon the ceded Indian lands, that may have been killed or seriously and permanently damaged by forest fires prior to the passage of this act, the proceeds of all such sales to be covered into the Treasury of the United States: *Provided,* That the damaged timber upon any lands embraced in an existing claim shall be disposed of only upon the application or with the written consent of such claimant, and the money received from the sale of damaged timber on any such lands shall be kept in a special fund to await the final determination of such claim.

SEC. 2. That upon the certification of the Secretary of the Interior that any such claim has been finally approved and patented the Secretary of the Treasury is hereby authorized and directed to pay to such claimant, his heirs or legal representatives, the money received from the sale of the damaged timber upon his land, after deducting therefrom the expenses of the sale; and upon the certification of the Secretary of the Interior that any such claim has been finally rejected and canceled the Secretary of the Treasury is hereby authorized and directed to transfer the money derived from the sale of the damaged timber upon the lands embraced in such claim to the general fund in the Treasury derived from the sale of public lands, unless by legislation the lands from which the timber had been removed had been theretofore appropriated to the benefit of an Indian tribe or otherwise, in which event the net proceeds derived from the sale of the timber shall be transferred to the fund of such tribe or otherwise credited or distributed as by law provided.

The act permits of the sale of all timber killed or seriously or permanently injured by forest fires that occurred *prior* to March 4, 1913, upon vacant public lands outside of national forests, including ceded

Indian lands, and also upon lands embraced within unperfected or unapproved claims, grants, or selections over which the Department of the Interior has jurisdiction. It does not, however, apply to unperfected or unapproved claims, grants, or selections within the boundaries of national forests. It is applicable to all of the public land States and to the Territory of Alaska.

Pursuant to the authority granted in the above act, the following rules and regulations are hereby prescribed for your guidance:

(1) Timber cruisers of the General Land Office, under the supervision of the chiefs of field divisions, shall at once make a reconnoissance cruise of the above-described timber, upon lands not within unperfected claims and unapproved selections and grants, in order to obtain an approximate scale of the timber to be offered for sale. They shall also blaze the outside corners of the area to be cut over or otherwise mark the outboundaries so that they may be readily distinguishable on the ground. They shall submit promptly reports thereupon:

(a) Describing the land to be cut over by township and range and by legal subdivisions thereof, if surveyed, or by metes and bounds and by approximate legal subdivisions, if unsurveyed, and setting forth where practicable the topography of the outboundaries of the tract or tracts to be cut over with reference to mountain tops, streams, or other natural objects;

(b) Showing the approximate percentage of the timber on the described area which has been killed or seriously or permanently injured by forest fires prior to March 4, 1913;

(c) The approximate scale in thousand feet board measure of timber subject to sale;

(d) The approximate market value thereof per thousand feet in its present condition and location, and fixing a minimum stumpage price per thousand feet board measure for the timber to be cut; and

(e) The method and approximate expense of disposing of the brush, tops, lops, and other forest débris which will result from the felling and removing of the timber.

(2) After an approximate estimate of the timber to be sold and the cost of disposing of the débris has been obtained you will offer the same for sale, under sealed bids, by advertisement for a period of not less than thirty (30) days (if a daily paper, at least twice a week) next preceding the time set for the opening of the bids, in two representative newspapers of general circulation in each field division wherein the timber to be sold is situated, and if the proposed sale be for twenty million or more feet board measure of timber available by location to a single logging operation you will also cause an advertisement of the proposed sale to be inserted once in two lumber trade journals of general circulation. In order that large sales may

be given all possible publicity, you will, during the period of the advertising, post copies of the advertisement where they will attract the notice of the general public.

(3) The notice of sale must announce the time and place of filing bids; the location, approximate amount in board feet and minimum stumpage value of the timber to be sold; the sum required to be deposited with the bid; the conditions by which the purchaser will be bound; and the name and address of the chief of field division, from whom full information can be obtained. It shall also be stated that bidders offering a sum based on a rate less than the minimum stumpage price of the timber mentioned therein will not be considered and that the right to reject any or all bids is reserved. The advertisement shall contain a careful description of the land to be cut over, whether surveyed or unsurveyed, designating the location with reference to water courses, mountain tops, or other well-known natural objects, as well as by township and range and by legal subdivisions, if surveyed, or by approximate legal subdivisions, if unsurveyed.

(4) All bids submitted for the purchase of timber must be sealed and transmitted with certified check, or checks, made payable to the Commissioner of the General Land Office, as hereinafter set forth, to that chief of field division having jurisdiction of the timber sale for which the bid is submitted, and the latter will number said bids consecutively in the order in which they are received, and endorse thereon the day and the hour thereof when received, and will on the day and at the hour set therefor open said bids and award said timber, either in one lot or in separate lots, located upon definitely described areas of land, in such manner as shall afford the greatest amount of revenue therefrom, to the highest bidder or bidders. Should two or more bids in the same amount be received for the same timber, the award will be made to the bidder whose bid was first received. The chief of field division will, immediately upon the acceptance of said bid or bids, notify the bidder or bidders thereof, and shall also promptly forward a report thereupon to the Commissioner of the General Land Office. A sale may be apportioned at the highest price bid among different bidders, if desirable and practicable, to prevent monopoly. Bids submitted by parties who have trespassed upon the public domain will not be considered unless settlement has been previously made with the Government.

(5) Each bid must state whether the bidder bids for the whole of the timber offered for sale in the advertisement or for only a part thereof, and, if the latter, it should designate how much, and describe the land from which it is to be cut. Each bid must state the amount per thousand feet which the bidder will pay for the timber.

(6) Each bid shall be accompanied by a certified check for at least 20 per cent of the amount bid, said certified check to be made payable

to the Commissioner of the General Land Office, and shall be retained by the chief of field division until the bond required, as hereinafter provided, shall be filed, and a contract of sale entered into, whereupon the latter shall immediately transmit to this office the certified check or checks of the successful bidder or bidders, together with the bond or bonds, and contract or contracts of sale, and said certified check or checks shall be retained by the receiving clerk of the General Land Office and be at once credited as part payment of the purchase price of the timber covered by said bid or bids. Should a bidder or bidders whose bid or bids shall have been accepted by a chief of field division fail to submit a bond or bonds, as hereinafter provided, the chief of field division will at once transmit said certified check or checks to the Commissioner of the General Land Office, and the amount or amounts called for therein will be collected and retained by the United States as a forfeit. Upon the acceptance of a bid or bids by a chief of field division the certified checks of the bidders whose bids were rejected shall be returned to them.

(7) Upon notice from a chief of field division to a bidder that his bid has been accepted, he will, within 30 days from the receipt of such notice, enter into a contract with the Government, through the chief of field division acting as its agent, and execute and file with the chief of field division a bond with proper sureties thereupon, the penalty of the bond to be of an amount which shall be 50 per cent of the stumpage value of the timber estimated in accordance with the provisions contained in subdivision c, section 1, of this circular. Blank forms to be used in executing contracts and bonds under the act governing the sale of timber herein have been approved by the Secretary of the Interior and copies of the same will be furnished by the chief of field division. The bond shall be conditioned for the payment for said timber, and for the faithful performance of the above-referred to contract, and for the observance of the regulations hereinafter set forth. The bond will follow the exact terms of the contract in its reference to the purchaser, the description of the land and timber, and the terms of the sale. The date of the execution of the contract must appear in the bond. The chief of field division will retain the original contract and the original bond. A bond furnished by a duly qualified and authorized guaranty or bonding company shall be considered preferable, although purchasers can not be required to furnish corporate surety. The Treasury Department issues lists of surety companies authorized to act as surety on bonds to the United States. Only the surety companies on these lists, copies of which may be procured by chiefs of field divisions, may be accepted. If, however, personal sureties are procured, an affidavit and certificate of solvency will be required to show that they own real estate, subject to execution, sufficient in value after deducting

the amount of all liens and encumbrances to satisfy any execution which might be issued on a judgment recovered against them for the amount of such liability as shall be incurred under any contract entered into between the bidder and the Government. The responsibility of individual sureties should be established by the signing of the "certificate of solvency," attached to the bond, by a judge or clerk of a State court of record; a judge, clerk, or deputy clerk of a United States court; a United States attorney, or one of his assistants; a United States commissioner; or a postmaster. If the purchaser is a corporation or a copartnership, sureties other than its officers, stockholders, or partners must be secured. In the event that the bidder whose bid has been accepted shall fail to submit the required bond within the specified time, the chief of field division shall cause his action in accepting said bid to be revoked by written notice to the bidder, and he shall then accept the bid received by him next in order of time should the bids be equal, otherwise the next highest bid. If the bid accepted was the only bid received, the timber will be readvertised for sale, as though no bid had been received.

(8) Immediately upon the execution of the contract and bond the chief of field division shall transmit the same, together with the certified check originally deposited, to the Commissioner of the General Land Office, who in turn will submit the same to the Secretary of the Interior for his approval or rejection, and shall at the proper time notify the chief of field division of the result of the action taken thereupon, who in turn shall notify the bidder.

(9) Immediately upon notification of the approval of a sale by the Secretary of the Interior, the chief of field division will cause an agent to go over the area from which the timber is to be cut, with the purchaser or his representative, and designate the timber subject to be cut under the act, and shall also point out the boundaries of the land as blazed or otherwise marked by the timber cruiser who made the appraisal. Cutting may then be commenced.

(10) All settlements for timber cut pursuant to this act must be based upon an actual scale made after the timber has been cut. The timber shall be scaled by a timber cruiser designated by the chief of field division, on the banking ground, landing, or skidway, and before it is placed on cars or put into the water. When the timber shall be ready for removal the purchaser shall submit a written notice thereof to the chief of field division. The scale must be made within 30 days after receipt of such notice. It will not be necessary, however, to wait until all of the timber covered by the contract has been cut before a scale shall be made. The purchaser may demand that installments of timber be scaled at such times as there may be a sufficient and reasonable amount thereof to warrant a scale. What

is to be considered a reasonable amount may be determined by a previous agreement entered into between the chief of field division and the purchaser, and may be incorporated as a condition in the contract. The scale shall be made in accordance with Scribner's rules, and each log or stick scaled shall be stamped "U. S." on at least one end. The timber cruiser shall keep a record in board feet of all timber scaled and file the same with the chief of field division.

(11) No timber shall be removed until it has been paid for. Although permission may be granted for the removal of installments, of timber, yet the sale is not to be considered a sale by installments, and failure on the part of the purchaser to cut and remove all of the timber covered by the terms of the sale will be considered a violation of the terms of the contract and render the obligors in the bond liable for whatever damage shall be incurred by the Government. The amount originally deposited shall be credited as an advance payment and installments of timber up to that amount may be removed without the requiring of a further deposit. When the stumpage value of an installment of timber, together with the installments previously cut, exceeds the sum originally deposited, a further deposit in a sum sufficient to equal the difference must be required before permission to remove that installment can be granted. All deposits must be made by certified check made payable to the Commissioner of the General Land Office and all checks thus deposited shall be transmitted to him at once by the chief of field division.

(12) The purchaser shall keep a record of the amount in board feet of timber cut and shall submit a monthly report to the chief of field division.

(13) All brush, tops, lops, and other forest débris, made in felling and removing the timber, shall be disposed of in such manner as shall be set forth in an agreement entered into between the purchaser and the chief of field division. If the purchaser fails to comply with the requirements contained in said agreement, then the chief of field division shall cause said débris to be disposed of and charge the expense thereof to the purchaser, provided, however, that written notice shall first be given by the chief of field division that such action will be taken if said instructions are not complied with within 30 days from the service of such notice. The aforesaid bond shall be conditioned to this requirement.

(14) Chiefs of field divisions shall see that so far as practicable all branches of the logging operations shall keep pace with each other, and the piling or burning of the brush and other débris shall not be allowed to fall behind the cutting and removing of the logs.

(15) The chief of field division shall determine the period within which all of the timber embraced within a sale shall be cut, and completion of the cutting within such period as shall be thus fixed shall

be made a condition in the contract and in the bond. The action of the chief of field division should be governed by the quantity of timber to be cut, the topography of the land, the accessibility of the timber, and any other circumstances that may have an influence on the cutting. Owing to the nature of the timber subject to disposal under these rules and regulations, the cutting should be done as rapidly as possible and the final time limits should be restricted as far as practicable logging conditions will permit. Any extension of the period fixed by the chief of field division will be granted only upon a showing that the completion of the cutting was unavoidably delayed by causes over which the purchaser had no control and that the interests of the Government will not be prejudiced thereby and must be approved by the Secretary of the Interior.

(16) Timber, of the character described in the above act, located upon existing unperfected claims and upon unapproved selections and grants, may be disposed of in the same manner and under the same conditions as set forth in the preceding paragraphs, provided, however, that an application shall first be filed with the proper chief of field division by such claimant, selector, or grantee, or by a prospective purchaser, with the written consent of such claimant, selector, or grantee, requesting that the timber on said claim, selection, or grant be offered for sale. Nothing herein shall prohibit such claimant, selector, or grantee from bidding for the timber thus offered.

(17) The act of March 4, 1913, or these instructions pursuant thereto, shall not be construed to abrogate or in any way modify the rights of settlers or homestead entrymen to cut and dispose of timber on their homestead claims, as explained in circular of September 27, 1907, or the rights of miners to the enjoyment of the surface embraced within the area of their mining claims, as provided by section 2322, United States Revised Statutes.

(18) If it shall be shown that there are settlers or residents within the vicinity of the burned-over vacant lands, who are in urgent need of timber for domestic purposes and that it shall be necessary to procure the same from said lands, permits may be granted under applications filed in accordance with the provisions contained in the acts of June 3, 1878 (20 Stat., 88), or March 3, 1891 (26 Stat., 1093), as extended by the acts of July 1, 1898 (30 Stat., 618), and March 3, 1901 (31 Stat., 1439); provided, however, that said applications shall be filed prior to the advertising of the timber for sale as hereinbefore set forth. The amounts of timber thus applied for shall be deducted from the amount offered for sale and the advertisement shall state that the sale shall be subject to the rights of such applicants to procure the amounts of timber applied for.

(19) All certified checks received by chiefs of field divisions for sales of timber under this act shall be promptly transmitted to the

receiving clerk of the General Land Office, together with a statement to the effect that such moneys are derived from the sale of burned timber. The receiving clerk shall immediately upon receipt of same, deposit all certified checks for collection and place the moneys derived therefrom in his special account in the United States Treasury to remain there subject to final disposition upon receipt of instructions from the Commissioner of the General Land Office, and he shall also issue his receipt to the purchaser for the amount deposited in each case.

(20) The above act specifies that the proceeds from the sale of the timber authorized therein shall be covered into the Treasury of the United States, and credited either to a general fund, that is, the fund derived from the sale of public lands, where the timber is on vacant, including ceded Indian lands, where the act of cession did not create a trust fund for the benefit of the Indians; or to a particular fund created by law as a trust fund for Indians, where the timber is on ceded Indian lands, and the act of cession provided that the proceeds from the sale of such lands shall be held as a trust fund for the benefit of the Indians; or to a special fund to be considered as a trust fund where the timber is on unperfected claims or on unapproved selections and grants. In the two last mentioned classes of sales chiefs of field divisions shall render to the Commissioner of the General Land Office expense accounts showing in each case all costs incident to the administration of the law with reference to such sales in order that the net proceeds therefrom may be ascertained. Where the sale is for timber on lands of the second class, the net proceeds shall, by direction of the Commissioner of the General Land Office, be deposited to that particular fund which was created by the act of cession and the Commissioner of Indian Affairs will be thus advised. In the third class of sales the net proceeds shall be held in a special fund, which the act of March 4, 1913, created and designated as a trust fund for the benefit of that claimant, selector, or grantee from whose claim, selection, or grant the timber was sold, until the unperfected claim, or unapproved selection or grant shall have been either patented or approved, or canceled or rejected. Upon receipt of the proper certification that a claim selection or grant shall have been patented or approved the Secretary of the Treasury will pay to the claimant, selector, or grantee, his heirs or legal representatives, the net proceeds, which had been deposited to his credit. Upon the cancellation or final rejection of a claim, selection, or grant, the Treasurer of the United States will upon receipt of the proper certification, transfer the money on deposit in the special fund, covering the value of the timber cut from the third class of lands, to the general fund covering the first class or the particular fund covering the second class, as the case may require.

(21) Chiefs of field divisions shall cause investigations to be made from time to time and submit a final report at the expiration of the period allowed for the cutting, showing whether or not the law and rules and regulations have been complied with and setting forth any infraction of the same.

(22) The cutting of the timber referred to herein in any other manner than that authorized by these instructions or the cutting of timber not authorized by these instructions, will be considered a trespass, except where the cutting is done under the conditions referred to in paragraphs 17 and 18, *supra*.

(23) Pursuant to acts of Congress no Member of or Delegate to Congress or Resident Commissioner, after his election or appointment, and either before or after he has qualified, and during his continuance in office, shall be admitted to any share or part of any contract or agreement, or to any benefit to arise thereupon, which shall be entered into with the Government in accordance with these rules and regulations. Nothing, however, contained in such contract or agreement shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such corporation. (See sec. 3741, U. S. R. S., and secs. 114 to 116, chap. 321, 35 Stat., 1109.)

Respectfully,

CLAY TALLMAN, *Commissioner*.

Approved:

ANDRIEUS A. JONES,

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 one thousand dollars, 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).

Suggestions regarding the cutting of timber by entrymen on their homestead claims.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., September 27, 1907.

1. Homestead claimants who have made bona fide settlements upon public land, and who are living upon, cultivating, and improving the same in accordance with law and the rules and regulations of this department, with the intention of acquiring title thereto, are permitted to cut and remove, or cause to be cut and removed, from the portion thereof being cleared for cultivation so much timber as is actually necessary for the purpose, or for buildings, fences, and other improvements on the land entered.

2. In clearing for cultivation, should there be a surplus of timber over what is needed for the purposes above specified, the entryman may sell or dispose of such surplus; but it is not allowable to denude the land of its timber for the purpose of sale or speculation before the title has been conveyed to him by patent.

3. It is not permissible to cut timber for sale, even when the money procured therefrom is to be used for improving or cultivating the land or supporting the claimant or his family.

4. The abandonment of a settlement claim after the timber has been removed is presumptive evidence that the claim was made for the primary purpose of obtaining the timber.

5. A bona fide settler upon unsurveyed public land who intends to acquire title to the land under the homestead laws as soon as he is allowed to do so after survey, and who, in good faith, is complying with the rules and regulations relative to residence, cultivation, and improvements, is permitted the same privileges with regard to the cutting of timber upon his claim as are allowed to the bona fide homesteader and is subject to the same restrictions.

Very respectfully,

R. A. BALLINGER, *Commissioner.*

Sec. 2322, U. S. R. S.: The locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

The rights to the timber on the surface of lands embraced within mining locations as conferred by section 2322, U. S. R. S., according to the interpretation placed thereon by the Secretary of the Interior, are limited to the cutting of timber necessary for the development of the mine or incidental to operations related thereto.

The land must be actually mineral in character and the location must be made in good faith and not for the purpose of controlling water courses or to obtain valuable timber thereon. (Sec. 60, U. S. Mining Laws and Regulations, 37 L. D., 728.)

By the act of June 3, 1878 (chapter 150, 20 Stat., 88), it is provided—

That all citizens of the United States and other persons, bona fide residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide citizens, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

The case of *United States v. Plowman* (216 U. S., 372) interprets the character of lands covered by the act of June 3, 1878. See also *Davis v. Weibbold* (139 U. S., 507); *Northern Pacific Railroad Company v. Lewis* (162 U. S., 366, 376); *Bunker Hill and Sullivan Mining and Concentrating Company v. United States*. (Decision rendered by U. S. Supreme Court, January 6, 1913.) [226 U. S., 548.]

The act of March 3, 1891 (26 Stat., 1093), provides:

In any criminal prosecution or civil action by the United States for a trespass on such public timber lands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber land for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

The act of March 3, 1891, as originally enacted, was applicable to the States of Colorado, Montana, Idaho, North Dakota, South

Dakota, Wyoming, Nevada, and Utah. By amendments contained in the acts of February 13, 1893 (27 Stat., 444), and of March 3, 1901 (31 Stat., 1436), it was made applicable also to the States of Arizona, New Mexico, California, Oregon, and Washington. It was extended by the act of July 1, 1898 (30 Stat., 618), providing for the export of timber from a specified area in the State of Wyoming into the State of Idaho, and by the act of March 3, 1901 (31 Stat., 1439), providing for the export of timber from a specified area in the State of Montana into the State of Wyoming.

STATE OF WYOMING.

Decided August 5, 1913.

SCHOOL INDEMNITY SELECTION—WITHDRAWN LAND—SURFACE PATENT.

In case of refusal of a State, after notice from the Commissioner of the General Land Office, to accept surface title under the act of June 22, 1910, for a school indemnity selection of withdrawn land, subsequently classified as coal, or to relinquish the selected land, the selection should be rejected, with right of appeal.

JONES, First Assistant Secretary:

On October 3, 1907, the State of Wyoming filed its list, No. 510, indemnity school land selection at Cheyenne, Wyoming, for lots 3 and 4, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 18, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 19, T. 15 N., R. 91 W., together with other land. Upon October 27, 1908, a special agent of the General Land Office reported that the land was coal-bearing and under this report the Commissioner, upon January 31, 1910, ordered a hearing upon the following questions:

- 1st. Whether said land is chiefly valuable for coal;
- 2nd. Whether it is actually known to be chiefly valuable for coal, or its comparative location or its surface indications were such as to put upon notice an ordinarily prudent man as to its coal character and chiefly valuable therefor; and
- 3rd. Whether, at time of initiation of claim, applicant was endeavoring to secure the land in good faith under the nonmineral laws.

The hearing was accordingly set by the register and receiver for January 17, 1912, but upon November 27, 1911, the Commissioner of Public Lands for the State of Wyoming advised the Chief of Field Division that as the State had no appropriation to cover the expenses of such a hearing, it would put in no defense and stated that the United States could, if it desired, cancel the State selection without any protest from the State.

The above township was withdrawn from all forms of entry October 15, 1906, the order being subsequently modified to apply to coal entries only and was again withdrawn by Executive order of July 13, 1910. The above lands were classified as coal January 21, 1911,

at prices varying from \$12.50 to \$17.50 per acre. The township was withdrawn from further entry on August 10, 1910, pending a resurvey.

The Commissioner of the General Land Office upon March 15, 1912, held that the lands were coal in character and made the following requirement:

After the resurvey has been made, if, upon examination the selection is found valid in other respects, a list containing these lands will be submitted to the Secretary of the Interior for approval, with the reservations, conditions, and limitations prescribed by said act. If the State does not desire a limited approval, a relinquishment of the lands in proper form should be submitted before this action is taken. Notify the State hereof.

In answer to this, the Commissioner of Public Lands, upon April 16, 1912, advised the register and receiver that the State declined to accept a title which reserved the coal and coal rights to the United States and requested that if the State could not obtain full and complete title, the application for selection be rejected. In answer to this, the Commissioner of the General Land Office, upon May 18, 1912, held as follows:

The act of June 22, 1910, provides, that where any claim of this character has been initiated, in good faith, patent shall issue thereon, reserving the coal to the United States, and no provision is made for a forfeiture of the entry by a failure to take any action. It will be necessary for the State, in this case, to file a formal relinquishment of the lands in question, accompanied by a certificate from the proper officer, showing that the State has not sold or incumbered the lands, before the selection can be canceled, and the base used therein become available for future selections.

The State has filed an appeal reiterating its position of refusing to accept a surface patent under the act of June 22, 1910 (36 Stat., 583), or to relinquish.

The proviso to section 1 of the act of June 22, 1910, reads as follows:

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.

Under this proviso it is not obligatory upon one who has initiated a nonmineral selection upon lands withdrawn or classified as coal lands prior to the passage of the act of June 22, 1910, to accept a surface patent. In case of the refusal of such selector to accept a surface patent or to relinquish, the Commissioner of the General Land Office should proceed to reject the selection with a right of appeal as in other cases.

The matter is accordingly remanded to the Commissioner for further proceedings in harmony herewith.

SAMUEL E. CROW.

Decided August 5, 1913.

SOLDIERS' ADDITIONAL RIGHT—ADJOINING FARM ENTRY.

Section 2306 of the Revised Statutes contemplates that a soldier within its provisions shall acquire under the homestead laws the full measure intended to be granted thereby, and where he made a homestead entry for less than 160 acres of public land he is entitled to an additional right of entry, regardless of the particular form, class, or character of the original entry. It follows that an adjoining farm entry is a proper basis for a soldiers' additional entry of an amount of land which added to the area of public land embraced in the adjoining farm entry will not exceed 160 acres.

CONTRARY DECISION OVERRULED.

Timothy Mahoney, 41 L. D., 129, overruled.

JONES, *First Assistant Secretary*:

Samuel E. Crow has appealed from the decision of the General Land Office, rendered October 3, 1912, rejecting his application, filed March 7, 1912, to make homestead entry, under sections 2306 and 2307 of the Revised Statutes, of the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 12, T. 23 N., R. 6 E., M. M., in the Great Falls, Montana, land district, based on an assignment of 40 acres of the right of Thomas Curtis, who it is alleged served in Company "F," 3d Regiment United States Volunteer Infantry, from October 17, 1864, to October 31, 1865, and who it is further alleged made homestead entry, at Ironton, Missouri, December 14, 1871, for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 20, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 28, T. 35 N., R. 1 W., 5th P. M., containing 80 acres, as an adjoining farm homestead entry.

It is represented in the decision of the Commissioner appealed from that the land owned by Curtis, adjoining which he entered 80 acres as an adjoining farm entry, December 4, 1871, amounted to 40 acres, and in the decision of the Commissioner appealed from, following the decision of the Department in the case of Timothy Mahoney (41 L. D., 129), he held that this 40 acres owned by Curtis must be reckoned as a part of his adjoining farm homestead entry, so that he was therefore charged with having entered 120 acres on account of his adjoining farm homestead entry, when in fact he had entered but 80 acres of public land. This holding was in full accord with the decision of the Department in the Mahoney case cited and relied upon.

In the present case, however, it is urged that the decision of the Department in the Mahoney case is wrong, and a reconsideration thereof is earnestly requested. It appears that the Department for many years ruled to the contrary. The first decision, that of Eri P. Sweet, reported in 2nd C. L. O., page 18, was decided as long ago as February 27, 1875, and that decision had been uniformly followed in the administration of soldiers' additional rights until the decision

in the Mahoney case. In view thereof, and of purchases of rights alleged to have been made upon the strength of the earlier departmental decision, I have determined to reconsider the question.

Section 2306, Revised Statutes, provides:

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, should be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

This section of the Revised Statutes is taken from section 2 of the Soldiers' Homestead Act of June 8, 1872 (17 Stat., 333). By the first section of that act it was made plain that it was the intention of Congress to permit honorably discharged soldiers or sailors, who had served in the army of the United States during the recent rebellion, for ninety days or more, to acquire under the homestead laws the full measure intended to be granted thereby, namely, 160 acres; and the purpose of the second section was to secure to such soldiers, who had previously made entry of less than 160 acres, such an additional amount of land as, when added to that previously entered, should not exceed this limit of 160 acres.

When so viewed, it makes no difference under what particular form or class or character of entry the original entry, made by the soldier, may fall, provided the amount of public land he had entered was less than 160 acres, he should be entitled to enter additional public land. In my opinion there was no warrant in charging up to the soldier or sailor, as a part of his homestead entry, the land already owned by him at the time of making of his original entry in determining his further right under section 2 of the act of 1872, or, more properly speaking, section 2306 of the Revised Statutes.

I must, therefore, recall and vacate the decision in the Timothy Mahoney case, and direct that the administration of rights under section 2306, Revised Statutes, proceed under the original ruling of the Department made in 1875, hereinbefore referred to. While I believe that ruling was correct, nevertheless, if I entertained doubt regarding the matter, in view of the long unbroken line of action respecting rights, which the Supreme Court has held assignable, I should feel bound thereby, for rights so acquired should properly be reckoned as of the nature of property rights and should not be disturbed by a change in departmental ruling, except upon the authority of some higher and controlling opinion, such as that of the Supreme Court.

For the reasons herein given the decision appealed from is reversed and the case remanded to the Commissioner of the General Land Office for further consideration and disposition in the light hereof.

BELLE L. PENNOCK.

Decided August 9, 1913.

THREE-YEAR FINAL PROOF—SUBSEQUENT CULTIVATION—SUPPLEMENTAL PROOF.

Where final proof submitted under the act of June 6, 1912, upon a homestead entry made prior to that act, is rejected because of insufficient showing as to cultivation, *ex parte* affidavits as to subsequent cultivation will not be accepted; but in such case new final proof should be submitted.

JONES, First Assistant Secretary:

I am in receipt of your letter of July 24, 1913, forwarding the record in the case of homestead entry 07763, Dickinson series, made by Belle L. Pennock March 30, 1908, upon which final three-year proof was offered December 20, 1912.

It appears from the record that one-sixteenth of the area entered was actually cultivated and planted for the first time in 1912, but that at no time prior to final proof was the cultivation of one-eighth of the area accomplished. The proof is not, therefore, acceptable under the law or under the provisions of the instructions issued thereunder February 13, 1913 (41 L. D., 479). Since making proof claimant has submitted corroborated affidavit to the effect that in the season of 1913 twenty-five acres had been cultivated in millet and flax.

You call attention to the fact that in this and other cases pending before your office, where entries were made before June 6, 1912, it is not incumbent upon the entryman to submit proof under the three-year homestead law, which requires specific areas to be cultivated, and if proof be rejected they may again offer three-year proof or five-year proof in accordance with the law as it was when the entry was made. You ask to be instructed as to whether in cases where final proof is unsatisfactory you are authorized to accept affidavits as to subsequent compliance with the law in lieu of formal submission of proof in the manner and after the preliminary notice prescribed by the act of Congress of March 3, 1879 (20 Stat., 472).

As stated by you, it has been the practice to accept supplemental affidavits in the form of affidavits explanatory of proof formerly submitted, but in this instance it is evident that compliance with the requirements of the law was not had before the submission of final proof and the affidavit submitted relates entirely to acts performed after proof. The evident purpose of the act of 1879, *supra*, and the notice required to be given thereunder, is that a specific time shall be fixed for the submission of proof and notice thereof given, including names of witnesses by which the facts are to be established, in order that the interested parties may have full opportunity to appear on the date fixed, hear or see the final proof offered, interpose any objections or protests which they may desire to submit,

which purpose would not be fulfilled were *ex parte* affidavits setting out the facts accepted without notice in lieu of formal proof. Furthermore, in the cases where the Department has heretofore accepted supplemental affidavits in support of homestead proofs it was in connection with proof submitted under the provisions of the general homestead law and not under the act of June 6, 1912, which requires a specific area to be cultivated during each year. In the cases arising under the general law no specific area of cultivation was required, except such as demonstrated good faith of the entryman, and supplemental affidavits bearing upon that point were therefore accepted. In this case the law under which the applicant tendered her final proof requires the cultivation of definite areas and applicant must be charged with knowledge of such requirement.

I am, therefore, of the opinion, and you are instructed to so advise the applicant in this case, that her proof must be rejected as insufficient and that *ex parte* affidavits showing subsequent compliance or attempted compliance with law can not be accepted in lieu of the formal offer proceedings prescribed by the law. Applicant may, if she so desires and is now prepared to do so, submit new final proof under the so-called three-year homestead law or at the proper time may submit final proof in accordance with the requirements of the general homestead laws in force at the time her entry was initiated.

The record is herewith returned.

RECLAMATION—HUNTLEY PROJECT—CHARGES AND PAYMENT.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., August 9, 1913.

PUBLIC NOTICE.

1. In pursuance of the provisions of the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, notice is hereby given that for all water-right applications for lands in private ownership filed on or after December 1, 1913, the building charge shall be \$50 per acre, payable in instalments as follows:

First instalment	\$10.00
Second instalment	1.00
Third instalment	2.00
Fourth instalment	3.00
Fifth instalment	4.00
Sixth instalment	5.00
Seventh instalment	5.00
Eighth instalment	5.00
Ninth instalment	5.00
Tenth instalment	10.00

2. The first payment on account of such water-right application shall consist of the first instalment of the building charge plus the operation and maintenance charges then in force for the first unit of the project, and shall be payable at the time of the filing of the application in the local project office. The second payment shall be due on December 1 of the next calendar year, and subsequent payments shall be due on December 1 of each year thereafter.

3. For land for which water-right application is made in the first unit after the date of this notice, whether private land or entered land, in cases where there has been no written assignment of credits by former entrymen, the operation and maintenance charge, until further notice, shall be \$1.00 per acre per annum whether water is used thereon or not, and payment thereof will entitle the water user to one acre foot of water for each acre of land irrigated. Additional water will be furnished at the rate of 50¢ per acre foot.

4. In all other respects, water-right applications for such private and entered lands shall be subject to the payments and conditions prescribed in the public notices and orders heretofore issued for the Huntley Project, the same being for the first unit thereof.

5. All payments shall be made to the special fiscal agent of the Reclamation Service assigned to make collections for the Huntley project.

A. A. JONES,

Acting Secretary of the Interior.

McKITTRICK OIL COMPANY.

Instructions, August 9, 1913.

OVERRULED DEPARTMENTAL DECISION REAFFIRMED.

Departmental decision of November 13, 1908, in *McKittrick Oil Co. v. Southern Pacific R. R. Co.* (37 L. D., 243), overruled in *Jackson Oil Co. v. Southern Pacific R. R. Co.* (40 L. D., 528), reaffirmed.

JONES, *First Assistant Secretary:*

By decision of November 13, 1908, in the case of *McKittrick Oil Co. v. Southern Pacific R. R. Co.* [37 L. D., 243], the Department directed that the application of the *McKittrick Oil Company*, presented December 28, 1904, for patent to the *California Oil Company* placer No. 28, embracing lots 1 and 2 and S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 1, T. 30 S., R. 21 E., M. D. M., Visalia, California, land district, be received, in the absence of any objection not involved in that case, which decision overruled that of March 26, 1902, in *Southern Pacific R. R. Co. v. Bruns* (31 L. D., 272), holding the tract above described to have passed to the railroad company, under a certain patent dated January 25, 1896.

Pursuant to said decision of November 13, 1908, the McKittrick Oil Company's application was accepted by the local officers and notice of the application having been published and posted for the required period, proof submitted, and payment made for the land, entry was allowed thereon May 16, 1910. This entry came before your office for consideration on or about April 28, 1913. In the meantime, the Department had, on October 6, 1911, rendered decision in the case of Jackson Oil Co. v. Southern Pacific R. R. Co. (40 L. D., 528), involving a state of facts similar to that disclosed in the case of McKittrick Oil Co. v. Southern Pacific R. R. Co., *supra*, in which decision a conclusion different from that reached in the McKittrick case was announced and the decision in the latter case overruled.

In view of the decision in the Jackson Oil Company case, your office, by letter of April 28, 1913, referred the matter of the McKittrick Oil Company's entry to the Department for instructions. In response thereto, the Department, by letter of May 7, 1913, directed that the McKittrick Oil Company be called upon to show cause why its entry should not be canceled for the reasons stated in the decision in the Jackson Oil Company case. Showing was made by the McKittrick Oil Company, and was served upon the railroad company, which filed answer thereto. Upon further consideration of the matter, the Department is of opinion that its decision in McKittrick Oil Company v. Southern Pacific R. R. Co., *supra*, correctly states the law of this case and reaffirms the views therein expressed. Further, in view of the proceedings had under the previous departmental decision in this case resulting in the entry by the McKittrick Oil Company, I do not think the case should be, at this late day, reopened for further consideration and therefore direct that this entry pass to patent, if proof submitted is found to evidence a satisfactory compliance with the mining laws.

SURVEY OF LANDS WITHDRAWN WHILE UNSURVEYED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, August 12, 1913.

Hereafter, upon receipt of the returns of a survey, the Commissioner of the General Land Office shall cause the tract books in his office to be examined and if it appears that any part of the area stands withdrawn in advance of survey upon any recommendation of any bureau of this or another Department, he shall ascertain whether the lands so withdrawn are capable of adjustment by reference to the legal subdivisions shown upon the plats of survey, and

if so, upon acceptance of the survey, he will advise the proper local land officers of such adjustment, in order that notation thereof may be made upon their records.

If there is doubt as to the lands intended to be withdrawn, the Commissioner of the General Land Office shall at once notify the appropriate bureau, through the proper channel, with a request for description according to the survey of the area which should be held withdrawn and a draft of a new order to that effect, if found necessary, shall be submitted for the approval of the Secretary of the Interior. Upon such approval, proper notation shall be made upon the tract books of the General Land Office, and the local land officers shall be duly informed, in order that proper notation may be made upon their records. Any withdrawal otherwise valid shall be valid notwithstanding any failure to make the notation on the tract books, or to give to local land officers the information, or otherwise to follow the procedure required by this order.

ANDRIEUS A. JONES,
First Assistant Secretary.

HENRY C. TAYLOR.

Decided August 13, 1913.

RECLAMATION ENTRY—ACT AUGUST 30, 1890—AGGREGATE AREA.

A homestead entry of a farm unit within a reclamation project, regardless of the area embraced therein, is the equivalent of a homestead entry for 160 acres outside of a project; but in fixing the area that should be charged against the entryman by reason of such entry, under the provision in the act of August 30, 1890, that not more than 320 acres in the aggregate may be acquired by any one person under the agricultural public land laws, the reclamation entry should be taken into account at its actual area and not charged as 160 acres.

JONES, First Assistant Secretary:

Henry C. Taylor has appealed from the decision of the Commissioner of the General Land Office of October 25, 1912, requiring him to relinquish 80 acres of the land included in his desert entry May 21, 1912, for the SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 30, T. 24 N., R. 29 E., M. D. M., Carson City, Nevada, land district.

It appears that Taylor had on September 24, 1907, made homestead entry for farm unit "H" or the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 25, T. 19 N., R. 29 E., M. D. M., Truckee-Carson reclamation project. That entry embraced an area of 80 acres while the desert entry (06892) embraces an area of 240 acres, the two entries aggregating 320 acres.

The act of August 30, 1890 (26 Stat., 371), as amended by act of March 3, 1891 (26 Stat., 1095), restricts entry under agricultural land laws, by any one person, to not exceeding 320 acres.

The Commissioner's decision of October 25, 1912, proceeds on the theory that a farm unit entered under the reclamation law is the equivalent of a homestead entry of 160 acres of land outside of a reclamation project and that figuring Taylor's entry as equivalent to 160 acres, that area added to the 240 acres entered under the desert law equals 400 acres or 80 acres in excess of that allowed to be entered by the act of August 30, 1890, *supra*.

The departmental instructions upon which the Commissioner's act was based, February 6, 1913, are to the effect that each entry made within a reclamation project is either made for or is subject to conformation to a farm unit "which is the equivalent of a homestead entry of 160 acres of land outside of a reclamation project." This regulation relates only to entries under the homestead laws and is construed to mean that a person who has exercised his homestead right by the entry of a farm unit within a reclamation project thereby exhausts that right and can not make another homestead entry either within or without a reclamation project, under the general laws; or where an entry has been made under the general homestead laws for lands outside a reclamation project, such an entryman can not again exercise the homestead right by making a homestead entry of lands within a project. It has no reference to the maximum area which may be entered under the provisions of the act of August 30, 1890, which was intended, as hereinbefore stated, to fix a maximum which might be entered under all the agricultural land laws. To illustrate: A man may enter and obtain title under the homestead laws for 160 acres of land and may also enter 160 acres under the desert-land law, or a total of 320 acres. In the case at bar, while the entryman has exhausted his homestead right, that fact does not warrant the Department in importing to him the acquisition of an area of land in excess of the true area of the tract entered in computing the maximum established by the act of 1890. Having secured but 80 acres heretofore under the agricultural public land laws, no objection exists under the act of August 30, 1890, to his acquiring 240 acres of vacant public land under the desert-land laws.

The Commissioner's decision is accordingly reversed and the case returned for appropriate action.

BROWN BEAR COAL ASSOCIATION.

Decided August 13, 1913.

COAL LAND—PRICE—OPENING AND IMPROVING OF MINE.

Where a tract of land was classified and appraised after the opening and improving of a mine of coal thereon, the filing of a declaratory statement, and the making of the expenditure required by section 2348, Revised Statutes, the applicant is entitled to purchase at the price existent at the date of the opening and improving of the mine.

COAL LAND—PRICE—RAILROAD.

Where a coal land applicant filed a proper application to purchase, complied with the regulations of the Department as to publication of notice, etc., and paid the price of the land according to conditions then existent as to distance from a completed railroad, he is entitled to purchase at that price notwithstanding the subsequent completion, prior to allowance of entry, of a railroad within fifteen miles of the tract.

CONFLICTING DECISIONS MODIFIED.

Edward B. Largent *et al.* (13 L. D., 397), and Allen L. Burgess (24 L. D., 11), overruled so far as in conflict.

JONES, *First Assistant Secretary*:

April 29, 1912, the Brown Bear Coal Association, unincorporated, consisting of four individuals, filed its coal declaratory statement under section 2348, R. S., at Blackfoot, Idaho, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$, SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 36, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, T. 5 N., R. 43 E., B. M., containing 640 acres, which alleged that the association went into possession of the above land and had remained in possession thereof continuously since August 14, 1906, and that they had opened a valuable mine of coal. It further states that the association has improved the mine, expending the sum of \$10,000 in labor and improvements consisting of cross-cut tunnels, entries, air courses, etc. Application to purchase was filed May 1, 1912, and after due proceedings the association, upon June 21, 1912, filed its completed proofs and made payment for the land in the sum of \$6,400, or at the rate of \$10 per acre.

The land at the time of the opening and improving of the mine was unsurveyed, the township plat being filed April 24, 1912. It was withdrawn by Executive order of August 24, 1910, from settlement, location, sale or entry and reserved for examination and classification with respect to coal value. It was restored to entry by Executive order of February 14, 1913, having been classified at prices varying from \$20 to \$40 per acre for the different subdivisions.

The register and receiver upon June 21, 1912, suspended the application for the reason that no report by a special agent had been filed and because of the order of withdrawal. Upon April 1, 1913, the Commissioner directed the register and receiver to call upon the Chief of Field Division for report and, if no objection should be made, to notify the applicant that 30 days would be allowed in which to make payment at the classified prices. This would involve an additional payment of \$9,640. A favorable report having been made by the field officer, the register and receiver called upon the applicant for the additional payment required by the Commissioner. The applicant has appealed from the Commissioner's action.

As above stated, at the time this mine was opened and improved, the land was unsurveyed. At that time it was the practice to sell public coal lands at the minimum prices fixed by section 2347 R. S., and this practice obtained until the promulgation of the circular of April 12, 1907 (35 L. D., 665, at 667). In the case of Carthage Fuel Company (41 L. D., 21) it was held that where a tract of land was reappraised after the opening and improving of a mine, and the filing of a declaratory statement but prior to the expenditure of \$5,000 required by section 2348, R. S., the claimant, upon seasonably making the required expenditures, is entitled to purchase at the price existent at the date of the opening and improving of the mine of coal. In harmony with the principle there laid down, the present association is entitled to purchase at the price existent at the time of opening and improving the mine, to wit, the minimum price fixed by the statute.

In an affidavit executed April 29, 1912, the members of the association stated that none of the land is within 15 miles of a completed railroad. It now appears that the land is within 15 miles of a branch of the Oregon Short Line running from Ashton, Idaho, to Driggs, Idaho. In the appeal it is stated that this branch line was not completed until December 1, 1912, which statement is corroborated by information informally obtained from the Postoffice Department.

The instructions of October 17, 1881 (1. L. D., 540, syllabus), held:

The price depends upon the distance from a completed railroad. If at date of proof and payment the land is more than fifteen miles from such road the price should be not less than \$10 per acre; if less than fifteen miles not less than \$20.

In Joseph L. Colton (10 L. D., 422), it was held that the status of coal land at date of proof and payment, with respect to its distance from a completed railroad, determines the price thereof irrespective of its status when the preference right of entry is initiated and acquired.

In Edward B. Largent *et al.* (13 L. D., 397) one Strong, upon October 1, 1887, tendered proof that the land was not within 15 miles of a completed railroad and payment for it at the rate of \$10 per acre. He was prevented from making entry by the protest of one Bagnell until June 29, 1888, by which time a railroad had been constructed within 15 miles of the tract. The report of the case does not clearly establish whether Strong paid the sum of \$10 per acre upon October 1, 1887, or not. It was held, however, that the price should be determined by the conditions existing as to distance from a completed railroad at the time of the allowance of the entry and not by those at the date of application. At page 399 it was said:

The filing of the protest against the entry of Strong was a risk that must be assumed by all who apply to enter the public land. The fact that in this par-

ticular case it had the effect to postpone the entry until after a railroad was completed within fifteen miles of the tract, which under the law doubled the price of the land, is only incidental, and the government can not be properly held chargeable for the delay occasioned by Mr. Bagnell's protest. It is quite probably true, as the law presumes, that the construction of the road within fifteen miles of the entry materially enhanced the value of the land to a sum which would justify the entryman in paying the \$20 per acre therefor.

The law is explicit in its declaration, that if at the date the entry of coal land is made there is a completed railroad within fifteen miles of the land, the price to be paid for the land is \$20 per acre and the fact that at the date an applicant for entry offers to make an entry, no railroad is completed within fifteen miles, and consequently the price of the land is only \$10 per acre can have nothing to do with fixing the price at the date of the actual entry. The law only provides what the price shall be at the date of entry and payment, irrespective of the preference right of entry.

This holding was adhered to in *Allen L. Burgess* (24 L. D., 11) the report of the case being likewise indefinite as to the date of payment of the price at \$10 per acre.

Section 2347 R. S. provides:

Every person . . . shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands . . . upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

The payment of not less than \$10 or \$20 per acre, as the case may be, is accordingly a condition precedent to the right to enter public coal land. The allowance of entry after payment is a function of the land officers over which the applicant has no control. I am accordingly of the opinion that where the applicant has filed a proper application to purchase, complied with the regulations of the Department as to publication of notice, etc., and has then paid the price of the land according to conditions existent at that time as to distance from a completed railroad, he should not be prejudiced by the failure of the land officers to immediately allow formal entry due to delay necessary for investigation or the determination of a protest which may later be adjudicated to be unfounded. I, therefore, regard the reasoning in the cases of *Edward B. Largent et al.* and *Allen L. Burgess*, if in conflict herewith, to be unsound and they will no longer be followed to that extent.

The applicant in this case has accordingly paid the proper price for the land. The decision of the Commissioner is reversed and final certificate and patent will issue, in the absence of any other objection.

JAMES E. CHRISTENSEN.

Decided August 13, 1913.

THREE-YEAR HOMESTEAD ACT—COMMUTATION—CITIZENSHIP.

The provision in the act of June 6, 1912, that persons commuting a homestead entry must at the time be citizens of the United States, has no application to entries made prior to that act and commuted under the original homestead law, it being sufficient if the proof in such cases shows that the entryman has declared his intention to become a citizen.

JONES, *First Assistant Secretary:*

James E. Christensen has appealed from the decision of the Commissioner of the General Land Office, dated October 28, 1912, requiring him to furnish record evidence of citizenship in connection with his homestead entry, made on May 17, 1910, for the NE. $\frac{1}{4}$, Sec. 23, T. 33 N., R. 56 E., M. M., Glasgow, Montana, land district, upon which he submitted commutation proof on July 6, 1912, and final certificate has issued.

It is shown by the proof that the claimant has resided upon the land, with his family, since May 1, 1908, that he has made improvements thereon, consisting of a dwelling house and a barn, valued at \$1,000, and that he has cultivated 113 acres of the tract.

In his application to make entry, the claimant filed a certified copy of his declaration of intention to become a citizen of the United States, made before the circuit court of Richland County, Wisconsin, on April 14, 1890. In his appeal from the action of the Commissioner, requiring evidence of final naturalization, Christensen states that it is his intention to perfect his citizenship, but that at no time since his settlement on the land, has he had the means to do so, as Glasgow, Montana, the county seat of Valley County, in which he resides, is one hundred and sixty miles distant and he is a poor man, sixty-seven year of age.

Paragraph 14 of the instructions of February 13, 1913 (41 L. D., 479), under the act of June 6, 1912 (37 Stat., 123), abrogated the practice adopted by the Department prior to the passage of said act, of permitting the commutation of a homestead entry by one who had merely declared his intention to become a citizen of the United States prior to his actual naturalization. It was further required by said instructions that in all cases where commutation proof has been made since the passage of said act, it should be exacted and shown that the claimant, if foreign born, has become fully naturalized.

The Department is convinced that the requirement of the instructions, above referred to, in so far as it applies to entries made prior to June 6, 1912, and commuted under the original homestead

law, is not warranted by the act of June 6, 1912, the act of August 24, 1912 (37 Stat., 455), amending the same, or the act of March 4, 1913 (37 Stat., 912, 925), extending the provisions of the act of June 6, 1912, to settlers upon unsurveyed lands prior to June 6, 1912. In each of the three acts referred to, it was distinctly provided that an entryman might elect to make proof upon his entry under the law under which the same was made, that is to say, with reference to the case now considered, under the provisions of the original homestead law. Whatever might be the attitude of the Department, were the question now presented to it for the first time for decision, it had become a settled construction of the original homestead law, prior to June 6, 1912, that an entryman, who had merely declared his intention to become a citizen of the United States, might commute and receive patent. The requirement in the act of June 6, 1912, for evidence of citizenship in connection with all homestead entries thereafter made, was thus an amendment of the original homestead law as construed by the Department, and a legislative recognition that that law had been so construed and an acquiescence in such construction as to entries theretofore made, as is apparent from the debates upon the act.

The decision appealed from is, accordingly, reversed, and the entry will be passed to patent, in the absence of other objection.

The Commissioner of the General Land Office is directed to prepare and submit to the Department an amendment to the instructions of February 13, 1913, in conformity with the views herein expressed. [See 42 L. D., 338.]

KELLY v. BOTT.

Decided August 14, 1913.

CONTEST AFFIDAVIT—DEFECTIVE ACKNOWLEDGMENT—AMENDMENT—REINSTATEMENT.

An affidavit of contest is not invalidated by the mistake of the notary public before whom it was acknowledged in giving the time of the expiration of his commission as prior to the date of the acknowledgment, when as a matter of fact it would not expire until after that date, and amendment thereof should be allowed; and where a contest affidavit was rejected because of such clerical error in the acknowledgment, and application for reinstatement thereof, based upon correction of the error, was filed within the time allowed for appeal from such rejection, the contestant is entitled to a preference right of entry upon the subsequent relinquishment of the entry.

JONES, *First Assistant Secretary:*

Appeal is filed by Alexander A. Kelly from the decision of July 11, 1912, of the Commissioner of the General Land Office denying said

Kelly a preference right to make entry for the N. $\frac{1}{2}$, Sec. 10, T. 6 N., R. 61 E., Miles City, Montana, land district, and allowing Peter J. Bott to make entry for said lands as prior applicant therefor; said Kelly claiming a preference right by reason of having filed contest May 31, 1911, against a prior entry for said lands made June 8, 1909, by Charles F. Kidder, which he relinquished July 24, 1911, pending the time allowed Kelly to appeal from dismissal of his contest July 22, 1911.

Kelly's said contest was dismissed, after service thereof, for the reason that the notary public in certifying to the acknowledgment May 30, 1911, of the contest affidavit stated his commission expired May 3, 1911.

At 9 o'clock a. m., July 24, 1911, within the time, as stated, allowed him to appeal from dismissal of his contest, Kelly filed his application to reinstate his contest, filing with same the notary's affidavit stating he had made a clerical error in giving the expiration of his commission as May 3, 1911, and that it should have been May 3, 1913. Kelly also filed at the same time a new contest affidavit against Kidder's entry which is apparently good and sufficient, in form and substance. At 9:07 o'clock a. m., July 24, 1911, Kidder's relinquishment was filed with Bott's application to make entry. And Kelly's application to make entry was filed at 3 o'clock p. m., on the same day.

Proceedings were instituted by Kidder, claiming that his stated relinquishment was fraudulently procured and filed, which went to hearing resulting in the holding by the Commissioner in his decision now appealed from by Kelly that such relinquishment was valid, from which finding Kidder has not appealed.

Further statement of facts herein is unnecessary, the decision appealed from containing a statement of the facts in detail.

A motion is made by an attorney claiming to be Kidder's attorney to dismiss this appeal because not served upon Kidder. Kidder, however, having failed to appeal from the Commissioner's decision herein, as above stated, is eliminated from the case. The question of disputed attorneyship raised herein is not necessary to be decided. Said motion to dismiss is denied.

It is shown that the notary public before whom Kelly's first contest affidavit was acknowledged was in fact then a *de jure* officer, his commission not expiring until May 5, 1913. His certification of the expiration of his commission was a clerical error, and Kelly's application to reinstate his contest based upon the correction of such error should have been allowed. An affidavit is not invalidated by the failure of the notary public taking the acknowledgment thereof to give the expiration of his commission, as required by the state law. Phelps etc. Windmill Company v. Baker (49 Kans. 434), Harbor-

Pitt Shoe Company *et al. v. Dickson* (60 S. W. Rep., 186). And "where the jurat is defective through the negligence of the officer it is freely allowed to be amended." (1 Encyc. of Pleading and Practice, 337, and notes.)

Furthermore, even if Kelly's first contest affidavit were not amendable, the filing by him of a new good and sufficient contest affidavit was a waiver of his first, and same being on file when Kidder's relinquishment and Bott's application for entry were filed the latter application is subject thereto, and the case should be remanded for action under the regulations of April 1, 1913 (42 L. D., 71), Kelly having on the record a presumptive preference right which can only be avoided, as held in said regulations, "on a showing that the contest charge was not true, or that the contestant is not a qualified applicant, or that the land is not subject to his application."

The case is remanded for action in accordance with the foregoing views.

ADA I. HINDMAN.

Decided August 16, 1913.

LAND CLASSIFIED AS COAL—CHARACTER OF LAND—EX PARTE AFFIDAVITS.

Paragraphs 3 to 5 of the circular of September 7, 1909, defining the procedure in case a nonmineral entryman whose land is subsequently classified, claimed, or reported as valuable for coal refuses to accept a restricted patent under the act of March 3, 1909, contemplate that testimony as to the character of the land shall be taken in the regular manner, subject to cross-examination, as in other hearings, and do not warrant the adjudication of the land as coal upon mere *ex parte* affidavits.

JONES, *First Assistant Secretary:*

November 9, 1903, Ada I. Hindman, now Redmon, made homestead entry No. 1907, at Glenwood Springs, Colorado, for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 17, E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, T. 7 N., R. 89 W. This township was withdrawn from filing or entry under the coal land laws October 10, 1906, and was classified as coal land at the minimum price, June 10, 1907. The classification was revoked and the township withdrawn for reclassification April 2, 1909. It is embraced in coal land withdrawal, Colorado No. 1, under Executive order of July 7, 1910, but has not yet been reclassified. The township was suspended from entry or disposal August 4, 1910, pending a resurvey, the plat of resurvey being filed April 4, 1913.

It appears that on or about September 23, 1909, the register and receiver served upon the entrywoman the notice required by paragraph 3 of the instructions of September 7, 1909 (38 L. D., 183). In response thereto she, upon November 24, 1909, filed her affidavit corroborated by three other persons denying the existence of any coal deposits in her entry.

Upon August 9, 1910, the entrywoman filed notice of her intention to make final proof before a United States Commissioner November 11, 1910. The notice for publication issued by the register bore the notation: "Claimant denies existence of coal." Final proof was made at the time fixed before the officer named, a practical miner of the General Land Office also appearing, but he apparently did not cross-examine the claimant or the proof witnesses, but executed an affidavit before the same officer, stating in brief that the land is underlain with workable deposits of coal. Upon the same day, he advised the register as follows:

I was present at the taking of this final proof, and submitted the evidence of the Government in regard to the coal character of this land.

I find that the entrywoman has complied fully with the law requiring residence, cultivation and improvements.

December 6, 1910, the register and receiver advised the chief of field division of the above report and enclosed a copy of the final proof notice with the request that he make a return either of "protest or non-protest." In response thereto, the chief of field division, December 8, 1910, made the following return:

There is no protest filed in this office against the validity of the within entry for surface rights under the act of March 3, 1909.

December 12, 1910, the register and receiver issued final certificate 01507, the certificate bearing the endorsement: "Patent to contain reservation, conditions and limitation of Act of March 3, 1909. (Public, No. 323.)" This action was taken notwithstanding the refusal of the entrywoman to execute an election to take a surface patent and her denial of the existence of coal in her land. By decision of May 17, 1912, the Commissioner adjudicated the land to be coal in character, which finding is based almost wholly upon the *ex parte* affidavit of the practical miner (which affidavit, as far as the record affirmatively shows, was not even brought to the entrywoman's attention), and affirmed the action of the register and receiver. The Commissioner's decision stated:

You will also notify the claimant that this action on the part of this office, merely as a matter of expedition, adjudicates the coal character of the land. Pending the resurvey hereinbefore alluded to, no action will be taken upon the final proof heretofore submitted.

The entrywoman has filed an informal appeal to the Department. The act of March 3, 1909 (35 Stat., 844), provides as to any person who has in good faith located, selected, or entered under the non-mineral land laws of the United States any lands which subsequently are classified, claimed or reported as being valuable for coal that—

Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with

the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

Paragraph 3 of the circular of September 7, 1909 (38 L. D., 183), provided, as to a nonmineral entrywoman whose land is subsequently classified, claimed or reported as being valuable for coal, but who refuses to receive a limited patent:

In the event the claimant declines to elect to receive such patent, *evidence* will be received at the time of making final proof for the purpose of determining whether the lands are chiefly valuable for coal; and the entryman, locator, or selector will be entitled to a patent without reservation unless at the time of hearing on final proof it shall be shown that the land is chiefly valuable for coal.

Paragraph 4 requires the Chief of Field Division to be advised sufficiently in advance of the date fixed for the taking of the final proof in order to be prepared to represent the Government at the time such final proof is made. Paragraph 5 provides:

In every case where there is controversy as to the coal character of the land, and *evidence* is offered thereon, the register and receiver will forward the *testimony* and other papers to the Commissioner of the General Land Office, *with appropriate recommendation*, notice of which should be given the claimant.

The above instructions contemplate the taking of testimony in the regular manner subject to cross-examination as in other hearings. They do not contemplate the adjudication of land as coal almost wholly upon an *ex parte* affidavit which, as above pointed out, the record does not clearly show was even brought to the attention of the claimant. Under the act of March 3, 1909, *supra*, and the regulations of the Department, it was incumbent upon the United States in this case to show at the time of final proof that the land is chiefly valuable for coal. This the United States has failed to do, and, under the law and regulations, the claimant is accordingly entitled to a patent without reservation.

The decision of the Commissioner is reversed and such patent will be issued in the absence of other objection.

RANKIN v. HEIRS OF BOX.

Decided August 18, 1913.

PRACTICE—NOTICE OF CONTEST—UNKNOWN HEIRS.

Where notice in a contest against a homestead entry, alleging the death of the entryman and that there are no known heirs, was duly published and posted, and a copy thereof mailed to the deceased entryman both at his record address and at the post office nearest the land, such service of notice was sufficient to confer jurisdiction upon the local officers, and it was not necessary that a copy of the notice should also be mailed to the "unknown heirs" of the entryman.

JONES, *First Assistant Secretary*:

January 17, 1906, George Box made homestead entry 01743 for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 28, T. 17 N., R. 22 E., W. M., North Yakima, Washington, land district.

July 26, 1912, Rodney C. Rankin filed contest affidavit against said entry, alleging that:

The said George Box died at the City of Ellensburg, Washington, January 22, 1912, leaving no known heirs; that there has been no settlement on or cultivation of the land by any heirs subsequent to his death.

November 12, 1912, the record in said case was transmitted by the local officers to the Commissioner of the General Land Office.

December 12, 1912, the Commissioner of the General Land Office, considering the case upon the record, disposed of it as follows:

Notice was issued August 21, 1912, and service was attempted by publication. The notice was printed in a newspaper and posted on the land and in your office, but no copy of it was mailed, as required by amended rule 10 of practice, to the unknown heirs.

The notice was however, mailed to the deceased entryman at the record address, to wit: Ellensburg, Washington, and to him at Boylston, Washington, the post-office nearest the land. The letters were returned unclaimed.

The notice not having been properly mailed, you acquired no jurisdiction thereunder and the contest is hereby dismissed, and the case closed.

You will so advise the contestant, and of his right to apply for a new notice and proceed anew, in strict compliance with the requirements of the rules of practice.

From this decision claimant has appealed to the Department.

The disposition of this case becomes important because of a junior contest filed against the entry by one William Moses Langley. The question presented is whether or not the mailing of the notice to "George Box" is a compliance with the amended Rule 10 of Practice. The paragraph of Rule 10 upon which the adverse decision of the Commissioner is based reads as follows:

Copy of the notice, as published, together with copy of the affidavit of contest, shall be sent by the contestant, within 10 days after the first publication of such notice, by registered mail, directed to the party for service upon whom such publication is being made, at the last address of such party as shown by the records of the Land Office, and also at the address named in the affidavit for publication, and also at the post-office nearest the land.

Upon this appeal it is contended that if the notice had been addressed "to the unknown heirs of George Box, deceased," or to "the unknown heirs of George Box," no delivery thereof would have been possible, and that such an address does not entitle a registered letter to be received and handled by the post-office.

This contention appears to be well taken. See Postal Laws and Regulations, Edition of 1902, Section 807, Paragraph 5; also Postal Laws and Regulations of 1913. (not yet published), Section 881, Paragraph 4.

The notice was mailed, addressed to "George Box," and if there had been any heirs or legal representatives entitled to receive such letter at either post-office to which it was addressed, such parties would have received it. It appears, however, from the record that there were no heirs in this country, and, of course, none at either place to which the letter was addressed.

Under these circumstances and conditions, the Department holds that the service in this case was complete, and jurisdiction acquired thereby. The decision appealed from is reversed, and the case returned to the General Land Office for further proceedings in accordance herewith.

HOMESTEAD ENTRIES WITHIN NATIONAL FORESTS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 19, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Your attention is called to the act of June 11, 1906 (34 Stat., 233), a copy of which is hereto attached as Appendix A. This act authorizes homestead entries for lands within national forests, and you are instructed thereunder as follows:

1. Both surveyed and unsurveyed lands within national forests which are chiefly valuable for agriculture and not needed for public use may, from time to time, be examined, classified, and listed under the supervision of the Secretary of Agriculture, and lists thereof will be filed by him with the Secretary of the Interior, who will then declare the listed lands subject to settlement and entry.

2. Any person desiring to enter any unlisted lands of this character should present an application for their examination, classification, and listing to the district forester for the district in which the land is located in the manner prescribed by regulations issued by the Agricultural Department. (The present regulations are attached as Appendix B.)

3. When any lands have been declared subject to settlement and entry under this act, a list of such lands, together with a copy of the notice of restoration thereof to entry and authority for publication of such notice, will be transmitted to the register and receiver for the district within which the lands are located. Upon receipt thereof the register will designate a newspaper published within the county in which the land is situated and transmit to the publishers thereof the letter of authority and copy of notice of restoration, said notice to be

published in the designated newspaper once each week for four successive weeks. You will also post in your office a copy of said notice, the same to remain posted for a period of 60 days immediately preceding the date when the lands are to be subject to entry. If no paper is published within the county, publication should be made in a newspaper published nearest the land.

4. The cost of publishing the notice mentioned in the preceding paragraph will not be paid by the receiver, but the publisher's vouchers therefor, in duplicate, should be forwarded to the Department of the Interior, Washington, D. C., by the publisher, accompanied by a duly executed proof of publication. The register will require the publisher to promptly furnish him with a copy of the issue of the paper in which such notice first appears, will compare the published notice with that furnished by this office, and in case of discrepancy or error cause the publisher to correct the printed notice and thereafter publish the corrected notice for the full period of four weeks.

5. In addition to the publication and posting above provided for, you will, on the day the list is filed in your office, mail a copy of the notice to any person known by you to be claiming a preferred right of entry as a settler on any of the lands described therein, and also at the same time mail a copy of the notice to the person on whose application the lands embraced in the list were examined and listed, and advise each of them of his preferred right to make entry prior to the expiration of 60 days from the date upon which the list is filed.

6. Any person qualified to make a homestead entry who, prior to January 1, 1906, occupied and in good faith claimed any lands listed under this act for agricultural purposes, and who has not abandoned the same, and the person upon whose application such land was listed, has, each in the order named, the preferred right to enter the lands so settled upon or listed at any time within 60 days from the filing of the list in your office. Should an application be made by such settler during the 60-day period you will, upon his showing by affidavit the fact of such settlement and continued occupancy, allow the entry. If an application is made during the same period by the party upon whose request the lands were listed, you will retain said application on file in your office until the expiration of the 60-day period, or until an entry has been made by a claimant having the superior preference right. If no application by a bona fide settler prior to January 1, 1906, is filed within the 60-day period, you will allow the application of the party upon whose request the lands were listed. If entry by a person claiming a settler's preference right is allowed, other applications should be rejected without waiting the expiration of the preferred-right period. Of the applicants for listing, only the one upon whose request a tract is listed secures any preference right.

Other applicants for the listing of the same tract acquire no right by virtue of such applications.

All applications by other than the two classes above referred to which are filed prior to the date of opening should be rejected forthwith, notwithstanding the fact that an attempted transfer of the preference right of entry may have been made.

7. The fact that a settler named in the preceding paragraph has already exercised or lost his homestead right will not prevent him from making entry of the lands settled upon if he is otherwise qualified to make entry, but he can not obtain patent until he has complied with all of the requirements of the homestead law as to residence and cultivation and paid \$2.50 per acre for the land entered by him.

8. When an entry embraces unsurveyed lands or irregular fractional parts of a subdivision of a surveyed section, a metes-and-bounds survey of such lands and fractional parts must be made at some time before the entryman applies to make final proof. Survey will not be required where the tract can be described by legal subdivisions or as a quarter or a half of a surveyed quarter-quarter section or rectangular-lotted tract, or as a quarter or half of a surveyed quarter-quarter section or rectangular-lotted tract.

9. Under the acts of August 10, 1912 (37 Stat., 287), and March 4, 1913 (37 Stat., 842), creating appropriations for the Department of Agriculture, such requisite metes-and-bounds surveys will be executed preparatory to listing, up to July 1, 1914, through the district forester under the direction of the surveyor general, in conformity with the regulations of circular No. 235, dated April 30, 1913.

Also under the acts and regulations last above mentioned, up to July 1, 1914, metes-and-bounds surveys required for entries based or to be based on listings under former practice, will be made through the same channel. Applications in these cases should be addressed to the district forester.

10. Such surveys will be made as stated in paragraph 9, up to July 1, 1914, under the appropriation made for that purpose; but if further appropriations be not thereafter available or other provision is not made by law, the entryman will cause such survey to be made at his expense. Application for the survey will be made to the proper United States surveyor general. It will be accompanied by the usual "duplicate" certificate of deposit, showing that an amount has been deposited in some United States depository to the credit of the Treasurer of the United States, sufficient to meet the expenses in the office of the surveyor general, incident to the requested survey. The application must be dated and signed and should state, so far as known to the entryman, each of the following items, namely: The list by number and date, the local land office, number or serial, and

name of entryman, the description of the desired tract by metes and bounds, which must not include unlisted or unentered lands, the location by section, township, and range and whether these are surveyed or unsurveyed and whether the tract has been marked on the ground by the Forest Service. The application must also state the name and address of the surveyor the entryman desires to execute his survey, to whom, if deemed reliable and competent, the surveyor general will issue special instructions. The entryman's arrangement with his surveyor should be for a survey and returns sufficient at final proof.

With the usual triplicate plat and transcript field notes of survey, for your files, the surveyor general will transmit to your office the quadruplicate plat, at which time you will inform the entryman thereof, and when he applies to make final proof you will supply him with the plat for posting on his claim, as hereinafter directed.

11. The commutation provisions of the homestead laws do not apply to entries made under this act, but all entrymen must make final proof of residence and cultivation within the time, in the manner, and under the notice prescribed by the general provisions of the homestead laws, except that all entrymen who are required by the preceding paragraphs to have their lands, or any portion of them, surveyed must, within five years from the date of their settlement, present to the register and receiver their application to make final proof on all of the lands embraced in their entries.

Entries made under the said act of June 11, 1906, are subject to the provisions of sections 2291 and 2297, United States Revised Statutes, as amended by the three-year homestead act of June 6, 1912 (37 Stat., 123), whether made before or after June 6, 1912. Proof, upon entries made prior to such date may, in the discretion of the entryman, be submitted under the old five-year law.

12. In all cases where a survey of any portion of the lands embraced in an entry made under this act is required, the register will, in addition to publishing and posting the usual final-proof notices, keep a copy of the final-proof notice, with a copy of the field notes and the plat of such survey attached, posted in his office during the period of publication, and the entryman must keep a copy of the final-proof notice and a copy of the plat of his survey prominently posted on the lands platted during the entire period of publication of notice of intention to submit final proof, and at the same time his final proof is offered he must file an affidavit showing the date on which the copies of the notice and plat were posted on the land and that they remained so posted during such period, giving dates.

13. Section 1 of the said act of June 11, 1906, having been amended by the act of May 30, 1908 (35 Stat., 554), the only counties in southern California in which entries thereunder can not be made

are San Luis Obispo and Santa Barbara, to which counties the act of June 11, 1906, does not apply. Entries made of lands in the Black Hills National Forest can be made only under the terms and upon the conditions prescribed in sections 3 and 4 of the act of June 11, 1906, as amended by the act of February 8, 1907 (34 Stat., 883), and the act of July 3, 1912 (37 Stat., 188).

14. This act does not authorize any settlements within forest reserves except upon lands which have been listed, and then only in the manner mentioned above, and all persons who attempt to make any unauthorized settlement within such reserves will be considered trespassers and treated accordingly.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

APPENDIX A.

AN ACT To provide for the entry of agricultural lands within forest reserves.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Agriculture may in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of land within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego; which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this Act.

Upon the filing of any such list or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length, at the expiration of sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated: *Provided*, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry: *Provided further*, That any entryman desiring to obtain patent to any lands described by metes and bounds entered by him under the provisions of this

act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of his notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like period; and further, that any agricultural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no lands entered under the provisions of this Act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries.

SEC. 2. That settlers upon lands chiefly valuable for agriculture within forest reserves on January first, nineteen hundred and six, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted an additional homestead right of entry for the purposes of this act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay two dollars and fifty cents per acre for lands entered under the provisions of this section, such payment to be made at the time of making final proof on such lands.

SEC. 3. That all entries under this act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation, and use of the waters within the said forest reserves for mining, irrigation, and other purposes; and no titles acquired to agricultural lands in said Black Hills Forest Reserve under this act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries.

SEC. 4. That no homestead settlements or entries shall be allowed in that portion of the Black Hills Forest Reserve in Lawrence and Pennington counties in South Dakota except to persons occupying lands therein prior to January first, nineteen hundred and six, and the provisions of this act shall apply to the said counties in said reserve only so far as is necessary to give and perfect title of such settlers or occupants to lands chiefly valuable for agriculture therein occupied or claimed by them prior to the said date, and all homestead entries under this act in said counties in said reserve shall be described by metes and bounds survey.

SEC. 5. That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been open to settlement as provided in this act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve.

Approved, June 11, 1906 (34 Stat., 233).

AN ACT Excepting certain lands in Pennington County, South Dakota, from the operation of the provisions of section four of an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following described townships in

the Black Hills Forest Reserve, in Pennington County, South Dakota, to wit: Townships one north, one east; two north, one east; one north, two east; two north, two east; one south, one east; two south, one east; one south, two east; and two south, two east, Black Hills meridian, are hereby excepted from the operation of the provisions of section four of an Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six. The lands within the said townships to remain subject to all other provisions of said Act.

Approved, February 8, 1907 (34 Stat., 883).

AN ACT Excepting certain lands in Lawrence and Pennington Counties, South Dakota, from the operation of the provisions of section four of an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following-described townships in the Black Hills Forest Reserve, South Dakota, to wit: Township three north, one east, and so much of townships two north, one east, and two north, two east, as are within Lawrence County, and township one north, three east, in Pennington County, Black Hills meridian, are hereby excepted from the operation of the provisions of section four of an Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six. The lands within the said townships to remain subject to all other provisions of said Act.

Approved, July 3, 1912 (37 Stat., 188).

AN ACT To amend an Act approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves."

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 provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six, be amended by striking out of section one the following words: "Except the following counties in the State of California: Inyo, Tulare, Kern, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego."

Approved, May 30, 1908 (35 Stat., 554).

APPENDIX B.

The following are in substance the Forest Service regulations governing applications under the act of June 11, 1906:

1. All applications for the listing of lands under the act of June 11, 1906, must be signed by the person who desires to make entry and must be mailed to the district forester for the district in which the land is located.
2. The person upon whose application the land is listed has the preference right of entry, unless there was a settler on the land prior to January 1, 1906, in which event the settler has the preference right.
3. Persons having preference rights under the act may file their entries at any time within sixty days after the filing of the list in the local land office. If they do not make entry within that time, the land will be subject to entry by the first qualified person to make application at the local land office.
4. All applications must give the name of the national forest and describe the land by legal subdivisions, section, township, and range, if surveyed, and if not

surveyed, by reference to natural objects, streams, or improvements, with sufficient accuracy to identify it.

5. Section 2 of the act gives, within national forests only, an additional homestead right of entry upon lands chiefly valuable for agriculture, to settlers prior to January 1, 1906, who have already exercised or lost their homestead privilege, but who are otherwise competent to enter under the homestead laws. The general act of February 8, 1908, provides that any person who, prior to February 8, 1908, made entry under the homestead laws, but for any cause has lost, forfeited, or abandoned his entry, shall be entitled to the benefits of the homestead law as though such former entry had not been made, except when the entry was canceled for fraud or was relinquished for a valuable consideration.

6. The fact that an applicant has settled upon land will not influence the decision with respect to its agricultural character. Settlers must not expect to include valuable timber land in their entries. Settlement made after June 11, 1906, and in advance of opening by the Secretary of the Interior, is not authorized by the act, will confer no rights, and will be trespass.

7. Entry under the act is within the jurisdiction of the Secretary of the Interior, who will determine preference rights of applicants.

8. Applicants who appear to have a preference right under the act of June 11, 1906, will be permitted to occupy so much of the land applied for by them as in the opinion of the forest supervisor is chiefly valuable for agriculture.

COMMUTATION PROOF—CITIZENSHIP—ACT JUNE 6, 1912.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 27, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

GENTLEMEN: Where commutation proof is submitted under the original homestead law in support of a homestead entry made prior to June 6, 1912, or initiated prior to that date by settlement on unsurveyed lands subject to homestead entry, it will be sufficient, in the matter of citizenship, if the entryman shows that he has declared his intention to become a citizen of the United States, or is by law given that status.

Paragraph 14 of circular No. 208, dated February 13, 1913 (41 L. D., 479), and paragraph 36 of circular No. 224, dated March 26, 1913 (42 L. D., 35), are modified accordingly.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved, August 27, 1913:

A. A. JONES,
First Assistant Secretary.

INSTRUCTIONS.**PRACTICE—DEFECTIVE APPEAL—RULE 77.**

The Commissioner of the General Land Office has no authority to dismiss an appeal received and filed within the time prescribed by the Rules of Practice; and where an appeal filed in time is held defective by the Commissioner, appellant should be given notice to cure the defect within 15 days, and, regardless of whether or not the defect be cured, the appeal, together with the record, should be transmitted to the Department, with appropriate report and recommendation.

Acting Secretary Jones to the Commissioner of the General Land Office, August 29, 1913.

I am in receipt of your letter of August 26, 1913, asking for a construction of Rule 77 of the Rules of Practice, approved December 9, 1910, the primary purpose of your inquiry being to determine whether you are authorized thereunder to dismiss appeals which you find defective in the event the defect is not cured within 15 days from notice, or whether such appeals must be forwarded to the Department for action.

Rule 82 of the Rules of Practice in force prior to December 9, 1910, provided that "when the Commissioner considers an appeal defective he will notify the party of the defect, and if not amended within fifteen days from the date of service of such notice the appeal may be dismissed by the Secretary of the Interior and the case closed." Rule 77, of the existing Rules of Practice, concludes with the statement that if the defect be not cured within 15 days "the appeal may be dismissed and the case closed," without specifying by whom such action will be taken.

The general rule as laid down in the decisions of the Department and as observed in practice, is that the Commissioner has no authority to dismiss an appeal once received and filed within the time prescribed by the rules, the case covered by such an appeal being removed from the jurisdiction of the General Land Office. The Commissioner may refuse to receive appeals filed out of time (33 L. D., 39), but, as indicated, appeals filed within the time prescribed, whether defective or not, occupy a different status.

Rule 77 did not in terms, nor by implication, vest in the Commissioner the power to dismiss an appeal filed in time, even though defective and even though, in the opinion of the Commissioner, the defect has not been cured within the time stated in said rule. The questions involved in such a proceeding are believed to be such as should receive consideration by the tribunal to which appeal is sought, and such is believed to be the effect and intention of the rule.

You are, therefore, advised that where you hold an appeal to be

defective and serve notice requiring the defect to be cured within 15 days, you should, whether the defect is attempted to be cured or not, transmit the appeal and the record to which it appertains to the Department with appropriate report and recommendation.

WELLS v. BODKIN.

Decided August 29, 1913.

CONTESTANT—PREFERENCE RIGHT—HEIRS—ACT OF JULY 26, 1892.

In event a successful contestant die after filing application to enter in exercise of his preference right, but before allowance of entry thereon, his heirs, by virtue of the provisions of the act of July 26, 1892, succeed to his rights and may carry the application to entry; but an heir can not while holding a homestead entry in his own right perfect the application of a deceased contestant.

JONES, *First Assistant Secretary:*

The Department has considered motion for rehearing filed in the above entitled cause wherein the Department May 27, 1913, rendered decision [not reported], reversing that of the Commissioner of the General Land Office and canceling the homestead entry involved in said cause allowed June 1, 1912, upon the application filed by Florence V. Bodkin May 18, 1910; and directing the allowance of the homestead application filed the same date by Charles E. Wells for the same lands upon proper showing of his present qualifications to make such entry, for the stated reason that said Bodkin had died March 25, 1912, prior to the allowance of her entry, following the Department's decision in the case of *Garvey v. Tuiska* (41 L. D., 510), holding that no descendible right attaches to a mere application to make homestead entry.

It appears from the record that said Bodkin filed contest against a prior entry for said lands made by one J. H. Geiger under which Geiger relinquished his entry March 7, 1908, and Bodkin was notified July 1, 1908, of her preference right accordingly and that same would be held suspended awaiting restoration of said lands to entry, the same then being under a first form withdrawal. On January 10, 1910, order was issued restoring said lands to settlement April 18, and to entry May 18, 1910, on which latter date said Bodkin and said Wells filed simultaneous applications for entry, Wells stating he had settled on said lands, the date not stated, which were suspended for investigation by the surveyor general, and upon such suspension being removed Bodkin's application was allowed June 1, 1912, and Wells's rejected for conflict therewith June 3, 1912. The Commissioner November 15, 1912, affirmed such action, holding that no settlement by another could deprive Bodkin of her preference

right of entry, and that her application duly filed was equivalent to an actual entry.

The Department in the case of *Garvey v. Tuiska* cited, held that Tuiska acquired no right by the filing of his application that could descend to his widow or heirs or be disposed of by sale, the reason assigned for such holding being that "Congress has made no provision for succession and descent with reference to a mere application to enter."

It is urged that Bodkin's application is not a "mere application to enter", but, by reason of having been filed by her under her preference right as successful contestant against Geiger's entry, is based upon a statutory right of entry given by the act of May 14, 1880 (21 Stat., 140), and preserved, as contended, to her heirs by the act of July 26, 1892 (27 Stat., 270).

The former act provides that such contestant "shall be allowed thirty days from date of such notice [of cancellation of the contested entry] to enter said lands," and the latter act provides:

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.

While a contest is terminated so far as the contestee and his rights under his contested entry are concerned when such entry is canceled, it can not fairly be said that the contest is thereby terminated as regards the contestant and his statutory rights based thereon. He is given by the act of May 14, 1880, *supra*, if a qualified person, a right of entry, as to the lands involved, as a reward for initiating contest and prosecuting same to a cancellation of the contested entry, and he must be assumed to have in contemplation when he initiates his contest, as he is required by the present rules of practice to have, the ultimate making of an entry based on such contest as its fruition and end. His contest carries with it, therefore, an incipient and inchoate statutory right of entry and is in legal effect subsisting as between him and the United States, as the basis for such right of entry, until said right is exercised, waived or lost by some act of his, or is foreclosed by some interest of the Government or by limitation of the law. Neither the contestee nor any other person can, by settlement or otherwise, acquire any interest in the lands after initiation of the contest and prior to termination of the contestant's right of entry based by the statute thereon which is superior to such right in the contestant. *Thorbjornson v. Hindman* (38 L. D., 335).

The purpose of the act of July 26, 1892, *supra*, giving to a contestant's heirs the right of succession to his contest and title to "the

same rights" he would have if he had not died, was, as stated in the case of Heirs of Robert M. Averett (40 L. D., 608) :

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.

This statute was manifestly enacted in recognition of the rights acquired and acquirable by a contestant under his contest, and was designed to secure all such rights to the contestant's heirs. To restrict the term used, "the final termination of the" contest, to the termination thereof as regards the contestee, only, would be contrary to the reason and purpose of the act. No interest of the contestee called for the enactment of such a law. The interest of the contestant, however, based upon a consideration, the payment of the costs of contest on the promise of a prospective right of entry, called for just such an enactment which should secure to such contestant and to his heirs that for which such consideration had been given by him, in part if not wholly, as in the present case; and good faith on the part of the United States with such contestant required such an enactment to apply to all cases where the contestant's death intervenes before the right of entry given him inchoately with his privilege of contest is merged into actual entry or otherwise extinguished in some of the ways indicated. It is within the reason and spirit of the statute so to construe it, and such construction is consonant to the terms and necessary to effect the purpose and object of the statute. "Where a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act." *Bernier v. Bernier* (147 U. S., 242).

The reason assigned for the holding in the case of *Garvey v. Tuiska*, *supra*, that Congress has made no provision for succession and descent with reference to a mere application to enter, does not therefore apply in the case of an application to enter filed under a contestant's preference right, but in such cases, by the act of July 26, 1892, *supra*, the contestant's heirs have the right to perfect such application filed by him and pending at his death and to make entry thereon.

In this case, however, it appears that Bodkin's heirs are her father and mother, equally, and that her father has made homestead entry in his own right, which precludes him and his wife as heirs of this daughter from perfecting the application filed by her under her preference right as successful contestant against the prior entry for the lands and erroneously allowed after her death; as heirs making

homestead entry under a preference right initiated in their ancestor whom they succeed under said act of July 26, 1892, must comply with all provisions of the homestead law, and reside upon, improve and cultivate the land the same as would their ancestor himself have been required to do had he made such entry. *Becker v. Bjerke* (36 L. D., 26); *Heirs of Robert M. Averett, supra*.

Bodkin's entry must, therefore, be canceled for the reasons above stated; and while Wells's application when filed was properly subject to rejection because of Bodkin's superior right of entry, and his settlement prior to her death was wholly a trespass upon her rights, no legal reason now exists for rejecting his application, which was only suspended until its rejection June 3, 1912, and same should be allowed.

This motion is accordingly, for the reasons above appearing, denied.

THREE-YEAR HOMESTEAD—REDUCTION OF CULTIVATION.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, September 6, 1913.

TO THE COMMISSIONER OF THE GENERAL LAND OFFICE:

It is found, in the administration of the three-year homestead law, act of June 6, 1912 (37 Stat., 123), that the regulations issued February 13, 1913, Circular No. 208 (41 L. D., 479), governing the reduction of cultivation, should be made more specific. Section 7 of said regulations is therefore amended to read as follows:

The Secretary of the Interior is authorized, upon a satisfactory showing therefor, to reduce the required area of cultivation. The homestead laws were enacted primarily for the purpose of enabling citizens of the United States "in good faith to obtain a home" and the provision of the statute in regard to reduction in the required area of cultivation will not be permitted to so operate as in any manner to relax the rule that the entryman must so reside upon, use, occupy, cultivate and improve the tract of land entered by him as to satisfactorily show that he in good faith at the time of such entry intended to make the land his bona fide home and that it has been his home to the date of final proof. However, if the tract of land entered is so hilly or rough, the soil so alkaline, compact, sandy, or swampy, the precipitation of moisture so light as not to make cultivation practicable, to the extent of the required amount, or if the land is generally valuable only for grazing, a reduction in the area of cultivation may be permitted. The personal or financial disabilities or misfortunes of the entryman existing at the time of entry will not be considered sufficient cause for reduction in the area of cultivation, but if after entry and actual settlement, through circumstances which at the time of entry could not reasonably have been foreseen, the entryman has met with misfortune which renders him reasonably unable to cultivate the prescribed area,

upon satisfactory proof thereof at the time of making final proof, a reduction in area of cultivation may be permitted during the period of disability following such misfortune, provided notice of such misfortune and the nature thereof shall be submitted under oath within sixty days after the occurrence thereof to the Register of the land office of the district in which the land is situated. Tilling of the land or other appropriate treatment for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year will be deemed cultivation within the terms of the act, where that manner of cultivation is necessary or generally followed in the locality.

No reduction in area of cultivation will be permitted on account of expense in removing the standing timber from the land. If lands are so heavily timbered that the entryman can not reasonably clear and cultivate the area prescribed by the statute, such entries will be considered speculative and not made in good faith for the purpose of obtaining a home.

The authority to make reduction in the prescribed area of cultivation relates to enlarged homestead entries as well as ordinary homesteads made under section 2289, R. S., and applications for reduction of area of cultivation under enlarged homestead entries will be made or refused in accordance with the provisions of this paragraph.

PROCEDURE TO OBTAIN A REDUCTION IN AREA OF CULTIVATION.

A showing should be made in each case as to the difficulties attendant upon the cultivation of that particular tract. To this end the entryman should show, in detail, the special physical conditions of the land which he believes entitles him to an order of reduction, describing its topography, whether hilly or level, its quality and character as adapted to cultivation, whether light or heavy, sandy, loamy, rocky or alkaline, together with the prevalent climatic conditions in the matter of annual snows or rains, as affording sufficient moisture for the production of crops one year with another. The presence of absence of springs or permanent streams on or in the immediate vicinity of the land should be shown. The natural products of the land without tillage, and the effect of tillage on the soil, should be shown, as well as the use to which the land is best adapted. It is desirable that the entryman should, wherever practicable, know in advance what, if any reduction can properly be made, and, therefore, as a general regulation governing applications for reduction in area of cultivation, it is directed that all entrymen who desire a reduction shall file applications therefor during the first year of the entry and upon forms to be prepared and furnished by the Commissioner of the General Land Office and distributed through the land offices, which will be forwarded, *without action*, to the Chief of the Field Division, and report made in accordance with circular 195, on form 4-007-b.

Applications for reduction in area of cultivation will be acted upon by the Commissioner of the General Land Office, who may in appropriate cases defer action until final proof, but his decision in granting or refusing applications for reduction in area shall be subject to review, upon appeal, by the Secretary of the Interior.

ANDRIEUS A. JONES,
Acting Secretary.

ADDITIONAL ENTRIES UNDER THE ENLARGED HOMESTEAD ACTS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., March 17, 1913.

Registers and Receivers, United States land offices, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington, and Wyoming.

SIRS: For your information there is hereto appended a copy of the act of Congress approved February 11, 1913 (37 Stat., 666), amending sections 3 and 4 of the acts of February 19, 1909 (35 Stat., 639), and June 17, 1910 (36 Stat., 531), providing for enlarged homesteads. The amendatory act in no way affects entries made under section 6 of either of the enlarged homestead acts.

The area required to be cultivated is reduced to one-sixteenth of the area embraced in the entry beginning with the second year of such entry and one-eighth of the area beginning with the third year, thus carrying into the enlarged homestead laws the reduction of cultivation effected by the three-year homestead law of June 6, 1912 (37 Stat., 123). As provided by the latter act the cultivation of at least one-eighth must be continued up to the time proof is submitted.

A person who has made original entry under section 2289 of the Revised Statutes and subsequently an additional entry under section 3 of the enlarged homestead acts may make proof under either of the following conditions:

CULTIVATION.

(1) By showing compliance with the requirements of the law applicable to his original entry, and that after the date of additional entry he cultivated, in addition to such cultivation as was relied upon and used in perfecting title to the original entry, an amount equal to one-sixteenth of the area of the additional entry for one year not later than the second year of such additional entry, and one-eighth the following year and each succeeding year until proof is submitted. The cultivation in support of the additional entry may be maintained upon either entry.

(2) When proof is submitted on both entries at the same time, by showing the cultivation of an amount equal to one-sixteenth of the combined area of the two entries for one year, increased to one-eighth the succeeding year, and that such latter amount of cultivation has continued until offer of proof. If cultivation in these amounts can be shown, proof may be submitted without regard to the date of the additional entry, i. e., the required amount of cultivation may have

been performed in whole or in part on the original entry before the additional entry was made, and proof on the additional need be deferred only until the showing indicated can be made. Such combined proof may be submitted not later than seven years from the date of the original entry.

RESIDENCE.

In instances where proof is first made on the original entry meeting the requirement of the homestead law respecting residence, no further showing in this particular will be exacted in making proof upon the additional entry; neither will a period of residence be exacted in proof upon the combined entry in excess of that required under the original entry.

PROOF SUBMITTED PRIOR TO FEBRUARY 11, 1913.

Proofs heretofore submitted, and which have not been acted upon, will receive consideration under the provisions of this act and the act of June 6, 1912.

Where proofs have been heretofore submitted, but were rejected solely because compliance with the requirements of the law did not continue for the required period after the date of the additional entry, applications for reconsideration will be entertained if seasonably filed.

Very respectfully,

FRED DENNETT, *Commissioner.*

Approved:

LEWIS C. LAYLIN,
Assistant Secretary.

AN ACT To amend an act entitled "An act to provide for an enlarged homestead."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections three and four of the act entitled "An act to provide for an enlarged homestead," approved February nineteenth, nineteen hundred and nine, and of an act entitled "An act to provide for an enlarged homestead," approved June seventeenth, nineteen hundred and ten, be, and the same are hereby, amended to read as follows:

"SEC. 3. That any homestead entryman of lands of the character herein described, upon which entry 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.

"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 said section, prove by two credible witnesses that at least one-sixteenth of the area embraced in such entry was continuously cultivated for agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-eighth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry: *Provided*, That any qualified

person who has heretofore made or hereafter makes additional entry under the provisions of section three of this act may be allowed to perfect title to his original entry by showing compliance with the provisions of section twenty-two hundred and ninety-one of the Revised Statutes respecting such original entry, and thereafter in making proof upon his additional entry shall be credited with residence maintained upon his original entry from the date of such original entry, but the cultivation required upon entries made under this act must be shown respecting such additional entry, which cultivation, while it may be made upon either the original or additional entry, or upon both entries, must be cultivation in addition to that relied upon and used in making proof upon the original entry; or, if he elects, his original and additional entries may be considered as one, with full credit for residence upon and improvements made under his original entry, in which event the amount of cultivation herein required shall apply to the total area of the combined entry, and proof may be made upon such combined entry whenever it can be shown that the cultivation required by this section has been performed; and to this end the time within which proof must be made upon such combined entry is hereby extended to seven years from the date of the original entry: *Provided further*, That nothing herein contained shall be so construed as to require residence upon the combined entry in excess of the period of residence as required by section twenty-two hundred and ninety-one of the Revised Statutes."

Approved, February 11, 1913.

GEORGE B. WHYTE.

Decided April 24, 1913.

ENLARGED HOMESTEAD—ADDITIONAL—RESIDENCE AND CULTIVATION.

Residence and cultivation to support an additional entry under the enlarged homestead act of February 19, 1909, must be performed subsequent to the date of such entry.

ENLARGED HOMESTEAD—ADDITIONAL—CULTIVATION—GRAZING.

Both the original enlarged homestead act and the act of February 11, 1913, amendatory thereof, specifically require that an additional entry thereunder must be "cultivated to agricultural crops other than native grasses beginning with the second year of the entry;" and grazing of the land does not meet such specific requirement as to agricultural cultivation.

LAYLIN, *Assistant Secretary*:

Appeal was filed herein by George B. Whyte from decision of May 4, 1912, of the Commissioner of the General Land Office rejecting the final proof submitted by said Whyte September 17, 1910, as to both his original and his additional homestead entries, so far as such proof relates to said additional entry which was made June 16, 1910, for the stated reason that said proof was premature.

The original entry herein made October 7, 1902, was for the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 18, and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 19, and said additional entry, made under the act of February 19, 1909 (35 Stat., 639), was for the E. $\frac{1}{2}$ NE. $\frac{1}{4}$; and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 19, T. 35 N., R. 3 E., Havre, Montana, land district. Final certificate and patent issued as to said original entry on said proof.

The Department February 27, 1913, remanded this case for consideration thereof by the Commissioner under the act of February 11, 1913 (37 Stat., 666), amending the enlarged homestead law. The Commissioner April 15, 1913, retransmitted the case, stating it does not come under the provisions of that act, the land being alleged in the proof and in the appeal to be valuable only for grazing purposes.

Under the original enlarged homestead law, residence and cultivation to support an additional entry must be performed subsequent to the date of such entry. John B. Day (40 L. D., 446).

Furthermore, both the original enlarged homestead act and said act of February 11, 1913, specifically require that an additional entry must be "cultivated to agricultural crops other than native grasses beginning with the second year of the entry." The proof shows that this entryman cultivated, since the year 1904, only a small garden patch on his original entry and grazed twelve head of horses and two cows. It appears further from his corroborated statement that three-fourths of the lands embraced in his two entries are cultivable and, except for one or two years out of five, raise fair crops.

Grazing of land does not comply with the specific requirements of the original or amended enlarged homestead acts as to agricultural cultivation, and the showing made is insufficient under either said original or said amended act. See Instructions under the latter act of March 17, 1913 (42 L. D., 345).

The decision appealed from is accordingly affirmed and the Commissioner's finding as to the application of said act of February 11, 1913, is concurred in.

ADDENDA TO REGULATIONS OF MARCH 1, 1913—ACT OF FEBRUARY 15, 1901.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, July 19, 1913.

THE COMMISSIONER OF THE GENERAL LAND OFFICE:

In order to provide for greater elasticity in dealing with the varying conditions under which water-power permits are issued, the regulations under the act of February 15, 1901 (31 Stat., 790), made and fixed by the Secretary of the Interior on March 1, 1913 [41 L. D., 532], are hereby modified to the extent of inserting the phrase "unless otherwise specified in the permit and" at the beginning of regulation 6, and the phrase "unless otherwise ordered by the Secretary" at the beginning of regulation 8.

FRANKLIN K. LANE.

**LAWS AND REGULATIONS RELATING TO THE RECLAMATION OF
ARID LANDS BY THE UNITED STATES.**

CIRCULAR.

APPROVED BY THE SECRETARY OF THE INTERIOR FEBRUARY 6, 1913—
AMENDED TO SEPTEMBER 6, 1913.

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 regular 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 lands 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. 5.¹ 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

¹ Sec. 5. Manner of payments, amended by act of Aug. 9, 1912. See p. 362.

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. 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 portion 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. 9.¹ 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

¹ Sec. 9 repealed by act of June 25, 1910, see p. 356.

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 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 town-site 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 town-site 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 town sites 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 shall 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. 5.¹ 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 moneys 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,"

¹Sec. 5 amended by act of Feb. 24, 1911, see p. 360.

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 entered 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 wherever 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 town site 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 town-site 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 town site shall be paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund.

* * * * *

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 reappraisal 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 said 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 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; the 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 expense 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 payments 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. 5.¹ 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).

¹ Sec. 5 amended by act of Feb. 18, 1911, see p. 359.

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, entrymen 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, entrymen 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 author-

ized 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., 930).

An Act For the relief of homestead entrymen under the reclamation projects in the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no qualified entryman who prior to June twenty-fifth, nineteen hundred and ten, made bona fide entry upon lands proposed to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, the national reclamation law, and who established residence in good faith upon the lands entered by him, shall be subject to contest for failure to maintain residence or make improvements upon his land prior to the time when water is available for the irrigation of the lands embraced in his entry, but all such entrymen shall, within ninety days after the issuance of the public notice required by section four of the reclamation Act, fixing the date when water will be available for irrigation, file in the local land office a water-right application for the irrigable lands embraced in his entry, in conformity with the public notice and approved farm-unit plat for the township in which his entry lies, and shall also file an affidavit that he has reestablished his residence on the land with the intention of maintaining the same for a period sufficient to enable him to make final proof: *Provided*, That no such entryman shall be entitled to have counted as part of the required period of residence any period of time during which he was not actually upon the said land prior to the date of the notice aforesaid, and no application for the entry of said lands shall be received until after the expiration of the ninety days after the issuance of notice within which the entryman is hereby required to reestablish his residence and apply for water right.

Approved, April 30, 1912 (37 Stat., 105).

An Act Relating to partial assignments of desert-land entries within reclamation projects made since March twenty-eighth, nineteen hundred and eight.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a desert-land entry within the exterior limits of a Government reclamation project may be assigned in whole or in part under the Act of March twenty-eighth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page fifty-two), and the benefits and limitations of the Act of June twenty-

seventh, nineteen hundred and six (Thirty-fourth Statutes at Large, page five hundred and twenty), shall apply to such desert-land entryman and his assignees: *Provided*, That all such assignments shall conform to and be in accordance with farm units to be established by the Secretary of the Interior upon the application of the desert-land entryman. All such assignments heretofore made in good faith shall be recognized under this Act.

Approved, July 24, 1912 (37 Stat., 200).

An Act Providing for patents on reclamation entries, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any homestead entryman under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation and cultivation submit proof of such residence, reclamation and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation Act for homestead entrymen; *Provided*, That no such patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid.

SEC. 2. That every patent and water-right certificate issued under this Act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights.

Upon default of payment of any amount so due title to the land shall pass to the United States free of all encumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with eight per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and costs. The balance of the proceeds, if any, shall be the property of the defaulting debtor or his assignee: *Provided*, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at not more than the amount in default, including interest and costs.

SEC. 3. That upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certifi-

cate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect except the lien for annual charges for operation and maintenance: *Provided*, That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation Act of June seventeenth, nineteen hundred and two, and Acts supplementary thereto and amendatory thereof, before final payment in full of all instalments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said Acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this Act.

SEC. 4. That the Secretary of the Interior is hereby authorized to designate such bonded fiscal agents or officers of the Reclamation Service as he may deem advisable on each reclamation project, to whom shall be paid all sums due on reclamation entries or water rights, and the officials so designated shall keep a record for the information of the public of the sums paid and the amount due at any time on account of any entry made or water right purchased under the reclamation Act; and the Secretary of the Interior shall make provision for furnishing copies of duly authenticated records of entries upon payment of reasonable fees, which copies shall be admissible in evidence, as are copies authenticated under section eight hundred and eighty-eight of the Revised Statutes.

SEC. 5. That jurisdiction of suits by the United States for the enforcement of the provisions of this Act is hereby conferred on the United States district courts of the districts in which the lands are situated.

Approved, August 9, 1912 (37 Stat., 265).

An Act Making appropriations to supply deficiencies in appropriations for the fiscal year nineteen hundred and twelve and for prior years, and for other purposes.

* * * * *

That any desert-land entryman whose desert-land entry has been embraced within the exterior limits of any land withdrawal or irrigation project under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, and who may have obtained a water supply for the land embraced in any such desert-land entry from the reclamation project by the purchase of a water-right certificate, may at any time after having complied with the provisions of the law applicable to such lands and upon proof of the cultivation and reclamation of the land to the extent required by the reclamation Act for home-

stead entrymen, submit proof of such compliance, which proof, if found regular and satisfactory, shall entitle the entryman to a patent and a final water-right certificate under the same terms and conditions as required of homestead entrymen under the Act entitled "An Act providing for patents on reclamation entries, and for other purposes, approved August ninth, nineteen hundred and twelve."

* * * * *

Approved, August 26, 1912 (37 Stat., 610).

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, Montana.

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, Nevada.

The act of April 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., 82), provides for the disposition, under the reclamation act, of lands in the diminished Colville Indian Reservation, Washington.

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, Washington.

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, Montana.

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 (35 Stat., 558), provide for the reclamation of lands on the Fort Peck Indian Reservation, Montana.

Par. 5, Sec. 10, act of June 20, 1910 (36 Stat., 564), provides for the disposition of school lands in reclamation projects in the State of New Mexico.

Par. 5, Sec. 28, act of June 20, 1910 (36 Stat., 574), provides for the disposition of school lands in reclamation projects in the State of Arizona.

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.

This circular contains only the laws specifically applying to reclamation homestead entries and water-right applications and regulations thereunder, but does not contain the general homestead laws, most of which also apply to reclamation homestead entries.

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. The reclamation act of June 17, 1902, and acts amendatory thereof or supplementary thereto are hereinafter referred to generally as the reclamation 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 law, in the same manner as for other lands subject to entry within reclamation projects except that the certificate of the project manager that water-right application has been made and charges deposited, which must be filed in the ordinary case, is not required. (See pars. 5 and 74.) 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. This act has no application where the cancellation of the entry made prior to June 25, 1910, was the result of

a contest or relinquishment resulting from the same. (*Fred v. Hook*, 41 L. D., 67.) The act is also inapplicable in the case of lands withdrawn under the first form and has reference only to lands covered by second-form withdrawals. (*Annie G. Parker*, 40 L. D., 406.)

5. Homestead entries of lands platted to farm units and covered by public notice are made practically in the same manner as the ordinary homestead entry and registers and receivers will allow homestead applications for such lands, if found regular, and accompanied by a certificate of the project manager showing that water-right application has been filed and the proper water right charges deposited. No application to make homestead entry of lands within a reclamation project and covered by public notice will be allowed unless accompanied by such certificate of the project manager. If no such certificate is filed, the register and receiver will notify the applicant that unless such certificate is filed within thirty days the homestead application will be rejected without further notice and the case closed. If such certificate be filed before rejection the application will be allowed if otherwise regular. Where under the reclamation law lands within the reclamation project are subject to entry notwithstanding public notice covering said lands has not yet issued, such certificate of the project manager is not required, and in such cases the application, if otherwise regular, will be received and entry allowed. The register and receiver will immediately notify the project manager of each entry allowed, stating whether the entry was allowed with or without the certificate of the project manager above referred to. (See par.74.)

SUBDIVISION OF FARM UNITS.

6. An entry may be made of part of an established farm unit (a) when the remaining portion of said unit is also desired for entry simultaneously by another person and is, in the judgment of the project manager, sufficient, if carefully managed, to return to the reclamation fund the charges apportioned to the irrigable area thereof, or (b) can be advantageously included as part of an established farm unit, or (c) can in combination with existing farm units be advantageously replatted into new farm units, each sufficient, if carefully managed, to support a family and return to the reclamation fund the charges apportioned to the irrigable area of the several new farm units.

7. Where it is desired to make entry of part only of a farm unit, an application for the amendment and subdivision of such unit should be filed with the project manager. If such subdivision is rectangular and survey is not required to determine the division of the irrigable area of the farm unit as proposed to be divided, no charge will be made. 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, the project manager will proceed as directed in paragraph 35 of this circular. Upon such application being filed, the project manager will either approve or disapprove the same, and if approved, proceed as directed in paragraph 36 of this circular.

8. 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.

9. 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. 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 project managers of the Reclamation Service fully informed, by correspondence, as to conditions affecting the same.

WITHDRAWALS AND RESTORATIONS.

10. 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.

11. 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 maintenance of irrigation works, but which may possibly be irrigated from such works.

12. 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.)

13. Lands withdrawn under the second form and becoming subject to entry in the manner provided by the acts of June 25, 1910, and February 18, 1911, can be entered only under the homestead laws and subject to the provisions, limitations, charges, terms, and conditions of the reclamation law, 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 with-

drawn, except that where settlement rights were acquired prior to the withdrawal and have been diligently prosecuted and the homestead law 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.) No person will be permitted to gain or exercise any right whatever under any settlement or occupation begun after withdrawal of the land from settlement and entry until the land becomes subject to settlement and entry under the provisions of the acts of June 25, 1910, and February 18, 1911, or is restored to the public domain.

14. 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 hundred h 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.

15. Should a homestead entry embrace land that is needed in whole or in part for purposes contemplated by said proviso in the act of August 30, 1890, the land would be taken for such purpose, and the entryman would have no claim against the United States for the same.

16. 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.)

17. 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.)

18. Where the Secretary of the Interior by the approval of farm-unit plats has determined, or may determine, that the lands designated 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 law 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.

19. 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 law, 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.

20. Uncompleted claims to lands withdrawn under the provisions of the reclamation law 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.)

21. Where the owners of the improvements mentioned in paragraph 19 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.

22. Inasmuch as every entry made under the reclamation law 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.

23. A person who has made homestead entry for any area within a reclamation project can not make an additional homestead entry for lands outside of a project, nor for lands within a project except as provided in the following paragraph. One who has made homestead entry for less than one hundred and sixty acres outside of a reclamation project is disqualified from making an additional entry within a reclamation project, as every entry within a project is either made for or is subject to conformation to a farm unit, which is the equivalent of a homestead entry of one hundred and sixty acres of land outside of a reclamation project.

24. 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.

25. An entry embracing lands included within a first or second form reclamation withdrawal, whether such entry was made before or after the date of such withdrawal, may be contested and canceled because of entryman's failure to comply with the law or for any other sufficient reason, and any contestant who secures the cancellation of such entry and pays the land office fees occasioned by his contest will be awarded a preferred right of making entry. Should the land embraced in the contested entry be within a first-form withdrawal at time of successful termination of the contest the preferred right may prove futile, for it can not be exercised as long as the land remains so withdrawn; should it be within a second-form withdrawal, however, the contestant may make entry under the terms of the reclamation law, and should it at that time be released from all forms of withdrawal, he may enter as in other cases made and provided. No contest can be allowed, however, against any qualified entryman who, prior to June 25, 1910, made bona fide entry upon lands proposed to be irrigated and who established residence in good faith upon the lands entered by him, for failure to maintain residence or to make improvements upon his land prior to the time when water is available for its irrigation. Successful contestants against entries in second-form reclamation withdrawals can not be allowed to exercise preference right of entry prior to the time when the Secretary shall have established the unit of acreage, fixed the water charges, and the date when water can be applied and made public announcement of the same. It should be the duty, however, of such contestant to keep the local officers advised respecting his residence to which notice may be sent him of his preference right of entry in event of successful contest, and a notice mailed to his address, shown by the records of the local land office at the time of the mailing of the notice of preference right, will be held to meet the requirements of the act of May 14, 1880 (21 Stat., 140). See paragraph 73.

26. When any entry for lands embraced within a first or second form reclamation withdrawal is canceled for any reason, such lands become subject immediately to such withdrawal. Such lands under first form withdrawal can not therefore, so long as they remain so withdrawn, be entered or otherwise appropriated, either by a successful contestant or any other person; but any contestant who gains a preference right to enter any such first-form withdrawn lands may exercise that right at any time within 30 days from notice that the lands involved have been restored to the public domain or the withdrawal changed to second form. Such lands withdrawn under second-form withdrawal may be entered under the reclamation act when subject to entry by reason of public notice

having been issued as in these regulations provided, and a contestant in such case will be allowed 30 days preference right to make entry. (As amended Mar. 1, 1913.)

27. Under these regulations the filing of contests will be allowed against homestead entries made subject to the reclamation law in the following cases:

(a) Where the entry was made on or after June 25, 1910.

(b) Where the entry was made prior to June 25, 1910, and it is alleged that the entryman failed to establish residence in good faith upon the lands entered by him.

(c) Where the entry was made prior to June 25, 1910, and a period of 90 days has elapsed since the issuance of public notice under section 4 of the reclamation act of June 17, 1902 (32 Stat., 388), fixing the date when water will be available for irrigation of the land.

(d) Where the entry was made prior to June 25, 1910, for any causes other than "failure to maintain residence or make improvements upon the land prior to the time when water is available."

LEAVE OF ABSENCE.

28. 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.

29. 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. The statement regarding the availability of water for irrigation must be corroborated by certificate of the project manager, to be filed with the application for leave.

30. 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.

31. 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 within which the entryman is required to submit final proof will be extended and the entry will not be subject to cancellation for failure to submit proof until the expiration of the period allowed in which to submit final proof, exclusive of the period for which leave of absence may be granted.

ASSIGNMENTS.

32. 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 law may assign their entries in their entirety at any time after filing in the local land office satisfactory proof of the residence, improvements, and cultivation 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. (See pars. 34 and 38.)

33. 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.

34. 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 manager. The assignment, with accompanying affidavit of the assignee and supplemental water-right application, must also be filed with the project manager for his consideration.

35. 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.

36. When the plats describing the amended farm units are approved by the project manager, he will forward copy of the amendatory plat, in duplicate, together with the assignment and accompanying affidavit and a certificate that water-right application has been filed, to the local land office, where the amendatory plat will be treated as an official amendment of the farm-unit plat, and one copy will be forwarded by the local land officers to the General Land Office, together with the assignment and accompanying affidavit. A copy of the amendatory plat should also be at once forwarded by the project manager to the Director's office at Washington, D. C., to be formally approved in the usual manner by authority of the Secretary.

37. 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 that a water-right application therefor has been accepted by the project manager.

38. Assignments under this act are expressly made "subject to the limitations, charges, terms, and conditions of the reclamation act," and inasmuch as the law limits the right of entry to one farm unit and forbids the holding of more than one farm unit prior to payment of all building and betterment charges, each assignor must present a showing in the form of an affidavit to the effect that the assignment is an absolute sale, divesting him of all interest in the premises assigned, and each assignee must present a showing in the form of an affidavit, duly corroborated, that he does not own or hold and is not claiming any other farm unit or entry under the reclamation law upon which all installments of building and betterment charges have not been paid in full and has no other existing water-right applications covering an area of land which, added to that taken by assignment, will exceed 160 acres, or the maximum limit of area fixed by the Secretary of the Interior. A person whose husband or wife is claiming any farm unit or entry under the reclamation law will not be allowed to take an assignment under the act of June 23, 1910 (36 Stat., 592). The affidavits above described should be in the following form, inserting the proper names and descriptions in the places indicated:

AFFIDAVIT OF ASSIGNOR.

That _____, of _____, _____, being duly sworn, deposes and says that his or her assignment under the act of June 23, 1910 (36 Stat., 592), of farm unit _____, or the _____ of section _____, township _____, range _____, _____ meridian, is a bona fide and absolute sale of all his or her interest in and to the land and rights therein described and that the assignee takes and holds same, as far as affiant is concerned, absolutely and free from any claim, interest, or demand on the part of the affiant other than (if mortgaged, so state) _____.

AFFIDAVIT OF ASSIGNEE.

That _____, of _____, _____, being duly sworn, deposes and says that he is the assignee of _____ under the act of June 23, 1910 (36 Stat., 592), for farm unit _____ or the _____, section _____, township _____, range _____, _____ meridian, and that he is a duly qualified assignee for the reason that he does not own or hold and is not now claiming any other farm unit or entry under the reclamation act of June 17, 1902 (32 Stat., 388), or acts amendatory thereof or supplemental thereto, upon which payment in full of all installments of building and betterment charges have not been made, and that the water right thus applied for, together with other water rights held by him or her under the reclamation law, do not exceed 160 acres of irrigable land, and that this assignment is accepted subject to any unsatisfied mortgage against the lands or any part thereof duly filed and recorded in the local land office; that neither he nor his wife, nor she or her husband, is now holding or claiming any other farm unit or entry under the reclamation law upon which all installments of building and betterment charges have not been paid; and that he has no agreement or understanding by which any interest therein will inure to the benefit of another. Affiant further says that he has acquired the entire interest of the assignor in the tract assigned and does not hold same as trustee or in any other manner for or on behalf of the assignor. (As amended Sept. 6, 1913.)

39. Assignments made and filed in accordance with these regulations must be noted on the local land office record and at once forwarded to the General Land Office for immediate consideration, and, if approved, the assignees in each case will at the proper time 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.

40. Mortgagees of lands embraced in homestead or desert-land entries within reclamation projects may file in the local land office for the district in which the land is located a notice of such mortgage interest and shall thereupon become entitled to receive and be given the same notice of any contest or other proceedings thereafter had affecting the entry as is required to be given the entryman in connection with such proceedings, and a like notice of mortgage interest may be filed with the project manager in case of any lands for which water-right application has been made and accepted under the provisions of the act of June 17, 1902 (32 Stat., 388), including homestead entries, desert-land entries, and lands in private ownership; and thereupon the mortgagee shall receive copy of all notices of default in payment upon the corresponding water-right application and shall be permitted to make payment of the amount so in default within 60 days from the date of such notice. Any payment so made shall inure to the benefit of such water-right application. (As amended July 11, 1913.)

41. Every such notice of mortgage interest filed as provided in preceding paragraph must be forthwith noted upon the records of the project manager and of the local land office, and be promptly reported to the Director of the Reclamation Service and to the General Land Office, where like notation will be made. Relinquishment of a homestead entry, or part thereof, 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. (As amended July 11, 1913.)

42. If such mortgagee buys in the land at foreclosure sale, no steps will be taken to cancel the water-right application on account of failure of the applicant to maintain residence upon or in the neighborhood of the land until one year after the end of the statutory period of redemption, if there be such statutory period; if not, until one year after the foreclosure sale; nor on account of the holdings by the same mortgagee of lands in excess of 160 acres or of the limit per single ownership of private lands as fixed by the Secretary of the Interior for which a water right may be purchased until two years after such foreclosure purchase, provided that all charges in connection with the water-right application that may be due at the time of foreclosure sale and all such charges that may become due during the period when the land is held under the terms hereof shall be promptly paid by or on behalf of the mortgagee; and also that within such period of one year an acceptable water-right application for such land be filed by a qualified person, who, upon submitting satisfactory evidence of transfer of title, shall receive a credit equal to all payments theretofore made on account of the water-right charges for said land. To secure the benefits of this order the mortgagee purchasing land at foreclosure sale hereunder must give notice thereof to the register of the local land office and to the engineer in charge

of the project within sixty days thereafter. (As amended June 12, 1913.)

CANCELLATION.

43. All homestead and desert-land entrymen holding land under the reclamation law must, in addition to paying the water-right charges, reclaim at least one-half of the total irrigable area in their entries as finally adjusted for agricultural purposes. Homestead entrymen must reside upon, cultivate, and improve the lands embraced in their entries for not less than the period required by the homestead laws. Desert-land entrymen must comply with the provisions of the desert-land laws as amended by the reclamation law. Failure to make any two payments when due, or to reclaim the land as above indicated, or any failure to comply with the requirements of the homestead or desert-land laws, as the case may be, and the reclamation law, as to residence, cultivation, and improvement, will render the entry subject to cancellation and the money paid subject to forfeiture, whether water-right application has been made or not. Failure to make any two payments of the installments of water-right charges when due renders such entries subject to cancellation; and upon receipt of a statement from the Director of the Reclamation Service that two of such payments remain due and unpaid, after proper service upon the entryman and upon the mortgagee, if any such there be of record, of the notice required by paragraph 101 of this circular, the date and manner of service being stated, the entry will, without further notice, be canceled by the Commissioner of the General Land Office. (As amended July 11, 1913.)

WIDOWS AND HEIRS OF ENTRYMEN.

44. The widows or heirs of persons who make entries under the reclamation law will not be required both to reside upon and cultivate the lands covered by the entry of the persons 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 law, and make payment of all unpaid charges when due.

45. 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 be required to conform the entry to one farm unit in the same manner as an original entryman by amending the former entry, relinquishing to the United States or assigning to a duly qualified assignee the lands embraced in the entry in excess of the farm unit he elects to retain. The purchaser and his assignees take subject to the payment of the water-right charges authorized by the reclamation law and regulations thereunder and must reclaim one-half the irrigable area, as required by said law, but are not required otherwise to comply with the homestead law.

FINAL PROOFS, CERTIFICATES, AND PATENTS.

46. Registers and receivers are directed to furnish chiefs of field divisions with copies of notices of application to make proof on all homestead and desert-land entries covering land withdrawn under the reclamation law, whether the entry was made before or after the withdrawal, noting on each application the particular reclamation project wherein the land lies. When the notice involves any lands withdrawn under the first-form withdrawal authorized by the reclamation law, 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 manager, 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 that he may be instructed to report on by special instructions. This notice should be returned by the project manager to the chief of field division in sufficient time to enable that officer to return the same to the local land office prior to the date fixed for proof.

47. If the lands covered by the final proof notice were entered prior to withdrawal for reclamation purposes and the project manager reports that they are not needed for construction purposes, and are not covered by water-right application, final certificate will be issued upon submission of final proof as on entries not subject to the reclamation law. In all cases where the project manager reports that the lands 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. In all cases where the entry was made after withdrawal of the land 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, unless there has been submitted a final affidavit, duly corroborated by two witnesses and approved by the project manager, showing compliance with the reclamation act as to payment of all charges due to date, and reclamation of one-half of the irrigable area in the entry, as provided for in paragraph 55. If such affidavit showing reclamation and payment of charges is filed, and the final proof of compliance with the ordinary provisions of the homestead law as to residence, improvements, and cultivation is found, on examination by the local land officers, to be sufficient, they will issue final certificate on the case as hereinafter provided.

48. If any final proof offered under this law 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, whether or not final certificate has issued on the same, the final proof or certificate may be held for rejection or cancellation 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.

49. 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 reclamation law, 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 the entryman to elect the farm unit he desires to retain, and to file an assignment of the remainder of his entry under the act of June 23, 1910 (36 Stat., 592), in default of which the entry will be conformed by the General Land Office, and cancelled as to the portion not assigned.

50. All persons who make entry of lands within the irrigable area of any project commenced or contemplated under the reclamation law will be required to comply fully with the homestead law as to residence, cultivation, and improvement of the lands, except that where entries were made prior to the issuance of public notice announcing the availability of water for the irrigation of the land and prior to June 25, 1910, in which case under the departmental decision in the case of *Ex parte J. H. Haynes* (40 L. D., 291) and under the provisions of the act of April 30, 1912 (37 Stat., 105), the submission of final proof is not required within the period during which proof must be submitted under the ordinary provisions of the homestead law.

51. 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 or sailor's service under the homestead laws will be allowed to claim credit in connection with entries made under the reclamation law, but will not be entitled to receive final certificate or patent until the water-right charges due have been paid and the requirements as to reclamation have been met.

52. Homesteaders who have resided on, cultivated, and improved their lands for the time required by the homestead law, 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 have not been 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 to an approved farm unit, and payment of all charges due under the public notices and orders issued in pursuance of the reclamation law.

53. The act of August 9, 1912 (37 Stat., 265), expressly requires reclamation of one-half of the irrigable area of the entry as finally adjusted before final certificate and patents may issue thereunder, and, therefore, the act does not authorize the issuance of final certificate on homestead entries made subject to the reclamation law, prior to the establishment by the Secretary of the Interior of farm units, and the conformation of the entry to an approved unit, for the reason that prior to that time the entry is still subject to adjustment in area, and it can not be determined what area must be ultimately reclaimed under the provisions of the act.

54. Upon the tendering to registers and receivers of homestead proof on entries subject to the reclamation law, 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 received of compliance with the requirements of the reclamation law as to reclamation and payment of the charges which have become due.

55. Homestead and desert-land entrymen, in making proof of compliance with the reclamation law as to reclamation of one-half of the irrigable area and payment of reclamation charges due, must submit an affidavit, duly corroborated by two witnesses, in duplicate, to the project manager showing these facts. Thereupon it shall be the duty of the project manager to verify the statement as to payment and also make such examination of the land as will enable him to determine whether reclamation as required by law and the regulations has been made. If he finds that the statement as to payment be correct he will so certify, which certificate will also show the date on which the next payment is due; but if he finds that all payments have not been made as required he will advise the entryman thereof, requiring him to pay the amounts found to be unpaid and due, with a right of appeal in the entryman from such requirement to the Director of the Reclamation Service and ultimately to the Secretary of the Interior. Should he find that reclamation has been accomplished he will so certify, but if he finds that reclamation has not been accomplished as required he will forward the proofs to the register and receiver of the land district in which the land is situate, with his report or findings thereon, and such officers will thereupon in turn transmit the showing to the General Land Office for its action. If the proof be rejected by the Commissioner of the General Land Office, appeal will lie to the Secretary of the Interior as in other cases provided, it being the purpose to issue final certificate upon any such entry only after a final determination that all water charges due on account thereof have been paid and that reclamation has been accomplished as required by the reclamation law. Where prior to issuance of public notice water has been furnished on a water-rental basis to reclamation entrymen or others, and by means whereof reclamation sufficient to obtain patent or water-right certificate under the act of August 9, 1912, has been accomplished and satisfactory proof made, water-right applications may be received from such entrymen or others desiring to obtain patent or water-right certificate under that act upon the form of application approved by the department, modified so as to refer to the irrigable acreage and the charge per acre as thereafter announced by the Secretary. In such cases reclamation homestead entries must be conformed to farm units as established by the Secretary of the Interior. If not theretofore created, farm units may be established upon application. (As amended Mar. 1 and 3, 1913).

56. To establish compliance with the clause of the reclamation law that requires reclamation of at least one-half of the irrigable area of an entry made subject to the provisions of that law, the land must have been cleared of sagebrush or other incumbrance and leveled, sufficient laterals constructed to provide for the irrigation of the required area, the land put in proper condition and watered and cultivated, and the growth of at least one satisfactory crop secured thereon; but the securing of an actual and satisfactory growth of orchard trees shall likewise be regarded as satisfactory reclamation.

57. Upon receipt of proof of reclamation and payment of water-right charges as provided in the acts of August 9, 1912, and August 26, 1912, in case of homestead entries under the reclamation law, on ceded Indian lands entered under the reclamation act, and in case of desert-land entries within the exterior limits of any land withdrawal or irrigation project under the reclamation act, if final proof of compliance with the homestead or desert land law, as the case may be, has been previously submitted and has been accepted by the Commissioner of the General Land Office, or if such final proof is submitted at the time of the receipt of proof of reclamation and payment of charges, and is found to be sufficient as to residence, improvement, and cultivation upon examination by the local land officers, the register and receiver will issue final certificate on the entry, proceeding in the usual manner, and forward the same with the proof of reclamation and payments to the General Land Office. The final certificate so issued must be stamped by the local land officers across the face of each certificate when issued as follows: "Subject to lien, under section 2, act of August 9, 1912 (37 Stat., 265)." Upon receipt of such case in the General Land Office, if found to be regular, it will be approved for patent under said act of August 9, 1912, or August 26, 1912, and patent issued reserving the lien as in said acts provided. (As amended July 12, 1913.)

58. Upon receipt of proof of reclamation and payment of water-right charges, as provided in the act of August 9, 1912, in the case of homestead entries, other than those under the reclamation act, where a water-right application has been filed by the entryman, and the register and receiver have been notified by the project manager of the acceptance of such application, if final proof has been accepted on the entry by the Commissioner of the General Land Office, or final proof is submitted at the time of the receipt of such reclamation proof and is found to be sufficient on examination by the local land officers, the register and receiver will issue final certificate of compliance with the homestead law, proceeding in the usual manner, and forward such final certificate, with proof of reclamation, to the General Land Office. When the case is received in the General Land Office and is found to be regular, it will be approved for patent and final water-right certificate will be issued by the project manager, reserving a lien to the Government and its successor for the charges due or to become due. (As amended September 3, 1913.)

59. Final water-right certificates are not required for and will not be issued for (a) lands entered under the reclamation act; (b) desert-land entries for which water-right application has been made; (c) entries of ceded Indian lands, whether patents for such lands are issued under acts of August 9, 1912, or otherwise, but patent in each of such cases carries with it the water right to which the lands patented are entitled. In all other cases, that is, in cases of lands in private ownership, and in cases of homesteads where entry was made prior to the reclamation withdrawal, final water-right certificate will issue as herein provided. (As amended July 12, 1913.)

60. In case of lands in private ownership and homestead entries made prior to reclamation withdrawal, reclamation is required to be shown of one-half of the irrigable area in each instance before any final water-right certificate is issued upon a water-right application

made for such lands under the reclamation law. Further, before issuance of such a certificate under the act of August 9, 1912 (37 Stat., 265), on account of any lands so held, evidence must be filed satisfactorily showing that the applicant for water right has an unencumbered title to the land, or, where encumbered, the consent of the encumbrancers must be furnished in such form that the lien to be given the Government to secure the deferred payments on account of the water right shall, as contemplated by the law, constitute a prior lien upon the land. Upon the filing of such proofs with the project manager and the payment of all reclamation charges then due, he will issue a water-right certificate to the applicant which shall expressly reserve to the United States a prior lien on the land upon which a water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims, or demands whatsoever, to secure the payment of all sums due, or to become due, to the United States or its successors. The project manager will forward all papers, including a copy of the certificate, to the Director of the Reclamation Service. (As amended, July 12, 1913.)

61. The Director of the Reclamation Service will, upon the full payment of all building and betterment charges by any water user, issue certificate of the full payment of such charges releasing the lien therefor reserved in the final water-right certificate or patent under the act of August 9, 1912 (37 Stat., 265). (As amended July 12, 1913.)

WATER RIGHTS.

62. In pursuance of the authority contained in the act of August 9, 1912 (37 Stat., 265), a special fiscal agent of the Reclamation Service has been designated to receive payment of the building and betterment charges and the charges for operation and maintenance payable on account of the lands within each project. All administrative matters regarding the filing of original water-right applications and all actions regarding water-right applications heretofore filed which have been carried on by the registers and receivers of the local land offices shall hereafter be carried on by the officer of the Reclamation Service in charge of the project, herein designated as project manager. Appeals from his action may be taken in accordance with rules promulgated by the Director of the Reclamation Service approved by the Secretary of the Interior to whom appeal may be ultimately taken.

63. Notice of all action in the local land office or in the General Land Office regarding any entry for which water-right application has been made, or may be made, whether subject to the reclamation law or not, shall be given immediately by the register and receiver to the project manager by the forwarding of copy of decision in the case. The project manager shall advise the register and receiver of all action regarding any water-right application or contract by the Reclamation Service affecting the status or validity of the homestead or desert-land entry covering the lands.

64. The control of operation of all sublaterals constructed or acquired in connection with projects under the reclamation law 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 for Lands in Private Ownership.

65. Lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the reclamation law, 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 a 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 law; 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, or more than the limit of area per single ownership of private land as fixed by the Secretary of the Interior, for which water may be purchased within the reclamation project, if such a limit has been fixed, must sell or dispose of all in excess of that area before water-right application will be accepted from such holders. 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 law, unless the land has been sold by the owner when the Government is ready to furnish water thereon, or provide for the disposal of such excess holdings in some manner approved by the Secretary of Interior. Holders of land in private ownership who have made and had accepted water-right application for their holdings may receive water for lands in excess of the area hereinabove stated, in case such excess lands have had water-right application made and accepted therefor, and have been acquired by descent, will, or by foreclosure of any lien; in which case said excess lands may be held for two years and no longer after their acquisition, without in any manner militating against the right of the holder to be furnished water under the reclamation law. (As amended June 12, 1913.)

66. The purpose of the reclamation law 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 applies likewise to 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.)

67. The provisions of section 5 of the act of June 17, 1902, relative to cancellation of entries with forfeiture of rights for failure to make any two payments when due 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 law 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 law. (37 L. D., 468.)

Vested Water Rights.

68. The provision of section 5 of the act of June 17, 1902 (32 Stat., 388), 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.

Townsite Subdivisions.

69. 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.

70. 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).

71. 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 fund" 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.

72. The department has adopted two forms of applications for water rights, viz, Form A for homestead entries under the reclamation law, Form B for lands, other than homestead entries under the recla-

mation law, embraced within a project. Copies of these forms have been furnished project managers and they will be used in all applications for water rights on all reclamation projects. (As amended Mar. 1, 1913.)

73. Under the act of April 30, 1912 (37 Stat., 105), a reclamation homestead entry made prior to June 25, 1910, where a residence was established in good faith, is not subject to contest for failure of the entryman to maintain residence or make improvements upon the land prior to the time when water is available for the irrigation of the lands embraced within the entry either under annual rental or under public notice. The entryman is required within 90 days after public notice has issued to file a water-right application. (See par. 25.)

74. 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 such lands under the provisions of the reclamation law 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. And any person settled on such lands or intending to make entry of any such lands may file application for water rights on Form A for the number of acres of irrigable land in the farm unit settled on or intended to be entered, as shown by such farm unit plats.

75. Where such settler or other person makes a water-right application before initiating entry for the lands for which such water-right application is made, the water-right application will be received by the project manager, and the amount due thereon as shown by the public notices and orders collected by the special fiscal agent of the Reclamation Service. The water-right application will be retained by the project manager until entry is made, or if entry is not perfected by the applicant within 30 days the application shall be endorsed "rejected" with the date thereof and the amount collected returned to the applicant, except in case water shall have been furnished such applicant under the application, in which case only the amount collected on account of the building and betterment charges will be returned. The amount collected for operation and maintenance will be retained by the special fiscal agent as payment to the United States for the service rendered in furnishing water. If entry is made the entryman will be required to exhibit to the project manager his land-office receipt. The project manager will endorse on the water-right application the number, date, and land-office serial number of the entry and take the action indicated in the following paragraph.

76. All applications on Form A must be filed in the project office of the United States Reclamation Service in person or by mail accompanied by three complete copies and the amount due thereon as shown by the public notices and orders. The project manager will carefully examine the original application, and if regularly and properly made out accept the same and endorse thereon his acceptance. He will see that the copies correspond with the original and that the entry number, date, etc., are properly given and will immediately transmit one copy to the director, one copy to the supervising engineer, and give the third copy to the applicant with the special fiscal agent's receipt for the amount collected. The original application will be retained in the project office of the Reclamation Service.

77. Upon the issuance of the public notice private landowners and entrymen whose entries were made prior to withdrawal may, in like manner, apply to the project office of the United States Reclamation Service, on Form B 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.

78. Each application on Form B must contain a statement as to the distance of the applicant's residence from the land for which a water right is desired.

79. If a greater distance than that fixed for the project is shown in any application, the case should be reported to the director through the supervising engineer 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, regarding residence elsewhere, must be stricken out.

80. The applicant on Form B must state accurately the nature of his interest in the land. If this interest is such that it can not be perfected into a fee simple title at or before the time when the last annual installment for water right is due, the application must be rejected.

81. Form B used by owners of private land and entrymen whose entries were made prior to the withdrawal of the land within reclamation projects for entering into contracts with the United States for the purchase of a water right must be signed, sealed, 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 prescribed for mortgages by the law of the State in which the lands covered by the contract lie. When so executed, the original must be filed in the project office of the United States Reclamation Service either in person or by mail, together with five complete copies, and must be accompanied by the amount of the charges for recording the same. The application must cover all the irrigable land of the applicant in the project (see par. 89). If the applicant owns more than the limit of irrigable area fixed for land in private ownership, he must make disposition of all the irrigable lands not covered by his application, as indicated in paragraph 65, before the application is accepted. If the application is (a) regular and sufficient in all respects; (b) bears the certificate of the secretary of the local water users' association in cases where such certificate is required; (c) is accompanied by the proper payments required by the provisions of the public notices and orders issued in connection with the project and the recording fees; the project manager will accept the same by filling out the blank provided and attaching his signature and seal and placing a scroll around the word "Seal," whereupon the water-right application becomes a water-right contract. (As amended Mar 3. 1913.)

82. Attention is especially called to sections 3743 to 3747, inclusive, of the Revised Statutes, relative to the deposit and execution of public contracts. The project manager 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 on one of the copies. No funds are available for the payment by the Government of any fees in connection with this oath, and the project manager

should therefore take such oath before some officer or clerk of the Reclamation Service, who is a notary public, during his office hours, for which service such officer or clerk is precluded from charging or receiving a fee. If 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 the project manager is authorized to refuse to accept the water-right application on failure of the applicant to make such payment.

83. 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 the project manager will therefore forward direct to that office the copy of the contract on which he has executed the oath of disinterestedness, as above directed, 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.

84. As stated in the instructions for the execution of the blank, 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 original will be transmitted by the project manager to the proper county officer to be recorded.

85. Upon return of the original copy of the contract to the project manager bearing certificate at the bottom of the last page, executed by the recording officer, showing the recordation of the instrument, the project manager will fill out the same blank on the four copies held in his office, signing the name of the recording officer with the word "signed" in parentheses, preceding such name. The original and one copy, when thus completed, will be sent to the director, who will transmit the original 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 supervising engineer, and the last copy must be retained by the project manager.

86. When application is filed by an assignee of an entryman under the reclamation act, and the assignee proposes to claim credit for any payment made by the assignor, the prior applicant should execute the following form at the bottom of the last page, 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.

Witness.

Assignor.

87. 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 and orders.

88. 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 project manager before accepting water-right applications on any of the forms must assure himself of the correctness of all allegations in the application so far as can be determined by the records in his office.

89. With reference to water-right applications for land in private ownership, including entries not subject to the reclamation law, the project manager must assure himself so far as practicable from the information available in his office that the application includes all the land owned by the applicant within 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, and in case of excess holdings that proper action has been taken with reference thereto.

Water-Right Charges.

90. The Secretary of the Interior will at the proper time, as provided in section 4 of the act of June 17, 1902, 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 law; 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.

91. 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 that act.

92. If any entry subject to the reclamation law 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 94 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.

93. Any person who applies to enter the same land at the time of relinquishment and at the same time files an assignment in writing of the charges theretofore paid will be allowed credit therefor. If the application to enter is made at a later date or is not accompanied by a written assignment of credits the applicant must pay the water-right charges as if the land had never been previously entered.

94. A person who has entered lands under the reclamation law, 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 at the time of the filing of the relinquishment, if subject to entry, receive full credit for all payments thus assigned to him, but must otherwise comply in every respect with the homestead law and the reclamation law.

95. 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 the case of Fleming McLean and Thomas Dolf, 39 L. D., 580.) After any such transfer water will continue to be delivered for the entire irrigable area of the tract transferred and tract retained, at the same place or places as delivery was theretofore made and no change will be made in the place of delivery except upon compliance with the provisions of paragraphs 99 and 100 regarding the additional expense for laterals, division boxes, surveys, or for other purposes, and for providing rights of way for irrigation or drainage ditches across the portions transferred or retained. (As amended June 23, 1913.)

96. In case of the sale of all or any part of the irrigable area of a tract of land in private ownership covered by a water-right application the vendor will not be recognized as being released of any part of the charge or any other obligation on account thereof except by compliance with the following requirements:

(a) If the land is covered by a water-right contract which has been duly recorded, the vendor will be required to file with the project manager an affidavit on form below executed by the transferee. Upon filing such affidavit the project manager will carefully check the same and, if found correct as to irrigable area, will make notation of the transfer and adjustment of the water-right charges to the respective tracts.

STATE OF _____, County of _____, ss:

_____, of _____, being duly sworn, deposes and says that he (or she) has acquired by transfer from _____, the _____ section _____, township _____, range _____, _____ meridian; that water-right application No. _____, _____ project, _____ State, for _____ acres of irrigable land in said tract was made _____, 19____, and is recorded in vol. _____, at page _____, of the records of the _____ of _____ County, State of _____; that the post-office address of the undersigned is _____; that the undersigned is a bona fide resident upon said land, or an occupant thereof residing in the neighborhood, namely, upon section _____, township _____, range _____, _____ meridian, a distance in a direct line of _____ miles therefrom; and that no water-right application or water-right contract has been made for a water right under the act of June 17, 1902 (32 Stat., 388), or acts amendatory thereof or supplementary thereto, appurtenant to any land now owned or claimed by the undersigned, except as follows:

Application No. _____, _____ project, State of _____, for _____, section _____, township _____, range _____, _____ meridian, an area of _____ acres, and containing _____ acres of irrigable land.

That affiant hereby assumes and agrees to keep and perform in respect of the lands first above described all the obligations necessary to be kept and performed to procure a water right under water-right application No. _____, _____ project, hereinabove referred to, for the lands first hereinabove described.

(b) If the original water-right contract was not recorded the vendor will be required to have his transferee make new water-right application for the land transferred. Upon such water-right application being made by the transferee the same proceedings will be had as in case of an original water-right application for lands in private ownership. Upon acceptance of such new water-right application the water-right charges under the original application of the vendor will be adjusted to the respective tracts. (As amended June 12, 1913.)

97. Where an entryman, whose entry is not subject to the reclamation law, relinquishes part of the land included in his entry, appropriate notation will be made on his water-right application showing such relinquishment, and his charges thereafter due will be reduced

accordingly upon presenting to the project manager certificate of the local land office showing the lands relinquished and the lands remaining in his entry. If entry is made for the relinquished portion at the time of filing the relinquishment the new entryman will receive credit for payments made thereon if assignment in writing is filed, as provided in paragraphs 86 and 93 of these regulations. No credit will be allowed if the new entry is not filed at the time of relinquishment.

CREDITS FOR PAYMENTS ON RELINQUISHMENT OF PART OF A FARM UNIT UNDER THE RECLAMATION ACT.

98. A homestead entryman subject to the reclamation law may relinquish part of his farm unit if in the judgment of the Secretary of the Interior it would not jeopardize the interests of the United States in the collection of the charges against the part proposed for relinquishment or otherwise. The portions of the payments theretofore made by him on account of the building charge applicable to the relinquished area will be credited as follows: First, upon the portion of the charges for operation and maintenance then due against the relinquished area, and second, any remainder will be credited upon the building charge against the area retained. In no case will payments theretofore made on account of operation and maintenance charges be so credited. The entryman desiring to make such relinquishment shall submit to the project manager his application therefor. The project manager will transmit such application with his recommendation through proper channels to the Director of the Reclamation Service for approval and submission to the department for authority to amend the farm unit plat. (As amended Mar. 15, 1913.)

99. No authorization for allowance of credits as hereinabove provided will be made which will, in the judgment of the Secretary of the Interior, impose any additional expense whatever upon the United States for the construction of laterals and division boxes, or for the making of surveys or for other purposes. Where such relinquishment would involve additional expenses on the part of the United States in order to irrigate either the retained or the relinquished portion of the farm unit the applicant may deposit from time to time, in advance, as required by the project manager, payment of the estimated amount necessary to provide for the proper irrigation of either portion of the farm unit, and, in such cases, if the application is not otherwise objectionable, the same will be allowed.

100. Every such relinquishment shall be subject to the following conditions: (a) That the relinquishing entryman and his successors in title shall permit the entryman then or thereafter entering the relinquished part to use the irrigating and drainage ditches and other irrigation works existing on the retained part at the time of relinquishment, whenever in the opinion of the project manager such use is reasonably necessary for the irrigation and drainage of the relinquished part; and the entryman then or thereafter making entry of the relinquished part shall have right of way over the retained portion for the necessary operation and maintenance of such ditches, drains, and irrigation works; (b) that the entryman then or thereafter entering the relinquished part shall have a right of way over the retained part for the construc-

tion, operation, and maintenance of such additional ditches, drains, and other irrigation works as the project manager may from time to time consider reasonably necessary or proper to be constructed upon or through the retained part for the irrigation and drainage of the relinquished part.

101. At least 30 days prior to the date on which any installment of the building charge becomes payable, under the terms of any public notice or order, by any water-right applicant under a project, a notice will be mailed by the project manager to each such water user at his last known post-office address as shown on the project records, which notice will state the amount of building charge due at the date of the notice and the amount to become due when the next succeeding installment of the building charge is due. In all cases of water-right application, upon which two payments of reclamation charges have become due, under any public notice or order under which such application has been made, and remain unpaid on the day after the second of such payments becomes due, a notice will be sent by the project manager as soon as practicable and in no case later than the first of the following month. Such notice shall be sent by registered mail to the applicant at his last known address, as above indicated, which notice will state the amount of reclamation charges then due, and that unless, on or before the 30th day following that on which the notice is sent, payment be made of the amount due in excess of one full installment the following action will be taken: (a) In case of reclamation homestead entryman, that the entry and the accompanying water-right application will be canceled without further notice, or (b) in cases other than those of reclamation homestead entrymen the case will be reported to the Secretary of the Interior with recommendation for appropriate action by suit to recover the amount due, and also, if such action is deemed advisable, for the cancellation of the water-right application. The rules of practice so far as they are not in conformity herewith are hereby modified. The project manager will preserve the registry return receipts of each such notice and promptly after the expiration of the time allowed in the notice to make payment forward to the Director of the Reclamation Service the registry return receipt and copy of notice sent in each case of delinquency, with report and recommendation relative to cancellation or other action to be taken against the delinquent. In case such a notice is returned unclaimed by the addressee, such unclaimed notice should accompany the other papers. In case the registry return receipt is not received, or being received has been lost, a new notice must be sent. The director will take appropriate action in each case. If the entry is subject to cancellation he will forward appropriate statement to the Commissioner of the General Land Office with evidence of service. (As amended Mar. 15, 1913.)

102. 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 public notices or orders relating to the particular project, and in default of such payment no water will be furnished for the irrigation of such lands.

103. 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, the same may be accepted if the insufficient

tender is, in the opinion of the project manager, caused by misunderstanding as to the amount due and approximates the same:

104. 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 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. No water will be delivered for the land of the water user in case of insufficient payment of the annual installment for operation and maintenance until such balance has been paid. If the balance of either such installments is paid within this period additional receipt must issue therefor, but if either or both installments remain unpaid for thirty days report shall be made to the director.

105. In all other cases where insufficient tenders are made they shall be rejected with notice to the water user of the reason for the rejection.

106. When full payment is tendered and upon examination is found to be correct the special fiscal agent will issue receipt therefor. In all cases payments must be made direct to the special fiscal agent.

107. All moneys collected in connection with water-right applications must be deposited in designated depositories to the credit of the Treasurer of the United States as a repayment to the reclamation fund. (As amended Mar. 15, 1913.)

DESERT-LAND ENTRIES WITHIN A RECLAMATION PROJECT.

108. 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.

109. 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 law, from improving or reclaiming the lands covered by their entries.

110. 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.

111. The register and receiver will at once forward the application to the project manager of the 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.

112. 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.

113. 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.

114. 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.

115. 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 may comply with all the provisions of the reclamation law, and must relinquish or assign 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 law, he shall be entitled to patent, and final water-right certificate containing lien as provided for by the act of August 9, 1912, and act of August 26, 1912.

116. Under the act of July 24, 1912 (37 Stat., 200), desert-land entries covering lands within the exterior limits of a Government reclamation project may be assigned in whole or in part, even though water-right application has been filed for the land in connection with the Government reclamation project, or application for an extension of time in which to submit proof on the entry has been submitted under the act of June 25, 1906 (34 Stat., 519), requiring reduction of the area of the entry to 160 acres.

117. Where it is desired to assign a desert-land entry, or a part thereof, under the act quoted, application for the establishment of farm units embracing the land covered by such entry should be filed with the project manager for the project in connection with which the lands are withdrawn.

118. When plats describing the farm units covering the lands embraced in a desert-land entry are approved by the project manager he will forward duplicate copies thereof to the local land office, where the same will be treated as an official amendment of the farm-unit plat. A copy should at the same time be forwarded to the director's office at Washington, D. C., to be formally approved in the usual manner by authority of the Secretary.

119. After the filing of the amendatory farm-unit plat in the local office, the assignment, describing the land in conformity to an established farm unit, with accompanying affidavit required by the desert-land regulations, should be filed in the local land office. If the land is withdrawn in connection with a contemplated project where no project manager has been designated, or if no farm-unit subdivisions have been approved by the Secretary of the Interior, the application for the establishment of the farm units may be filed in the local land office and transmitted with the proper papers to the General Land Office for the purpose of submission to the Secretary of the Interior through the Director of the Reclamation Service.

120. Assignments of desert-land entries made and filed in accordance with these regulations must be noted on the local land office records and at once forwarded to the General Land Office for immediate consideration under paragraphs 14 to 16, inclusive, of the circular approved September 30, 1910, and reprinted with additions November 20, 1911, entitled "Statutes and Regulations Governing Entries and Proof Under the Desert-land Laws." Assignments filed in local land offices prior to July 24, 1912, will be recognized and accepted, if found to be regular, without compliance with these regulations. All assignments filed on or after the date of the passage of the act must comply herewith.

121. 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 law, 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.

122. Desert-land entrymen within exterior boundaries of a reclamation project who expect to secure water from the Government must relinquish or assign 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.

TOWN SITES IN RECLAMATION PROJECTS.

123. *Withdrawal, survey, appraisalment, and sale.*—Town sites 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 town sites.

124. *Survey and appraisal.*—Town sites under any law directing their disposition under section 2381 will be surveyed, when ordered by the department, under the supervision of the General Land 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 the General Land Office before proceeding with his work. That 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.

125. *The schedule of appraisement* must be prepared in duplicate on forms furnished by the General Land 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 said office, and when approved by the Secretary of the Interior one copy will be sent to the local land officers.

126. *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.

127. *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.

128. *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.

129. *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.

130. *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.

131. *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.

132. *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.

133. *Certificates.*—All lots purchased at the same time, in the same manner, in the same town site, and by the same persons 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.

134. 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 town sites 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 town sites. The lots so offered at public sale will then become subject to private sale at the reappraised price.

135. 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 town sites 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.

136. The Director of the Reclamation Service shall, from time to time, recommend to the Secretary of the Interior the withdrawal and reservation of such lands, for town-site purposes, under the acts of April 16 and June 27, 1906 (34 Stat., 116 and 519), as he may deem advisable. He shall, when in his judgment the public interests require it, from time to time, cause not less than a legal subdivision, according to the official township surveys, of the lands so reserved to be surveyed into town lots, with appropriate reservations for public purposes. The plats and field notes of such surveys shall be prepared in triplicate for each town site, and shall be submitted for the approval of the Commissioner of the General Land Office, who, after such approval, shall submit the original plat for the approval of the Secretary of the Interior.

137. The said director shall, from time to time, recommend to the Secretary of the Interior the sale, the time and place of sale, the appraisal, the appraisers to be appointed, the officer to superintend the sale, and the compensation of the appraisers and superintendent, and the newspapers for the publication of the notice of sale, of such portions of the surveyed lots as, in his judgment, the public interest may then require to be appraised and sold. The recommenda-

tions in this regulation above required shall be submitted through the Commissioner of the General Land Office for his concurrence or dissent. The Commissioner of the General Land Office shall prepare and submit to the Secretary of the Interior the details and appointments of the appraisers and the superintendent of sale in accordance with the approved recommendations, and when detailed or appointed he shall give them all necessary instructions; and he shall also prepare and transmit the notice of sale for publication. The report of the appraisers shall be transmitted to the Secretary of the Interior, through the Commissioner of the General Land Office, for action in accordance with the general regulations under section 2381, United States Revised Statutes.

138. The said director from time to time, in like manner, may cause one or more additional legal subdivisions of the lands so reserved for town-site purposes to be so surveyed into town lots, with appropriate reservations for public purposes; and he shall submit such further recommendations for appraisal and sale, in accordance with these regulations, as he may deem necessary or advisable; and he may in like manner submit recommendations for the reappraisal and sale of lots previously offered for sale and remaining unsold, as authorized by act of June 11, 1910 (36 Stat., 465).

APPEALS.

139. Appeal may be taken from the action of the project manager to the director, and ultimately to the Secretary of the Interior, as follows:

140. All cases of error or applications for relief should be promptly called to the attention of the project manager by the party affected. If the project manager decides to deny the request or application, he will serve upon the party aggrieved, personally or by registered mail, notice of his decision. The notice will state the facts, the reason for denying the relief asked, and also that the party aggrieved may appeal to the director within 30 days after receipt of the notice by filing with the project manager addressed to the director such appeal. (As amended June 12, 1913.)

141. The appeal may consist of a written statement addressed to the director, setting out clearly and definitely the ground of complaint. The project manager will note thereon the date of its receipt in his office and promptly forward the same, with full report, to the director through the supervising engineer, who will attach his recommendation. (As amended June 12, 1913.)

142. Upon receipt of the papers in the director's office, the matter will be reviewed and decision rendered stating the reasons therefor and that appeal therefrom may be taken as in the next paragraph provided. Notice and copy of this decision will be served by the project manager upon the party aggrieved personally or by registered mail sent to the last-known address of such party. (As amended June 21, 1913.)

143. The party aggrieved desiring to appeal from the director's decision will file with the project manager within 60 days from receipt of notice of director's decision, written statement of appeal, setting out the grounds thereof, addressed to the Secretary of the

Interior. In case of appeal from the director's ruling, the matter will be submitted to the Secretary for consideration and appropriate action. (As amended June 21, 1913.)

144. In case of service of notice of decision by registered mail, such notice will be mailed to the last-known post-office address as shown in the record, and evidence of service will consist of the registry return card on which such letter was delivered, or, in case of inability of postal authorities to make delivery, of the returned unclaimed letter. When service is personal, the party making the service will make affidavit to that fact, stating time and place of service, or secure written acknowledgment of the person served, and file the same with the project manager. (As amended June 12, 1913.)

INSTRUCTIONS.¹

RAILROAD RIGHTS OF WAY—RESERVATION FOR CANALS AND DITCHES IN PATENTS.

The reservation of rights of way for canals and ditches required by the act of August 30, 1890, to be inserted in patents for public lands west of the one hundredth meridian need not be inserted in patents issued for lands granted to railroad companies to which the grant or right of the company attached prior to the date of said act; but should be inserted in patents for lands covered by indemnity selections made by railroad companies, and in selections made by the Northern Pacific Railway Company under the provisions of the act of July 1, 1898, in all cases where such indemnity or other selections are approved subsequent to August 30, 1890.

First Assistant Secretary Adams to the Commissioner of the General Land Office, April 19, 1912.

Your letter of April 13, 1912, refers to recent order directing the insertion in approvals of rights of way granted under various easement acts of the reservation of a right of way through the lands for ditches and canals constructed by the authority of the United States, and asks instructions as to whether a similar reservation should be inserted in patents issued for lands granted to railroad companies, indemnity selections made by such companies, and selections made by the Northern Pacific Railway Company under the act of July 1, 1898 (30 Stat., 597).

The act of August 30, 1890 (26 Stat., 391), requires—

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.

In the case of grants of lands to railroad companies in what are commonly known as the granted or primary limits, the right of the railroad company thereto under the law attaches if the lands be subject to the grant at the date of the definite location of the rail-

¹ Omitted from volume 40.

road, and as to such lands, where title vested prior to August 30, 1890, the reservation clause should not be inserted in patents issued.

As a rule, indemnity selections are required to be made upon designated sections within the limits defined by law, but selections can only be made after and upon the basis of a loss occurring within the primary limits. Until selection the lands remain subject to appropriation and disposition under the applicable laws and no vested right in or to the selected lands accrues until the approval of the selections.

The act of July 1, 1898 (30 Stat., 597), which permits the Northern Pacific Railway Company to select nonmineral public lands in any State or Territory through which the road passes in lieu of lands within the granted or indemnity limits purchased from the United States or claimed in good faith by any qualified settler under color of title or claim of right under the public land laws, requires a selection by the railroad company, and until the lands are so selected, same remain disposable under the public land laws.

If of the character subject to selection and the selections be regularly made and perfected as required by the law, patents are issued to the company, but its right, in so far as the selected lands are concerned, does not relate back to the date of the original grant of lands to the company or to the date of the definite location of the road.

As in the case of indemnity selections, hereinbefore described, it has a right which, though based upon a grant made prior to August 30, 1890, is not initiated so far as the selected land is concerned, until the filing of selection. You are accordingly advised as follows:

The reservation required to be inserted in patents for public lands west of the one hundredth meridian is not required to be inserted in patents issued for lands to which the grant or right of a railroad company attached prior to the date of the said act. It should be inserted in all patents for lands covered by indemnity selections made by railroad companies and in selections made by the Northern Pacific Railroad Company under the provisions of the act of July 1, 1898, *supra*, in all cases where such indemnity or other selections are approved subsequent to August 30, 1890.

JOHN D. OKIE.

Decided July 26, 1913.

DESERT LAND APPLICATION—REJECTION OF APPLICATION IN PART.

If part of the land embraced in a desert land application is subject to entry and part is not, the application should not be rejected in its entirety, but should be allowed as to the land subject thereto.

DESERT LAND APPLICATION—PAYMENT.

Upon rejection of a desert land application the money paid therewith should not be covered into the Treasury but should be returned to the applicant.

JONES, *First Assistant Secretary*:

On July 15, 1912, Jay Blake filed his desert land application for the SW. $\frac{1}{4}$, Sec. 13, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 24, T. 43 N., R. 86 W., 6th P. M., Buffalo, Wyoming, land district, which was rejected by the local officers on the same day because of conflict as to the SW. $\frac{1}{4}$, Sec. 13, with the desert land entry of one Kirch. On the same day, the receiver deposited to the credit of the Treasurer of the United States \$80 received of Blake in connection with said entry.

On July 20, 1912, Blake, who appears not to have had notice of the rejection of his application, but who had received the receiver's receipt for the money, assigned the entry to John D. Okie. On August 5, 1912, Okie applied for repayment of the purchase money paid on said entry, accompanied by the receiver's receipt, his relinquishment of the land, and a copy of the assignment from Blake. Okie has appealed to the Department from the decision of the Commissioner of the General Land Office, dated October 17, 1912, denying the application for repayment.

The local officers committed two wholly indefensible errors in this case, which, in the judgment of the Department, cannot be held to have prejudiced the right of Okie to repayment under his pending application. In the first place, they were without any authority to reject Blake's application as to that part of the land subject to desert land entry. As was held in the case of *Heter v. Lindley* (35 L. D., 409):

It has been uniformly held in numerous cases that if a part of the land covered by an application to enter is subject to entry, and a part is not, the application should not be rejected as an entirety but should be allowed as to the land subject thereto.

The covering of the money paid by Blake into the Treasury, when the application had been rejected, instead of its return to the applicant with the receipt issued by the receiver, was a violation of the rule prescribed by the Department in such cases. Blake not only had the right to assume that this entry had been allowed, but his rights in the premises were unaffected by the erroneous action of the local land officers, and for the purposes of this decision the matter will be treated as if the local officers had allowed the application as to the land subject thereto.

Under section 2 of the act of June 16, 1880 (21 Stat., 287), the assignee of a desert land entry is entitled to repayment of the purchase money paid in connection with an entry which has been erroneously allowed and cannot be confirmed. Under this section it has been uniformly held by the Department that one who makes entry for a tract of land which is subsequently canceled because of conflict

as to a part of the tract entered, may relinquish the entire entry and obtain repayment for the entire tract.

The decision appealed from is accordingly reversed and repayment will be made to Okie as the assignee of Jay Blake.

MILLER ET AL. v. WATERS.

Decided August 9, 1913.

TWO CONTESTS AGAINST PARTS OF SAME ENTRY.

Two qualified persons may initiate a contest against an entry by joint affidavit; but two separate contests by different persons against the same entry, each attacking a different part of the entry, will not be permitted.

JONES, *First Assistant Secretary*:

F. B. Miller and Jacob E. Moore have appealed from the decision of the Commissioner of the General Land Office, dated November 12, 1912, dismissing their contests against the desert land entry, made by Elizabeth Waters, on February 3, 1910, for lot 4, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, and lot 1, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 2, T. 44 N., R. 10 E., N. M. P. M., Del Norte, Colorado, land district, containing 320.18 acres.

The following facts appear from the record:

On March 14, 1911, the claimant filed her first annual proof, showing the expenditure of \$347.50 for sinking and curbing a well and breaking brush on 80 acres.

On March 26, 1911, Miller filed an affidavit of contest against the E. $\frac{1}{2}$ of said entry, alleging that:

Elizabeth Waters has wholly failed to expend one dollar per year towards the redemption of said land or for the purposes of the statutes in such cases made and provided.

On the same day, Moore filed an affidavit of contest against the W. $\frac{1}{2}$ of said entry, alleging that:

Elizabeth Waters has wholly failed to expend one dollar per acre per year for the purpose of redeeming said land or for the purposes of the statute in such cases made and provided.

On March 30, 1912, the claimant filed a second annual proof showing the expenditure of \$365 for five hundred posts, 2,296 pounds of wire and staples, and labor in setting posts and stringing wire.

Miller, Moore, and the claimant appeared before the local officers on June 11, 1912, the day set for the hearing, in person, and the case of Miller v. Waters was first called. The register and receiver denied a motion filed by the claimant to dismiss the case, whereupon the contestant submitted testimony, to the sufficiency of which the claimant demurred. The demurrer was overruled and the claimant submitted

testimony in defense of her entry. It was then stipulated that all the testimony submitted in the case of *Miller v. Waters* should be considered as evidence in the case of *Moore v. Waters*.

Upon the cases thus consolidated, the local officers rendered decisions recommending the dismissal of Miller's contest and the cancellation of the entry upon the contest of Moore, for the reason that the second year's expenditure was not commenced until fifty-two days after the expiration of the second year of the entry.

In the decision from which this appeal is prosecuted, the Commissioner held:

The applications to contest the said entry were wholly insufficient and neither stated a cause of action. There is no statute which requires an entryman or entrywoman to redeem the land in a desert-land entry, and the charges of failure to expend one dollar per year or one dollar per acre per year for the purpose of "redeeming said land" or "towards redemption of the land" or "for the purposes of the statutes in such cases made and provided" were meaningless and the proceedings based thereon are void. . . . Moreover, a contest charging failure to comply with the law as to a portion of the entry can not be entertained. However, there would appear to be no objection to two qualified contestants initiating proceedings by a joint affidavit.

The Department is unable to agree to the reasoning of the Commissioner of the General Land Office that the affidavits of contest in this case did not state a cause of action. It appears from the record that neither the claimant nor any other party to the case entertained any doubt with reference to the default charged against the entry, and it is obvious that, however informal the charge may have been, the claimant had every opportunity to defend her entry and that she took advantage of such opportunity. The charge made by Miller was defective in that the words "per acre," after the word "dollar," were omitted, and he should have been permitted by the local officers to amend his affidavit by inserting these words, as he offered to do.

The most serious objection to this proceeding was the effort to bring two separate contests against the same entry, each contest attacking only a part of the entry. This can not be permitted for the obvious reason that it would subject the entryman to an unnecessary burden. The Commissioner properly held that two qualified contestants might initiate a contest by joint affidavit, and this result was actually accomplished in this case by the consolidation of the two proceedings.

The fact that the claimant has sunk a well, broken the brush, and made the expenditures for post, wire, and staples and erecting the fence are undisputed. Testimony was submitted tending to show that the amounts paid by her on account of the well and the breaking of brush were excessive. However, it was clearly shown that the expenditures claimed upon annual proof were made and the

weight of the testimony supports the finding that the amounts paid by the claimant were not in excess of the prices obtaining in that locality. Upon the merits, therefore, the contests have failed.

While it is true, as found by the local officers, that the improvements shown in the second annual proof were not commenced until after the expiration of the second year of the entry, it was clearly shown that they were begun before notice of contest was served and without knowledge that the contests had been filed. It was further shown that the contract for the performance of the work shown upon the second annual proof was made long prior to the expiration of the second year of the entry and that the delay in the work was through no fault of the claimant. Under these circumstances, the Department is unwilling to cancel the entry at this time.

As above modified, the decision of the Commissioner of the General Land Office is affirmed.

HUGHES v. STATE OF FLORIDA.

Decided August 14, 1913.

MINERAL LAND—DEPOSIT OF SHELL ROCK.

A deposit of shell rock, used for building purposes, construction of roads and streets and the foundations of houses, is not a mineral within the meaning of the general mining laws.

BUILDING STONE PLACER—SCHOOL INDEMNITY SELECTION.

Land embraced in a school indemnity selection is not subject to location as a building stone placer under the act of August 4, 1892.

JONES, *First Assistant Secretary:*

This is an appeal by E. Lee Hughes from the decision of the Commissioner of the General Land Office of March 25, 1912, dismissing his protest against indemnity school land selection No. 09395 filed by the State of Florida at Gainesville, Florida, for lot 3, Sec. 27 and lot 2, Sec. 34, T. 30 S., R. 19 E., containing .08 and 2.34 acres, respectively.

The above tracts constitute an island situated in Hillsboro Bay, known as Bull Frog Mound. It was ordered surveyed as public land by decision of the Department of October 27, 1906, which also directed that it be disposed of as an isolated tract. Later, however, upon August 8, 1907, one Gibson was allowed to make homestead entry thereon. In *Davis v. Gibson* (38 L. D., 265) a contest affidavit, which alleged that the land consisted of a deposit of shell on a sand bar which is covered at high tide, save the deposit of shell, and that there is no soil on the mound and it is not susceptible of cultivation or of use as a place of residence, was held sufficient. The

homestead entry was canceled as a result of the contest proceedings. The present selection was filed August 25, 1911, it being stated that it was in lieu of a loss of 2.42 acres in Sec. 16, T. 3 N., R. 5 E., the cause of loss being given as "Georgia Boundary." Publication of notice of the selection was made from September 7, 1911, to October 5, 1911.

January 10, 1912, E. Lee Hughes located a placer claim on this land, the notice of location reading as follows:

NOTICE is hereby given that the undersigned, having complied with the requirements of Chapter Six (6) of Title Thirty-two (32) of the Revised Statutes of the United States, and the local laws, rules and regulations has located three (3) acres of placer mining ground situated in Hillsboro County, State of Florida, and described as follows, to wit:

Lot No. 3 in section 27, and lot No. 2 in section 34, all in township 30 south, range 19 east, Tallahassee Meridian, Florida.

January 12, 1912, he filed a protest against the selection, stating the fact of his location and alleged that the land is "a mound of stone and shell such as is used for building purposes, construction of roads and streets, and the foundations for houses, and is absolutely of no other value whatsoever." Section 4 of the protest reads:

4th. Said land is of such character as is contemplated by the act of Congress of August 4th, 1892, extending the mineral land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands.

In the appeal it is urged that it having been found in the homestead contest proceedings that the shell on this land is worth from \$5000 to \$6000 for commercial purposes, such as building roads, foundation for houses and the like, and that prior to the allowance of the homestead entry some 40,000 cubic yards of the material had been removed, the shell being worth about \$1.00 per cubic yard in Tampa, Florida, the land is mineral in character, subject to mineral entry under the general mining laws and, therefore, excepted from the grant to the State of Florida. It is stated that the shell has become cemented together and has to be blasted out as ordinary rock is blasted. The material is claimed to be the same as or similar to, what is known as coquina, and the following quotations stated to be taken from the second annual report of the Florida State Geological Survey are presented:

One of the most common of the marine Quaternary deposits in the coquina, which occurs at various points along the coast. This consists of a mass of more or less water worn shells cemented by calcium carbonate. The amount of cement is seldom great enough to close the openings between the individual shells, though in some localities the process of cementation has proceeded far enough to produce a rather compact fossiliferous limestone. There is usually more or less sand present, which is commonly in the form of thin laminae separating the shell beds, and various gradations from sand rock to shell may

be noted along the Florida coast. This rock was described by several of the earlier writers on the geology of the State. The following account is from a paper published by Jas. Pierce in 1825.

Extensive beds of shell rock, of a peculiar character, occupy the borders of the ocean, in various places from the river St. Johns to Cape Florida. They are composed in unmineralized marine shells, of species common to our coast, mostly small bivalves, whole and in minute division, connected by calcareous cement. I examined this rock on the isle of Anastasia opposite St. Augustine, where it extends for miles, rising twenty feet above the sea and of unknown depth. It has been penetrated about thirty feet. In these quarries, horizontal strata of shell rock of sufficient thickness and solidity for good building stone, alternate with narrow parallel beds of larger and mostly unbroken shells, but slightly connected. Hatchets are used in squaring the stone. Lime is made from this material, of a quality inferior to ordinary stone lime. The large Spanish fort, and most of the public and private buildings of St. Augustine, are constructed of this stone. The rock extends in places into the sea, with superincumbent beds of new shells of the same character. Similar shell rock is found on the continent in several places.

* * * * *

COQUINA.

The word is here used, as it is used on the east coast, to designate those deposits of cemented shell fragments and quartz sand that can be seen at many localities near the present ocean shore of southern Florida.

* * * * *

All phases between shell rock and material which is made up mostly of quartz sand, can be found near Hillsboro Inlet, Delray and Palm Beach.

* * * * *

Coquina has been quarried for road material at several localities along the east coast. For this purpose, it is not so satisfactory as the Miami oolite, the coquina is not so calcareous as the oolite, is loosely cemented, where quarried, and breaks up instead of packing solidly.

* * * * *

The coquina rock of Anastasia Island near St. Augustine has been known as a building stone for more than three hundred years. This coquina was, in fact, the first stone used for building purposes in America, its use having begun with the settlement of St. Augustine about 1565. Coquina consists of a mass of shell of varying size or fragments of shells, cemented together ordinarily by calcium carbonate. A small admixture of sand is in some instances included with the shells. When first exposed the mass of shells is imperfectly cemented and the rock is readily cut into blocks of the desired size. Upon exposure, however, the moisture contained in the interstices of the rock evaporates and in doing so deposits the calcium carbonate which it held in solution thus firmly cementing the shell mass into a firm rock. Thus endured the resisting qualities of the rock are good. The shells from this formation have been extensively used with concrete in the construction of modern buildings at St. Augustine. Aside from its occurrence on Anastasia Island, coquina is found at many other points along both the east and west side of the peninsula.

The Department does not concur with the contention that this deposit is a mineral within the meaning of the general mining laws. It presents features greatly similar to the deposits of sand and gravel

considered in the case of *Zimmerman v. Brunson* (39 L. D., 310). The Department there said (at page 313):

From the above resume it follows that the Department, in the absence of specific legislation by Congress, will refuse to classify as mineral land containing a deposit of material not recognized by standard authorities as such, whose sole use is for general building purposes, and whose chief value is its proximity to a town or city, in contradistinction to numerous other like deposits of the same character in the public domain.

In harmony with that holding, the deposit of shell rock here involved cannot be held a mineral under the general mining laws.

The plat of T. 3 N., R. 5 E., discloses that that township is rendered fractional by the boundary line between Georgia and Florida and contains no section 16. By the act of March 3, 1845 (5 Stat., 788), there was granted to the State of Florida "section number sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township, for the support of public schools." Section 2275, R. S., as amended by the act of February 28, 1891 (26 Stat., 796), provides:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

The method of making selections to satisfy such deficiencies is set forth in section 2276, R. S., as amended by the act of February 28, 1891.

In the protest it was alleged that the land is chiefly valuable for building stone and is, therefore, subject to entry as a placer claim under the act of August 4, 1892 (27 Stat., 348). This act provides:

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.

Assuming, without deciding, that the material here present is building stone within the meaning of the above act, it should be pointed out that the location was not made until after the filing of the State selection and the publication of notice thereof. In *South Dakota v. Vermont Stone Company* (16 L. D., 263) it was held that lands valuable for building stone were not excepted under the act of August 4, 1892, from a grant to a State for school purposes, it being stated at page 264:

The passage of this act makes land chiefly valuable for building stone subject to entry under the placer mining laws, unless such lands have been reserved for the benefit of the public schools or donated to any State.

Section 2275, R. S., appropriates and grants other lands of equal area to be selected by a State as indemnity for a deficiency in the lands granted for school purposes. The indemnity lands are accordingly "donated" to the State when properly selected by it and are thereafter excluded from subsequent location as a building stone placer under the proviso of the act of August 4, 1892. The present location being subsequent in point of time to the selection by the State, is, therefore, made upon land not subject to such location and constitutes no bar to the allowance of the State selection.

The decision of the Commissioner is accordingly affirmed.

HUGHES v. STATE OF FLORIDA.

Motion for rehearing of departmental decision of August 14, 1913, 42 L. D., 401, denied by First Assistant Secretary Jones, October 27, 1913.

SVAN HOGLUND.

Decided August 29, 1913.

NATIONAL FOREST LANDS—HOMESTEAD ENTRY.

Where a homestead entryman at the time of withdrawal of the lands for forest purposes was in default, but no proceeding was instituted against his entry until after he had cured his default by further compliance with law and the submission of proof which would have entitled him to patent had no withdrawal intervened, he is entitled to patent notwithstanding such withdrawal.

JONES, *First Assistant Secretary:*

Svan Hoglund has applied to the Department for the exercise of its supervisory authority with reference to his homestead entry for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and fractional SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 34, N. $\frac{1}{2}$ SW. $\frac{1}{4}$ and fractional SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 35, T. 19 N., R. 4 E., H. M., Eureka, California, land district, which was canceled by departmental decision of May 13, 1913, motion for rehearing whereof was denied on July 15, 1913.

This entry was made on July 26, 1902, it being stated in the application that Hoglund settled on the land on July 1, 1902.

The land embraced in the entry was included in the Klamath Forest Reserve, on May 6, 1905 (34 Stat., 3001), subject to the following exception:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office or upon which any valid settlement has been made, pursuant to law, and the statutory

period within which to make entry or filing of record has not expired: *Provided*, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made.

The proceeding which resulted in the cancellation of the entry was directed by the Commissioner of the General Land Office, on April 19, 1910, upon the charge of failure to establish and maintain residence. At the hearing, on May 31, 1911, testimony was submitted showing, as has heretofore been found by the Department.

The land in controversy contains about 4,000,000 feet of timber, chiefly Douglas fir, with cedar and pine; the claimant alleged that he settled on the tract during September, 1902, and remained two or three weeks. He returned to the land during January, 1903, and remained until July, following. During July, 1903, he secured employment at a lumber mill, forty or fifty miles from the land, and continued to work for said mill until the date of the hearing. According to his own statement, he was on the land in November, 1903; April or May, 1904; November, 1904; April or May, 1905; and November, 1905, for from two weeks to a month or more on each occasion. He lived on the land continuously from May, 1906, until August, 1907, when he submitted proof. Final certificate was issued to him on August 6, 1907. His cultivation of the tract consisted of the raising of a garden each year of one-half acre or less.

Upon the foregoing finding of facts with reference to the claimant's residence and cultivation of the land, the Department held, in its said decision of May 13, 1913, that:

His alleged residence upon the tract, prior to the date of his entry and until May, 1906, was in the nature of occasional visits, and that the withdrawal for forestry purposes, under the terms of the proclamation, has attached.

Upon reconsideration of the entire record, it is believed that an erroneous disposition has been made of this case. Undoubtedly, at the date of the withdrawal for forestry purposes and for some time thereafter, the entry was subject to attack and cancellation because of the claimant's failure to substantially meet the requirements of the homestead law as to residence and cultivation. As has been before stated, however, this proceeding was not directed until nearly three years after the date of the submission of proof. The claimant is therefore entitled to judgment upon the entire record and his rights in the premises were not foreclosed prior to May, 1906. If all the facts before the Department would justify the issuance to him of a patent had no withdrawal intervened, he is entitled to patent notwithstanding the withdrawal. The very statement in the withdrawal, "that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant *continues* to comply with the law" indicates a purpose not to confine the claimant to the facts theretofore existing but to make his future conduct material, if not controlling.

It sufficiently appears from the record, in addition to what has been hereinbefore stated, that Hoglund made a valid settlement upon the

land; that he has expended in the neighborhood of \$1,000 in improvements thereon; that he was practically without means when the entry was made and that he expended his surplus earnings in improving the land; that six years have elapsed since the issuance of final certificate and there is no suggestion that he had sold or contracted to sell the land or the timber, or done any other act suggestive of speculation or bad faith, nor is there evidence that he has had any other home than on the land under consideration. The record fairly warrants the finding, and it is now the judgment of the Department, that his absences from the land, during the period covered by the proof, were necessary and that he is entitled to have the final proof accepted, as he now asks that it be considered, as commutation proof.

For the reasons hereinbefore stated, the decisions of May 13, 1913, and July 15, 1913, are revoked and vacated and the entry will be passed to patent, upon payment of the purchase price for the land.

INSTRUCTIONS.

ENLARGED HOMESTEAD—ADDITIONAL ENTRIES UNDER SECTION 3.

Sections 3 of the enlarged homestead acts*of February 19, 1909, and June 17, 1910, and the act of February 11, 1913, amending said sections, all provide that additional entries thereunder may be made only by "homestead entrymen of lands of the character herein described upon which final proof has not been made;" and the land department is without authority to allow additional entries under said sections after the submission of final proof upon the original entry, no matter how strong the equitable considerations in favor of the allowance of such entries may be.

First Assistant Secretary Jones to the Commissioner of the General Land Office, September 11, 1913.

I am in receipt of your letter of August 25, 1913, asking for construction of sections three of the enlarged homestead acts of February 19, 1909 (35 Stat., 639), and June 17, 1910 (36 Stat., 531), as applied to those cases where homesteaders, who made entries under the general law of lands now subject to designation under the enlarged homestead acts, desire to make additional entries under the provisions of the sections mentioned but whose time for submission of final proof upon the original entries has expired before they can make the additional entries.

The reasons stated why the additional entries can not be made are that in some instances the land has not been designated though petition therefor is pending; in others there are pending adverse claims upon the land which applicants are seeking to remove by contest; in other instances plat of survey of the land sought has not been filed, or existing surveys are suspended pending resurveys.

All of the instances cited by you present equitable reasons why additional entries should be allowed, if permissible under the law. However, the sections referred to specifically provide that the right to additional entry accorded therein may only be exercised by "homestead entrymen of lands of the character herein described upon which final proof has not been made." The same language is repeated in the act of February 11, 1913 (37 Stat., 666), amending said sections three.

The law, as will be perceived, confers the right of additional entry only upon those entrymen who have not made final proof upon their original entries; makes no exceptions on account of equitable or other conditions; and, consequently, this Department is without authority to allow additional entries in any case where final proof has been submitted upon the original. If, therefore, an entryman makes final proof upon his original entry without applying prior thereto for the exercise of the additional right, so conferred, his original entry exhausts his right and debars him thereafter from an additional entry under the said acts. The fact that conditions beyond his control, affecting the lands which he desires to include in the additional entry, exist, preventing such additional entry, can not vary the express requirement of the law.

You are, therefore, advised that the entrymen to whom your letter refers, cannot be allowed to make additional entries under existing enlarged homestead acts after they have submitted final proofs upon their original entries. You will, however, consider and report upon the advisability of recommending legislation to Congress which will accord the right of additional entry to persons who have heretofore submitted final proof upon original entries for lands of the character subject to designation under the enlarged homestead act, upon the condition that such entrymen still occupy and own the lands embraced in their original homestead entries and upon which they have theretofore submitted final proof, and upon condition that the lands within the additional entry shall be, as a prerequisite to patent, cultivated to the extent and for the time prescribed in the applicable laws.

M. R. HIBBS.

Decided September 11, 1913.

NATIONAL FOREST HOMESTEADS—CONDITIONS, LIMITATIONS, OR RESERVATIONS.

The act of June 11, 1906, authorizing the opening of agricultural lands within national forests to homestead entry, does not authorize either the Secretary of the Interior or the Secretary of Agriculture to impose upon entrymen thereunder, or insert in patents issued upon the lands, any conditions, limitations, restrictions or reservations not specifically authorized by existing laws.

JONES, *First Assistant Secretary*:

In connection with the application of M. R. Hibbs for the listing of 61.5 acres of land in the Nez Perce National Forest, Idaho, under the act of June 11, 1906 (34 Stat., 233), the Secretary of Agriculture requested the restoration of the lands described in the application with the exception of a strip of land five chains wide and containing a total of 4 acres, which was desired to be reserved for a roadway.

Upon consideration of the matter, and under departmental ruling of June 3, 1913, you held that it is unnecessary to except the so-called roadway from the listing and restoration but that the use of same may be reserved by the insertion of the following reservation in the patent: "Reserving, however, to the United States for the use of its officers, agents, and employees and for the use of all other persons who may desire to travel over, upon, and along the same, an easement or roadway for a wagon road ——— feet wide, being ——— on each side of the center line of said road as the same has been surveyed, laid out and extended over, upon, and across the lands hereby granted and conveyed."

In connection with the Hibbs application, the Director of the Geological Survey reported, under date of June 14, 1913, that the land lies along Granite Creek the water of which is sufficient for the development of 1,500 horsepower by means of a pressure pipe extending along the creek and located entirely upon the land applied for by Hibbs. The district engineer of the Survey recommended that all of the land in the Hibbs application, below an elevation of 10 feet above that of the junction of Granite and Little Granite creeks, be withheld from entry. The Director suggested that in lieu of such reservation the entire tract be listed and patented to Hibbs with a reservation for the pressure pipe line in the patent similar to that approved for the roadway, citing as authority therefor that part of the act of June 11, 1906, which gives the Secretary of Agriculture discretionary powers as to the elimination of lands from national forests, and the opinion of Attorney General Moody (25 Ops., 470), to the effect that the power of the Secretary of Agriculture to prohibit the use of forest reserves carries with it the right "to attach conditions to a permission."

The Department has given the subject careful consideration and has reconsidered its action of June 3, 1913, with respect to the roadway, and while it believes that the disposition of the lands subject to the roadway and pipe line reservations would be desirable in that it would permit the agricultural use while at the same time protecting the possible road use and power development, concludes that it was without authority to insert such reservations or restrictions in the patent.

The act of June 11, 1906, *supra*, authorizes the Secretary of Agriculture, in his discretion, to request the Secretary of the Interior to open lands for forest reserves, which may be occupied for agricultural purposes without injury to the reserves, to entry "in accordance with the provisions of the homestead laws and this act." It authorizes the Secretary of the Interior, upon the filing of such a request, to "declare the said lands open to homestead settlement and entry, in tracts not exceeding 160 acres in area." There is nothing whatever in the said act which authorizes either the Secretary of the Interior or the Secretary of Agriculture to impose upon the entryman, or insert in the patents issued upon the lands, any conditions, limitations, restrictions or reservations not specifically authorized by existing laws.

The general homestead laws, sections 2289-91, after providing the conditions of residence, improvement and cultivation required to be performed by the entryman as a pre-requisite to patent, provides that entryman shall, after compliance with all of said requirements "be entitled to a patent as in other cases provided by law." There is no provision in those sections for the insertion in patents of restrictions, limitations or reservations other than those authorized by existing law.

Looking to the various acts of Congress, it will be found that certain reservations or restrictions have been specifically authorized. For instance, the act of August 30, 1890 (26 Stat., 371, 391), provides that in all patents thereafter taken for public lands 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 authority of the United States." The act of August 9, 1912, applicable to entries within reclamation projects, authorizes the issuance of patent prior to payment of all charges due, upon the express condition that each patent shall reserve to the United States a prior lien upon the lands patented. Other instances are found in the land laws authorizing or directing the insertion of reservation, limitation or conditions in patents issued, but no such direction or authority is found in the statutes with respect to roads or rights of way for pipe lines, conduits, etc., utilized in the generation, or transmission of electrical energy.

It is a general rule, well established, that an executive department of the government is only possessed of authority to execute, administer and enforce laws enacted by Congress (115 U. S., 406). As intimated, Congress has not conferred upon this Department or the Department of Agriculture the authority sought to be exercised in these cases of listing, entering, and patenting the lands subject to limitations, conditions and reservations with respect to a future use

as a roadway or in the development and transmission of electrical power.

It is, therefore, held that Mr. Hibb's application must be allowed, either without the conditions hereinbefore described, or, if the roadway and power development are of sufficient value and importance to warrant the retention of the lands by the United States, its areas, so valuable, must be excluded from the survey application, listing, and entry and the remainder of the lands only disposed of under the homestead law.

In this connection your attention is directed to the fact that S. 2404, introduced by Senator Myers, proposing to authorize the disposition of public lands subject to reservation of rights of way for the development of power, is before your office for report.

IDA I. LUDOLPH.

Decided September 13, 1913.

DESERT LAND ENTRY—CHARACTER OF LAND.

A desert land entryman may properly include in his entry a legal subdivision necessary for use for reservoir purposes, or for other necessary part of the irrigation system adopted by him, notwithstanding less than one-eighth of the area thereof is susceptible of irrigation from such system.

JONES, *First Assistant Secretary:*

Ida I. Ludolph has appealed from decision of October 25, 1912, by the Commissioner of the General Land Office, holding for cancellation her desert land entry as to the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 10, T. 131 N., R. 106 W., Dickinson, North Dakota, land district.

The entry was made May 25, 1905, for the tracts above described and also the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, said section. May 29, 1908, the entrywoman filed final proof. Final certificate was withheld. It is stated that this township was included within coal land withdrawal No. 1, by executive order of July 7, 1910.

September 22, 1911, the Commissioner directed proceedings against the entry upon the charge that the irrigable portion of the land had not been reclaimed by irrigation, and was not provided with the necessary ditches, laterals, and available water; that not as much as one-eighth of the land entered has been cultivated and irrigated; that claimant has not provided a permanent water supply and irrigation system sufficient to irrigate all the irrigable portion of the land entered; that not so much as \$3.00 per acre has been expended in the necessary irrigation, reclamation, and cultivation of said land and in permanent improvements thereon.

A hearing was had upon the charges, and the local officers rendered decision recommending dismissal of the proceedings. Upon appeal the Commissioner, as above stated, held the entry for cancellation, except as to the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, mainly for the reason that in his opinion it was shown that not as much as one-eighth of each of the legal subdivisions was susceptible of reclamation and irrigation, citing instructions under the desert land laws (39 L. D., 264, Par. 24). He considered it somewhat doubtful as to the sufficiency of the water supply for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, which he allowed to remain intact, but concluded to accept the proof as sufficient for said subdivisions.

The special agent testified that all of the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, was being irrigated and cultivated; that the area irrigable on the other subdivision is as follows: SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, about 3 or 4 acres; SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, about 3 acres; NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, about 2 acres; SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, about 2 $\frac{1}{2}$ acres; S. $\frac{1}{2}$ SW. $\frac{1}{4}$, none; that the dam which gathers the water supply is on the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$.

The evidence for the defense states the irrigable portions as follows: N. $\frac{1}{2}$ NE. $\frac{1}{4}$, about 65 acres; SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, about 10 acres; SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, about 3 acres; W. $\frac{1}{2}$ SE. $\frac{1}{4}$, about 15 acres; S. $\frac{1}{2}$ SW. $\frac{1}{4}$, used only for storage purposes.

Departmental regulations provide that where there is not as much as one-eighth of any legal subdivision irrigable, such subdivision is not subject to desert land entry. This is a proper provision because the character of lands should be determined by legal subdivisions when considering whether they are subject to entry under a certain law. This is the well established rule.

If, as contended by counsel, all of the required one-eighth of an entry which must be irrigable, may be in one subdivision, there might be 280 acres of a 320-acre entry entirely devoid of the possibilities of irrigation, and only one subdivision of 40 acres irrigable. The law provides that final proof must show cultivation of one-eighth of the land. Under this provision of law, departmental instructions require that one-eighth of the whole area of the entry must be shown to have been cultivated and irrigated prior to final proof, but it is held that it is not necessary that such cultivation and irrigation be upon each legal subdivision. It may all be upon one subdivision. However, this is an entirely different question from the one arising with reference to what lands are subject to desert land entry. If no portion of the subdivision can be irrigated, and is not of use as a necessary part of the reclamation scheme, there can be no reason or justification for permitting that tract to be taken under the desert-land law. Some reasonable and considerable portion must be susceptible of such reclamation, and the Department has fixed one-eighth of each subdivision as the minimum. But if a tract be used as a necessary part

of the reclamation project, as for reservoir purposes, which may be a very necessary part of an irrigation plan to irrigate adjoining tracts embraced in the same entry, it would appear that such tract is as necessary as any other portion of the entry in perfection of the scheme, and perhaps the most important part of the plan. It is believed that such use is sufficient to classify such a tract as subject to entry under the desert land law.

In this view of the case, the Department sees no sufficient reason for cancellation of any portion of this entry. On the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ is the dam which, according to the plans will make a reservoir covering 15 acres of that tract and the adjoining SW. $\frac{1}{4}$ SW. $\frac{1}{4}$. The water is conveyed from there across the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, which according to the evidence for the defense contains about 15 acres of irrigable land, and according to the special agent, about $4\frac{1}{2}$ acres, almost equally divided between the two subdivisions. The water passes on over the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and on this tract there are about three acres irrigable, and valuable buildings and improvements have been placed on this tract. This subdivision is also important for the conveyance of water onto the main irrigable portion of the entry, namely, the N. $\frac{1}{2}$ NE. $\frac{1}{4}$. The SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ has about 4 acres irrigable according to the special agent, and about 10 acres, according to the defense. As these areas as given are only approximate, and, in any event, close to the required area, and as the tracts taken together form one complete irrigation system, which might be seriously disturbed by the elimination of some of the subdivisions about which there may be doubt as to the required area of irrigable land, it is deemed proper to give claimant the benefit of the doubt.

The water supply was found by the Commissioner sufficient for the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, which contains the greater portion of the irrigable area. Considering all of the facts and circumstances shown, the water supply will be considered as sufficient for the irrigable portion of the entire entry. If no other objection appear, the proof will be accepted and patent issued, with proper consideration with reference to the said coal withdrawal.

The decision appealed from is accordingly reversed.

ARCHIBALD McNABB.

Decided September 13, 1913.

PLACER CLAIM—DESCRIPTION—SURVEY.

Where a placer entry of part of a regular-shaped lot composed of legal subdivisions is described in terms of the public surveys as a legal subdivision, and may be readily identified by that description, a special mineral survey thereof will not be required.

JONES, *First Assistant Secretary*:

This is an appeal by Archibald McNabb from the decision of the Commissioner of the General Land Office, dated August 15, 1912, holding for cancellation his mineral entry No. 014336, made February 8, 1912, at Los Angeles, California, for the Philippe placer embracing the N. $\frac{1}{2}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, T. 2 N. R. 9 W., S. B. M. The Commissioner required certain further evidence as to the improvements claimed, an abstract of title, and also an official survey as to that part of the entry described as the N. $\frac{1}{2}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$. The entryman has appealed as to the two latter requirements.

The location was made March 10, 1906, and described the land as above stated. McNabb filed an application for patent No. 05381 therefor, January 7, 1908. This was held for rejection by the Commissioner in his decision of July 19, 1910, wherein, among other requirements, he stated:

No abstract of title has been furnished in the case, as required by paragraph 42 of the mining regulations. If it be sought to establish title in claimant, under the provisions of section 2332, U. S. Revised Statutes, paragraphs 43 and 74-77 of the U. S. Mining Regulations prescribe the evidence necessary to be furnished in such a case.

McNabb filed a withdrawal of this application, July 31, 1911, in which he stated:

I, Archibald McNabb, of Los Angeles County, State of California, do hereby declare that I am unable to furnish any abstract of title to the N. $\frac{1}{2}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 21, T. 2 N., R. 9 W., S. B. M., under my application 506 (Serial 05381). I therefore hereby abandon and withdraw said application, with the purpose of completing my location of said premises under my application for the same in my own name, made in September, 1910. I am now and have been since 1905, in possession of said premises and have made valuable improvements thereon.

It is apparent from the record that McNabb is desirous of securing title under section 2332, Revised Statutes, which provides:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim.

Under the above section the applicant is not required to furnish an abstract of title (paragraph 75 of the mining regulations). The Commissioner's decision in this respect is reversed. The entryman has furnished part of the evidence required by paragraphs 75 to 77 of the mining regulations, concerning claims asserted under section 2332, Revised Statutes, and he should be permitted a reasonable time within which to furnish the necessary showings.

June 30, 1881, the Woodman Placer, lot No. 41, was patented. Upon the plat of T. 2 N., R. 9 W., approved by the surveyor general April 3, 1876, this lot 41 is shown as being situated in Secs. 21 and 28, that part lying in Sec. 21 embracing the S. $\frac{1}{2}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and the S. $\frac{1}{2}$ SE. $\frac{1}{4}$ SE. $\frac{1}{4}$. The remaining 30 acres of the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ were designated as lot 5. In the decision now under review the Commissioner held:

A portion of a lot is not a legal subdivision, and claimant will be required to have an official survey made of this part of lot 5, described in his entry as the N. $\frac{1}{2}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 21, and furnish this office with a copy of the approved plat and field notes of such survey. See cases of Holmes Placer (29 L. D., 368) and Chicago Placer (34 L. D., 9).

In the Holmes placer, *supra*, the Department considered an application which described part of the land as the "W. $\frac{1}{2}$ of lot 1, the W. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of lot 1, . . . Sec. 3." From the earlier decision in that case, reported in 26 L. D., at page 650, it appears that lot 1 was originally less than 40 acres, and that since survey a part of it had also been patented as a lode claim. The Department there said at page 651:

A lot is necessarily an abnormally shaped tract, whether made by the original survey or caused by the segregation of a part thereof by a mineral entry. Hence to attempt to describe a part of it in the way that one would describe a legal subdivision, as is done in the case at bar, would necessarily cause confusion in the records as well as the possibility of raising doubt as to the exact area patented.

The prior holding was affirmed in the latter decision, the Department saying in 29 L. D., at page 369:

In this case it is clear that as to the designated portions of lot 1, claimed under said entry, the same do not conform and can not be made to conform to the rectangular or legal subdivisions of the public land survey of the section or township in which said lot is situated. While said lot 1 is in itself a legal subdivision of said survey, the Department is not aware of any rule or provision of law whereby the subdivision of said lot into smaller legal subdivisions, under the system of public land surveys may be recognized.

The present case, however, presents material distinctions. Under section 2330, Revised Statutes, pertaining to placer claims, legal subdivisions of 40 acres may be divided into 10 acre tracts. That part of lot 41 lying within Sec. 21, embraced the S. $\frac{1}{2}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, or a legal subdivision, the remaining 30 acres could also be described in terms of legal subdivisions and the designation of them as lot 5 was unnecessary. In the Chicago placer mining claim, 34 L. D., page 9, a part of the land was described as "S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of lot 1 in Sec. 4." The Department said at page 10:

By the public survey of said sections 3 and 4 (approved March 2, 1883) the quarter sections in which the Chicago claim is situated are represented to be

fractional, the lands in the north half of each quarter section being designated as lots, each lot containing more than forty acres, while the lands in the south half of each quarter section are legal subdivisions of forty acres each.

And held at page 11:

There is another objection to the entry not noticed in your office decision. Portions of the lands stated to be embraced in the entry are not described in such manner as to sufficiently identify them. These portions are referred to in the entry certificates as "the S. $\frac{1}{2}$ of lot 3 in Sec. 3," "the S. $\frac{1}{2}$ of S. $\frac{1}{4}$ of lot 4 in Sec. 3," "the S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of lot 1 in Sec. 4," and are parts of irregular-shaped tracts designated as lots by the public survey. It would be impossible from the description given in the entry certificate to identify the lands claimed under the location and entry. This can be done only by a survey of the portions of said lots intended to be embraced in the entry.

It is apparent that that case also differs from the one now under consideration. In the present case the land is not part of an irregular-shaped tract, but one that is regular, and it is possible to identify with ease the land claimed under the location and entry from the description given in the entry certificate. Further, in the case of Charles H. Head *et al.* (40 L. D., 135), part of the land claimed was described as follows:

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.

The Department said as to that description at page 137:

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.

I am, therefore, of the opinion that a special mineral survey of that portion of the claim described as the N. $\frac{1}{2}$ S. $\frac{1}{2}$ SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 21, is unnecessary, and the action of the Commissioner requiring such a survey is reversed.

The Commissioner is directed to construct a supplemental plat of the township, showing by protraction lot 5 of Sec. 21, divided so as to exhibit the part thereof embraced in this mineral entry.

The matter is remanded for further proceedings in harmony herewith.

AMERICAN ONYX AND MARBLE CO.

Decided September 17, 1913.

PLACER MINING CLAIM—COMMON IMPROVEMENT.

Where a deep quarry has been excavated upon one of a group of placer mining claims held in common, for the purpose of developing a deposit or formation of marble existing within the group, and has been projected to within a few feet of another claim of the group, and the topographic conditions are such that the marble within such claim can be more economically removed through the existing excavation than through an independent plan of development, a proportionate share of the cost of such improvement is applicable to such claim in satisfaction of the statutory requirement concerning expenditure as a basis for patent.

JONES, First Assistant Secretary:

This is an appeal by the American Onyx and Marble Company from a decision of the Commissioner of the General Land Office, dated February 29, 1912, requiring a further showing as to improvements in the matter of its mineral entry 0701, made December 22, 1908, for the Blue Marble and White Marble No. 2, survey 889, and Scania No. 1, Scania No. 2, Flink, and Cream Marble placer mining claims, described by legal subdivisions, embracing a total area of 119.983 acres in Sec. 25, T. 39 N., R. 38 E., W. M., Spokane land district, Washington.

The improvements sought to be applied in satisfaction of the statutory requirement as common to all of the claims of this entry were returned by the mineral surveyor as follows:

Improvement 1, of Blue Marble Placer Claim.

A marble quarry, the discovery and center of the southeasterly end of which bears from Cor. No. 2, White Marble No. 2, Placer Claim, this survey, S. 21° W. 50 ft., averaging 93 feet wide, 32 ft. deep and extending N. 51° 30' W. 70 ft. in solid marble, at which point it ends, and stripping commences, which extends with the same width, 50 ft. further. Value, \$13,000.00.

Improvement 2.

A boiler and engine house 15 ft. by 40 ft., the N. W. Cor. of which bears from Cor. 2, White Marble No. 2 Placer Claim, this survey, S. 17° 15' W. 150 ft., course of long sides, S. W. This building and the machinery used therein and in the quarry, are absolutely essential, as the marble has to be moved by agents other than explosives.

This machinery consists of a forty horse power boiler with locomotive fire box, a Sullivan Channeler, steam drill, gaddy and tripod, a derrick, steam pumps and fittings, and all necessary pipes, small tools, etc. Value, \$4,700.00. Total value of improvements, \$17,700.00.

Upon consideration of the entry, the Commissioner held, on February 27, 1912, that said improvements did not promote or directly tend to promote the extraction of mineral from the Cream Marble, Flink, Scania No. 2, and White Marble No. 2 claims, and were, therefore,

not properly applicable to said claims, citing the case of Elmer F. Cassel (32 L. D., 85), and required the company to show other and sufficient improvements for the benefit of said claims.

April 4, 1912, the company submitted the affidavit of the mineral surveyor who surveyed the claims, together with other affidavits, by which it was sought to support the contention that the quarry, by reason of its immediate proximity to the White Marble No. 2 claim, directly tends to facilitate the extraction of marble from said claim, and that a portion of the cost of said common improvement should also be accredited to the other claims, in regard to which a further showing was required, because the character of the deposit in said claims has been demonstrated by disclosures made in the quarry.

This showing was held to be insufficient by the Commissioner April 16, 1912, and the entry was held for cancellation as to the Cream Marble, Flink, Scania No. 2, and White Marble No. 2 claims. From this action the company has appealed to the Department.

As to the benefit of the common improvement to the White Marble No. 2 claim, the affidavit of the mineral surveyor contains the following statement:

In addition to the above, the main quarry on the Blue Marble and Scania No. 1 locations is certainly of equal value to the White Marble No. 2 both for development and extraction. It is situated on a side hill slope that extends about parallel to the course of the river and which ascends rapidly several hundred feet in elevation with occasional narrow benches. The width of the reef or deposit is at least 300 feet; the main quarry is located upon the lower or southwest edge of it; the strike of the reef is northwest so that with the extremely close location of the quarry to the White Marble No. 2 ground, it can be readily seen that the lateral extension of the quarry about one angle cut of the channeler to the right will put it into this ground and give it the complete benefit in extraction, of the depth and of all machinery in the plant.

The following is offered by the mineral surveyor in his affidavit as a reason why a proportionate share of the common improvement should also be accredited to the Scania No. 2, Cream Marble, and Flink claims:

With this statement of conditions it can be seen that while the main quarry will not be used for the extraction of the marble in Scania No. 2, Flink and Cream Marble, still all information gained in its development is applicable to these and will be a guiding estimate of their value and in the determination of the best manner of opening them. Whether the deposit is of commercial value can only be determined by attaining a depth sufficient to get the solid marble or at least to where a sufficient percentage is solid to make it profitable to quarry.

Under a general consideration of the subject to placer excavations, it may be readily perceived that such work done outside of the boundaries of a claim to which it is sought to be applied, ordinarily does

not tend to facilitate the development of that claim. In the case of Elmer F. Cassel, *supra*, it was held (syllabus) :

An excavation made upon one of a group of placer mining claims containing a deposit or formation of marble so near the surface as to be most advantageously removed by means of quarries, and which manifestly does not tend to facilitate the extraction of the marble from the other claims of the group, or to promote their development, is not such an improvement as may be accepted in satisfaction of the statute requiring an expenditure of \$500 in labor or improvements upon or for the benefit of each of the claims constituting the group as a condition to obtaining patent thereto.

However, in a case like the one under consideration, where a deep quarry has been developed and projected to within a few feet of a claim, and the topographic conditions are such that the mineral can be more economically removed through the existing excavation than through an independent plan of development, it is believed that a proportionate share of the cost of such improvement is justly and properly applicable to such claim in satisfaction of the statutory requirement.

As to the contention that a share of the cost of the common improvement is also properly applicable to the Scania No. 2, Cream Marble, and Flink claims, because the character of the deposit in said claims has been determined through such development, the Department believes the benefit, if any, to said claims is too remote. In the case of C. K. McCornick *et al.* (40 L. D., 498), it was held that expenditures for drill holes upon a lode mining claim for the purpose of prospecting it in order to secure data upon which the further development of the claim might be based were available for meeting the statutory provision requiring the expenditure of \$500 as a basis for patent. In this case, however, the drill holes were actually sunk upon the claims with respect to which the requirement of the statute was found by the Department to have been met, and the character of the deposit was thus directly determined, whereas, in the case under consideration, the excavation is from 600 to 1,200 feet from the claims mentioned.

The Commissioner's decision as to the Scania No. 2, Cream Marble, and Flink claims is therefore affirmed, and reversed as to the requirement that a further showing be made in the case of the White Marble No. 2 claim.

INSTRUCTIONS.

PRACTICE—APPLICATIONS FOR POWER PERMITS WITHIN INDIAN RESERVATIONS.

All applications for preliminary and final power permits presented under the act of February 15, 1901, and the regulations of March 1, 1913, on lands within Indian reservations or allotments, should be filed with the register and receiver of the proper local land office, and after notation thereof transmitted to the General Land Office, whereupon they will be referred to the Geological Survey and the Commissioner of Indian Affairs for report and recommendation.

Acting Secretary Jones to the Commissioner of the General Land Office, September 18, 1913.

In order to insure uniformity of practice, avoid confusion, and secure notation of applications and permits upon the land office records it is hereby directed that all applications for preliminary and final power permits presented under the act of February 15, 1901 (31 Stat., 790), and regulations approved March 1, 1913 (41 L. D., 532), on lands within Indian reservations or allotments, shall be filed with the register and receiver of the appropriate local land office, as required by regulation 2 of instructions. Notations will then be made and the papers transmitted to the General Land Office, as required by regulation 21, whereupon the Commissioner of the General Land Office will, in addition to referring the application to the Geological Survey, as required by said regulation, also refer it to the Commissioner of Indian Affairs for report and recommendation, so that the interests of the Indians may be protected and such compensation for the lands or rights taken as the law and facts may warrant, may be secured. Upon approval of a preliminary or final power permit by the Secretary for lands within an Indian reservation, or covered by an Indian allotment, a copy of the permit, as approved, will be transmitted to the Commissioner of Indian Affairs for his information.

HEIRS OF MARTIN JEMISON.

Decided September 18, 1913.

COAL ENTRY—AGREEMENT PRIOR TO ENTRY.

An agreement by a coal land applicant to pay to another, out of the proceeds of the sale of the land after patent, the money advanced by such party to pay the purchase price, fees, etc., in connection with the entry, and in addition one-third of the balance remaining after making such repayment, being merely a promise to pay in case of sale, not enforceable against the land, is not in violation of the coal land regulations requiring an applicant to make oath that the entry is made in good faith for his own benefit, and not, directly or indirectly, in whole or in part, in behalf of any other person or persons.

JONES, First Assistant Secretary:

This is an appeal by the heirs of Martin Jemison, deceased, from a decision of the Commissioner of the General Land Office, dated August 17, 1912, holding for cancellation coal entry 03819, made June 19, 1907, by Martin Jemison, under section 2348, United States Revised Statutes, for lot 4, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 3, T. 5 N., R. 91 W., 6th P. M., Glenwood Springs land district, Colorado.

Proceedings against the entry were instituted upon the following charges, predicated upon a report of a special agent:

(1) That entryman did not make his said filing or entry for his own exclusive use and benefit, but did make the same in the interest of, and for the use and benefit of one Sarah J. Pettit.

(2) That prior to making said entry said entryman had entered into an agreement with Sarah J. Pettit, whereby he agreed to deed to said Sarah J. Pettit a two-thirds interest in said land, for the consideration that said Sarah J. Pettit was to provide the money with which to purchase the land from the Government.

Testimony was taken by oral depositions, appearance being made by the heirs of Martin Jemison, said entryman having died in the meantime. From the evidence thus adduced, the local officers on October 28, 1911, found and held that the entry was not made for the exclusive use and benefit of the entryman, but in part, at least, for the benefit of Fred B. Jemison and Sarah J. Pettit, and recommended that the entry be canceled. Upon appeal this action was affirmed by the Commissioner on August 17, 1912, and further appeal brings the case before the Department.

It appears from the testimony that on March 7, 1907, Martin Jemison executed the following agreement:

Received from Mrs. Sarah J. Pettit, the sum of fifteen hundred ninety seven $\frac{60}{100}$ (\$1597.60) dollars for the purpose of paying for coal declaratory statement No. 3268 for lot No. 4, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, section 3, township 5 N. of range 91 W., 6th P. M., State of Colorado, and containing 159 $\frac{76}{100}$ acres. And I agree that upon receipt of patent for same from the United States Government that said land shall be sold as soon as possible and from the proceeds of said sale, the amount so advanced shall first be paid to Mrs. S. J. Pettit, together with any fees or costs that may have been paid by her for obtaining said patent, and also any interest on said sum remaining unpaid. After all these sums of money so advanced have been paid, then from balance remaining I agree to pay one-third of same to said Mrs. Sarah J. Pettit and I agree to pay her interest at the rate of 7 per cent per annum from date until paid on the amount so advanced, interest payable quarterly and if said claim shall not be held valid and the money so sent be returned by the U. S. Government, I agree to immediately return same to Mrs. S. J. Pettit with any amount advanced for fees or any interest paid.

Henry C. Stillwell, who negotiated this loan, and who appears to have been well acquainted with the Jemisons, testified that Fred B. Jemison, a son of Martin Jemison, approached him upon the subject of securing money to pay for the land and that from conversations had with said Fred B. Jemison, he formed the impression that he was to receive whatever benefit might accrue under said entry.

Fred B. Jemison testified that his father was a very old man of limited means, and that he had been accustomed in recent years to transact all business for him; that the money was secured more on his credit than that of his father, and that he has kept up the pay-

ments of interest. This witness, however, denied that there was any understanding or agreement of any kind for a conveyance of the land or any interest therein to him after title was secured, and declared that his only interest in the matter was the desire to assist his father in securing a tract of valuable coal lands.

In the case of *Hafemann v. Gross* (199 U. S., 342), where a pre-empter entered into an agreement to give one-fourth of the proceeds of the sale of the lands to a party in consideration of his paying one-fourth of the expenses incident to final proof, it was held that such an agreement was only a promise to pay in case of sale, which could not be enforced against the land and was therefore not in contravention of section 2262, United States Revised Statutes, which provides for an oath that the claimant has not entered into any agreement whereby title shall inure to the benefit of any other person.

The oath required by paragraph 14 of the coal-land regulations (35 L. D., 665) is substantially similar in this regard to the requirements of section 2262, United States Revised Statutes, and the rights and relations of the parties under the agreement here under consideration appear to be essentially similar to those of the parties in the case of *Hafemann v. Gross, supra*. Under this situation, therefore, it must be held that the agreement between Martin Jemison and Mrs. Sarah J. Pettit was simply a promise to pay in case of sale, which did not violate the requirements of the coal-land regulations. Furthermore, the testimony in this case fails to show that Mrs. Pettit is disqualified to receive the benefits of the coal-land law. *United States v. Colorado Anthracite Co.* (225 U. S., 219).

As to the alleged interest of Fred B. Jemison, the Department believes that under the showing as to the business relations existing between the father and son, and in the absence of any specific showing of an agreement of any character whereby the benefits under the entry were to accrue to the son, the conclusion that the entry was made for the benefit of said Fred B. Jemison is not warranted.

The decision appealed from is therefore reversed, and the entry will be passed to patent in the absence of other objection.

JOHN WILLIAM ROATCAP.

Decided September 18, 1913.

RECLAMATION HOMESTEAD—RESIDENCE—ACT OF JUNE 25, 1910.

The act of June 25, 1910, relieving entrymen within reclamation projects from the necessity of residence until water is available from the project, applies to all *bona fide* qualified entrymen who made entry prior to the act and have made substantial improvements, regardless of whether they have established and maintained residence.

JONES, *First Assistant Secretary*:

April 30, 1913, the Department affirmed a decision of the Commissioner of the General Land Office of June 25, 1912, holding for cancellation homestead entry No. 1125, Ute series, Montrose, Colorado, land district, made February 6, 1907, for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 26, T. 50 N., R. 11 W., N. M. P. M., then and now within the limits of the Uncompahgre reclamation project, undertaken under the provisions of the act of June 17, 1902 (32 Stat., 388).

The entryman has asked for consideration of the case on the ground that the Commissioner's decision contains an erroneous statement of fact and that the decision of the Department contains an erroneous construction of the law.

The decision of the Commissioner stated that a cabin upon the land when claimant made entry was subsequently removed therefrom. This statement was incorrect, as shown by the evidence submitted at the hearing, the matter removed from the claim being some logs which entryman had himself hauled there for the construction of a barn but which he moved because other people were taking them. The departmental decision held that the entry must be canceled because claimant had "entirely failed to make any compliance whatever with the requirements of the homestead law."

It appears from the record of a hearing had, at which the United States was represented by special agents, that Roatcap purchased from a former entryman a cabin upon the land and a relinquishment of the entry for \$100, the cabin being valued at \$75 and the relinquishment at \$25; that in February, 1907, he was upon the claim, doing work, and that he also worked thereupon during the summers of 1907, 1908 and 1909, but that his family, consisting of a wife and nine children, have never resided thereupon.

June 6, 1907, entryman applied for leave of absence for one year, alleging, in substance, that his wife is a confirmed invalid and that it was impossible for him to make a living upon the land until water should become available. This application was granted by the register and receiver July 1, 1907.

Only about 35 acres of the land included within the entry are supposed to be irrigable, the remainder being rough and rocky, and it was contended at the hearing that entryman's object in entering the land was to secure it for the stone, there being some market for same in the vicinity. Entryman, however, contends, and the Department concludes, that when water is applied to the land from the government reclamation project it will, as a whole, be chiefly valuable for agricultural purposes, and that the stone is not of such character or value as to constitute the land mineral in character within the meaning of the law.

The decisions of the Commissioner and of the Department overlooked the provisions of the act of June 25, 1910 (36 Stat., 864), and the construction placed thereon by departmental decision in the case of *Roberts v. Spencer* (40 L. D., 306). The act in question 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 seventeen, 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 departmental decision cited holds that the purpose of the act was to relieve entrymen who had made entry for lands within a reclamation project prior to the passage of the act, from the necessity of maintaining residence until water is available, and condones the prior failure of such entrymen to maintain residence where water has not been available for the irrigation of the land. The decision further held that the only conditions required to entitle such an entryman to leave of absence are "that he shall be a qualified entryman, shall have made a *bona fide* entry upon the land, and have made substantial improvements thereon." The Commissioner erred in holding that Roatcap was not entitled to the benefits of this act because he had never established and maintained his residence upon the land. As indicated in the departmental decision cited the law makes no such requirement, and I find from the record that Roatcap had made *bona fide* entry for the lands involved and had valuable and substantial improvements thereon, and that consequently he was and is entitled to the benefits of the act of June 25, 1910, *supra*. I am informally advised by the Reclamation Service that the land lies on the outer limit of the reclamation project and that construction of works for the irrigation of these and adjacent lands was not undertaken until the summer of 1912.

The case is *ex parte* in its nature and, as indicated, the Department believes the act in question was designed to relieve entrymen in just such cases as this. The departmental decision of April 30, 1913, in this case is accordingly hereby annulled and vacated and the Commissioner's decision of June 25, 1912, reversed. Mr. Roatcap's entry will be held intact, subject to his future compliance with the homestead laws as modified by the Reclamation Act of June 17, 1902 (32 Stat., 388), and acts supplemental thereto or amendatory thereof.

In this connection it is noted that the entryman offered final proof in support of his entry, September 23, 1912, which proof was suspended by the register and receiver. This proof fails to show such

residence upon the claim as warrants the acceptance of the proof under the general homestead laws or under said laws as amended June 6, 1912 (37 Stat., 123). The said proof is accordingly hereby rejected and the Commissioner will so advise entryman, also advising him of the holding hereinbefore made, that his original entry will remain intact subject to compliance with the homestead and reclamation laws from and after the time when water became available for the irrigation of the land.

INSTRUCTIONS.

NATIONAL FOREST LANDS—LISTING UNDER ACT OF JUNE 11, 1906—ELIMINATION.

Where by change of boundary lands are eliminated from a national forest which had prior thereto been listed by the Secretary of Agriculture for restoration under the act of June 11, 1906, upon the application of a qualified homesteader, or had been settled upon prior to January 1, 1906, and the settlement since maintained, the preference right secured to such applicant or settler under said act is not terminated or defeated by such elimination.

Acting Secretary Jones to the Commissioner of the General Land Office, September 19, 1913.

In a communication from the Secretary of Agriculture, dated June 23, last, he refers to the elimination from the Angeles National Forest, by proclamation of the President of May 17, last, of an area of approximately 100,000 acres, and calls particular attention to the fact that within the area eliminated a large number of tracts had been, prior to said proclamation, listed by his department for restoration under the act of June 11, 1906 (34 Stat., 233), upon the applications of persons who were in possession of the lands under special-use permits issued by his department prior to said elimination, and that he had been informed by the district forester at San Francisco that the register and receiver at Los Angeles land office had received no instructions respecting the preference rights of these persons, and, for that reason, the attention of this Department was invited to the matter and request made that appropriate instructions be issued in the premises.

The act of June 11, 1906, *supra*, authorizes the Secretary of Agriculture, upon application or otherwise, to ascertain the location and extent of lands within permanent or temporary forest reserves which are chiefly valuable for agriculture and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and he may list and describe the lands by metes and bounds, or otherwise, and file the list with the Secretary of the Interior with

request that said lands be opened to entry in accordance with the provisions of the homestead laws and of that act. Upon the filing of such list it is made the duty of the Secretary of the Interior to declare said lands open to settlement and entry in tracts not exceeding 160 acres, provided—

That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry, upon whose application the land proposed to be entered was examined and listed, shall each, in the order named, have a preference right of settlement and entry.

By section 5 of said act it is, however, provided—

That nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this act, or to in any way impair the legal rights of any *bona fide* homestead settler who has or shall establish residence upon the public lands prior to their inclusion within a forest reserve.

If, as represented, portions of the lands included within the elimination from the forest by the President's proclamation had prior thereto been listed by the Secretary of Agriculture for restoration under the act of June 11, 1906, upon the application of any qualified homesteader, the preference right secured to such applicant, and the preference right secured to those having settled upon the land prior to January 1, 1906, where such settlement has since been maintained, is not terminated and defeated by the elimination under the President's proclamation. Under the President's proclamation the general body of the lands eliminated is to be restored at a time to be fixed by the Secretary of the Interior, and I am informed that because of the particular value of these lands some appropriate manner should be fixed, giving equal opportunity to those desiring to secure one of these valuable tracts, with the least possible confusion in the disposition of the lands and expense to the applicants.

The time and manner of the actual opening to settlement and entry of the major portion of these eliminated lands have not been yet determined upon, but, in my opinion, this fact should not longer withhold from those entitled to a preference right under the act of 1906, the privilege of asserting the same. Further, good administration would require that any claimed preference rights within this eliminated area should be ascertained and determined before the general opening occurs, especially if a particular manner of opening be finally determined upon.

Therefore, I have to direct that you advise the local officers that they should give published notice, through advertisement, requiring all persons claiming preference rights in these lands, either under settlement begun prior to January 1, 1906, and since maintained, or

upon application to and listing by the Secretary of Agriculture of the lands, under the act of June 11, 1906, to make due assertion of claim through formal application to enter the land, within 60 days from date to be fixed in the published notice, and that after the expiration of such time the lands may be disposed of without regard to any claimed preferential rights. This published notice should be for a period of not less than four weeks in one newspaper of general circulation, published in the county in which the lands are situated.

In this connection your office should carefully investigate the question as to what particular tracts within this eliminated area were in fact listed by the Secretary of Agriculture under the act of June 11, 1906, upon the application of an individual, and the register and receiver should be directed, in addition to the published notice, to specially notify such applicants of their preferential right of entry within the period named, at the address shown by the records. In the event there are instances of listings under the act of 1906 upon the application of an individual, otherwise than within the elimination in question or within the limits of some other forest, I have to direct that the direction herein given be followed, the purpose being to secure to those entitled to preferential rights the earliest opportunity of enjoying the same.

INSTRUCTIONS.

ENLARGED HOMESTEAD—SECTION 6—UTAH OIL LANDS—ACT OF AUGUST 24, 1912.

An entryman under section 6 of the enlarged homestead act of February 19, 1909, who complies with the requirements of the law as to improvement, cultivation, and residence in the vicinity, is an actual settler within the meaning of the act of August 24, 1912, providing that unreserved public lands in the State of Utah withdrawn or classified as oil lands, or as valuable for oil, shall be subject to entry "under the homestead laws by actual settlers only," and certain other laws; and lands in said State withdrawn or classified as oil, or valuable therefor, are subject to designation and entry under said section 6.

Acting Secretary Jones to the Commissioner of the General Land Office, September 23, 1913.

I am in receipt of your request for opinion upon the construction of section 6 of the so-called enlarged homestead act of February 19, 1909 (35 Stat., 639), as applied to lands withdrawn or classified as oil lands, in the State of Utah.

The question upon which there seems to be a difference of opinion in your office is whether the surface of lands so classified or withdrawn may be designated and entered under the provisions of section 6 of the act of February 19, 1909, *supra*, and of the act of August

24, 1912 (37 Stat., 496). The last-mentioned act provides that unreserved public lands in the State of Utah withdrawn or classified as oil lands, or as valuable for oil, shall be subject to entry "under the homestead laws by actual settlers only," and under certain other laws specifically named therein, provided that all such entries or selections shall be subject to the reservation to the United States of all oil and gas in the lands patented, together with the right to prospect for, mine, and remove the same.

Homestead entrymen under section 6 of the act of February 19, 1909, are not required to settle or reside upon the lands entered and by reason of the requirement in the act of August 24, 1912, that they shall be subject to entry under the homestead laws by actual settlers only, you are in doubt as to whether such lands may be disposed of under section 6.

The act of February 19, 1909, *supra*, is a part of the homestead laws and was enacted to secure the development under those laws of lands not susceptible of producing crops by irrigation or ordinary farming methods. For this reason twice the area permitted to be taken under the general laws is allowed to be entered as an enlarged homestead. The first five sections of the act require residence and improvement like that fixed by the homestead laws, and, in addition, cultivation of specified areas during each year until final proof. Section 6 of the act relates to lands of similar character to those described in the preceding portion of the act but which do not have upon them such a supply of water for domestic purposes as will make continuous residence thereupon possible, and in such entries no residence upon the land is required, though entrymen are specifically required to "reside within such distance from such land" as will enable them to successfully farm the same. Such entrymen are required to cultivate a specified area during each year, beginning with the second year after entry, and continuously until final proof.

As already intimated, it is my opinion, that section 6 of the act of February 19, 1909, is essentially a part of the general homestead laws and that one who makes an entry under its provisions, resides within such distance therefrom as enables him to successfully farm the land, and who complies with the other provisions of law as to improvement and cultivation, is an actual settler within the meaning of the act of August 24, 1912. He is, by virtue of the required improvements and cultivation and of residence in the vicinity, directly and personally interested in and connected with the farming of the land, as distinguished from those who under the so-called soldiers' additional homestead entries, section 2306 Revised Statutes, are not required to perform any acts of residence, improvement or cultivation upon or connected with the land entered.

Claimants for lands of the character described in section 6, are, by the act of August 9, 1912, granted a preference right of entry similar to that accorded settlers under the general homestead law, upon condition that they shall plainly mark and place improvements upon the unsurveyed lands claimed.

From the foregoing it appears that Congress has generally accorded the same privileges and exacted the same requirements, with the exception of residence on the land itself, of claimants under section 6 of the enlarged homestead act as under other homestead laws, and within the meaning of the act of August 24, 1912, they should be regarded as actual settlers, and lands withdrawn or classified as oil or valuable therefor permitted to be designated and entered under said section 6, act of February 19, 1909.

OLE BROWN.

Instructions, September 24, 1913.

REPAYMENT—TIMBER AND STONE APPLICATION—ACT OF MARCH 26, 1908.

Where an application under the timber and stone act is rejected for failure of the applicant to appear and submit proof on the date fixed therefor, or within ten days thereafter, the applicant is entitled under the act of March 26, 1908, to repayment of the purchase moneys paid in connection with the application, provided he has not been guilty of false statements, fraud, or attempted fraud, in connection therewith.

TIMBER AND STONE APPLICATION—FORFEITURE OF PURCHASE MONEY.

That part of paragraph 29 of the regulations of November 30, 1908, as revised August 22, 1911, under the timber and stone act, which declares that all moneys paid by an applicant under the timber and stone act will be forfeited to the government, and his rights under the act exhausted, "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," is without authority of law, and said paragraph is amended by eliminating therefrom the clause, "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."

JONES, Acting Secretary:

I am in receipt by your informal reference, with request for instructions, of papers relating to the application of Ole Brown for repayment of \$100, paid in connection with timber and stone sworn statement 09906, for the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 20, T. 66 N., R. 22 W., Minnesota.

The facts of the case appear to be that sworn statement was presented November 2, 1911, alleging the timber on the land to be worth \$100. The chief of field division concurred in the amount fixed by applicant, and on September 3, 1912, the latter paid \$100, per receipt No. 947,017, and the register and receiver fixed December 16, 1912,

as the date for submission of final proof. The applicant failed to appear on the date set or within 10 days thereafter, and on December 28, 1912, the register and receiver rejected the timber and stone application. February 15, 1913, Brown executed a relinquishment of the filing and applied for the return of the purchase money paid, alleging that he was unable to appear at the land office on the day fixed for final proof or within 10 days thereafter, because business in the Territory of Alaska required affiant's personal attention at that time.

Section 2 of the act of June 3, 1878 (20 Stat., 89), which provides for the initiation of a timber and stone application by the filing of a sworn statement for the purpose that "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."

The regulations issued under said act August 22, 1911 (40 L. D., 238), paragraph 29, state that if such an applicant is guilty of false swearing or attempted fraud in connection with his application "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."

The act of Congress approved March 26, 1908 (35 Stat., 48), provided that:

Where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof or to his legal representatives in all cases where such application, entry, 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.

It will be perceived from the foregoing that purchase money deposited by applicants to enter, under the said act of June 3, 1878, is by that statute declared forfeited in the event that he shall "swear falsely in the premises." Forfeiture of moneys so paid is not directly or by implication declared in said act for any other reason. Ordinarily, however, and in the absence of other legislation by Congress, no authority exists for the return of fees, commissions, or purchase money paid in connection with such an application where the land was properly subject to the application and where the failure to perform same was chargeable to the applicant. However, by the act of Congress of March 26, 1908, *supra*, Congress provided ex-

pressly for the return of purchase moneys and commissions paid in connection with any application, entry, or proof which may have been rejected unless the applicant or his representatives shall have been guilty of fraud or attempted fraud in connection with the application.

The forfeiture attempted to be imposed by paragraph 29 of the regulations approved August 22, 1911, *supra*, for failure to perform any act or make payment or proof in the manner and in the time specified in the regulations, is not one authorized or contemplated by either of the acts of Congress cited herein. In construing the act of 1908 the Department has held (40 L. D., 106), that even if an entry is voluntarily relinquished that fact will not bar repayment in a case where good faith of the entryman is apparent from the facts and circumstances, and where the entry could not be completed from any cause not due to fault on the part of the entryman.

In the case at bar there is nothing in the record to impugn the good faith of applicant Brown, and his failure to appear on the date fixed for submission of final proof or within 10 days thereafter is satisfactorily explained in his sworn statement accompanying the application for repayment. The application was properly rejected by the register and receiver on December 28, 1912, and the subsequent relinquishment of Brown, dated February 15, 1913, was without effect and, presumably, executed because he believed such a relinquishment to be an essential part of an application for repayment.

There is no evidence that his timber and stone sworn statement contained any false statement or that he or his legal representatives have been guilty of any fraud or attempted fraud in connection with the application. Under these circumstances, and in the absence of other objection, I am of opinion that he is entitled, under the act of March 26, 1908, to the repayment prayed for.

You will dispose of the application of Brown and of similar cases in accordance with the views hereinbefore expressed, but in order to ascertain the good faith of such an applicant, and to determine whether he has been guilty of false statements, fraud, or attempted fraud, you will require in each of such cases evidence as to why the application to enter or make final proof was not perfected in all cases where the rejection was due to the failure of such applicant to proceed.

For the reason that paragraph 29 of instructions issued August 22, 1911, under the timber and stone act, attempts to impose a forfeiture not warranted by the act of Congress, and therefore beyond the authority of this Department to impose, said regulation is hereby amended by striking therefrom the clause "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."

OPENING OF UNDISPOSED LOWER BRULE LANDS.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS the lands described in the act of Congress approved April twenty-first, nineteen hundred and six (thirty-fourth Statutes at Large, one twenty-four), were, by Proclamation of the President issued August twelfth, nineteen hundred and seven, and in the manner therein provided, restored to settlement, entry and disposition under the general provisions of the homestead laws and of the act of April twenty-first, nineteen hundred and six, on October twenty-first, nineteen hundred and seven, and have been subject to disposition under the general provisions of the homestead laws and the act of April twenty-first, nineteen hundred and six, since December twentieth, nineteen hundred and seven; and

WHEREAS a portion of said lands remain undisposed of; and

WHEREAS, in my judgment, no more of said lands can be disposed of at the appraised value thereof, and under the provisions of said act of April twenty-first, nineteen hundred and six, I now deem it to the best interest of all concerned to sell said undisposed of lands in the manner hereinafter directed:

Now, therefore, I, WOODROW WILSON, President of the United States of America, do, in the exercise of the authority conferred on me by said act of Congress, prescribe and proclaim that all of said lands now remaining undisposed of shall be offered for sale to the highest bidders for cash at not less than one dollar per acre, at public outcry, at the City of Pierre, in the State of South Dakota, under the supervision of James W. Witten, Superintendent of the Opening and Sale of Indian Reservations, beginning at ten o'clock a. m., on Monday, November third, nineteen hundred and thirteen, and continuing thereafter from day to day, Sundays excepted, as long as may be necessary to the offering of all of said lands, and the Secretary of the Interior is hereby authorized to issue such regulations as he may deem necessary to carry this proclamation into effect, and to cause patents to issue to the purchasers at said sale of said lands upon the full payment by such purchasers of the price thereof.

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 24th day of September, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundredth and thirty-eighth.

[SEAL.]

WOODROW WILSON.

By the President:

W. J. BRYAN

Secretary of State.

OPENING OF UNDISPOSED LOWER BRULE LANDS.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
Washington, September 24, 1913.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: Pursuant to the Proclamation issued by the President on September 24, 1913 [42 L. D., 432], directing the sale of the undisposed of lands within that part of the Lower Brule Indian Reservation heretofore opened to entry under the act of April 21, 1906 (34 Stat., 124), the following regulations relating thereto are hereby issued:

2. *Area in which lands will be offered.* All contiguous quarter-quarter sections or fractional lots situated in the same quarter section, or otherwise conveniently situated, will be listed as one tract and offered for sale at the same time.

3. *Qualifications and restrictions.* Purchasers will not be required to show any qualifications as to age, citizenship, or otherwise, and no person will be required to reside upon, improve or cultivate lands sold to him.

4. *Bids by agents, etc.* Bids and payments may be made either through agents or in person, but no bid of less than one dollar per acre will be received from the first bidder, or of less than ten cents per acre more than the last highest bid, after the first bid has been made, will be received or accepted; and no bids can be made through the mails or at any time or place other than the time and place at which said tracts are offered for sale.

5. *Payments and forfeitures.* All successful bidders to whom tracts are awarded must, on or before four-thirty o'clock, p. m., on the day succeeding the date on which awards are made to them, Sundays excepted, pay to the receiver of the United States land office at Pierre, South Dakota, the full amount bid by them for such tracts; and, if any bidder fails to make payment within that time, he will not thereafter be permitted to pay for the tract, or bid on any other tracts.

6. *Lands re-offered.* All tracts awarded to persons who fail to make payments therefor, and all tracts which shall not be sold when first offered, will be re-offered for sale after all of said lands have been once offered, or at any other time during the sale which the Superintendent shall think best.

7. *Combinations in restraint of the sale* are forbidden by section 2375 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, con-

tract, or agree with any other person, that the last-named person shall not bid upon or purchase the lands 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.

8. *Suspension or postponement of sale.* If at any time it becomes evident to the Superintendent of the sale that there is a combination among bidders, or any other cause which effectually suppresses competition, or if for any other cause it shall seem best to the Superintendent to do so, he may suspend such sale temporarily or postpone it indefinitely; and, if in his judgment, the highest bid offered for any tract is below its reasonable cash value, the Superintendent may reject all bids then offered and re-offer the tract for sale as herein provided.

9. *Fees and Commissions.* All persons purchasing any of said lands will be required to pay a commission of two per cent on all payments made by them up to and including \$1.25 per acre, but no commission will be collected on moneys paid in excess of \$1.25 per acre.

Respectfully,

A. A. JONES,
Acting Secretary.

MONTANA-ILLINOIS COPPER MINING CO.

Decided September 27, 1913.

MILLSITE—LOCATION ADJOINING END OF LODE CLAIM.

A millsite claim may be located adjoining the end of a lode mining claim, provided it be clearly shown that the lode or vein along which the mining location is laid either terminates before the end abutting upon the millsite claim would otherwise be reached, or that it departs from the side line of the mining claim, and that the ground embraced in such adjoining millsite claim is nonmineral in character.

JONES, *First Assistant Secretary:*

The Montana-Illinois Copper Mining Company has appealed from the Commissioner's decision of September 3, 1912, requiring further showing as to the nonmineral character of the area embraced in the Bismark millsite claim, situate in the Wilmah (unorganized) mining district, Helena, Montana, land district, for which, and in connection with the Bismark No. 2 lode mining claim, mineral entry 05564 was allowed August 25, 1911.

It appears that the southeasterly line of the said millsite claim is coincidental with the northwesterly end line of the patented Bismark lode mining claim. Upon considering this feature of the case, the Commissioner, by decision of April 2, 1912, directed the claimant

company's attention to the provisions of section 2337, Revised Statutes, and required the claimant to show cause why the entry, as to the millsite, should not be canceled because of its contiguity to the end of said patented lode claim. Responding to said requirement, the claimant company filed the affidavit of Benjamin W. Wilson, its attorney in fact, and the plat of the patented Bismark lode claim and the adjoining millsite. In said affidavit, it was averred that affiant had known the millsite for ten years and had spent a large portion of his time thereon; that, under his direction, the ground included in the millsite had been prospected and that no vein or veins had been found or were known to exist thereon; that near the southeasterly side line of the millsite, nearly opposite the center of the northwesterly end line of the lode claim, a mill 90 feet wide and 120 feet long had been constructed, the excavation for the foundation of the mill attaining a depth of 15 feet beneath the surface; that the underground workings upon the Bismark lode were made under affiant's personal direction, and that he is familiar with the conditions existing therein; that, in a certain tunnel on said claim, which is projected in an easterly direction from a point about 75 feet to the east of the southeasterly line of the millsite, a wide blue mud dike striking north and south was encountered about 125 feet from the portal to the tunnel, and that west of this dike no vein or veins had been found and none is known to exist; that the surface of the millsite claim rises gently from the northwesterly to the southeasterly side line and thence rises abruptly to a height of at least 2,000 feet. Upon considering this showing, the Commissioner, in the decision here appealed from, said:

The location of the lode claim and the subsequent issuance of patent for the land covered thereby gives rise to the presumption that a lode exists along the line and follows the course indicated by the official plat of survey; that it does not capriciously deviate from such course, and that it passes through and across both end lines. This presumption is so far conclusive that it can not be overcome by evidence indicating the existence of intrusive dikes, or other like interruptions to the continuity of the vein, inasmuch as such interruptions do not terminate but merely break the continuity. Consequently, the nonmineral character of the ground into and in which, in accordance with such presumption, the vein or lode should pass and exist, can be established only by evidence of a positive and definite character, showing that exploration sufficient to have discovered the continued existence of a vein in such land, if any such continuance there was, had been accomplished, without such discovery, and without discovery of any other valuable mineral deposit. (Lindley on Mines, Sec. 522.)

The showing made was accordingly held to be insufficient and the claimant required to submit further showing and, in default, suffer the cancellation of the entry to the extent of the millsite.

In the informal appeal from this decision, which is sworn to by Wilson, it is averred:

that in the excavation for the foundation for the mill, now situated upon the Bismark Mill Site Sur. No. 9058B, trenches were dug for the foundation to a

depth of from 10 to 30 feet, reaching bed rock, and that a large excavation was made about 10 feet square and over 30 feet in depth for the concrete bed of the Chillian mill; that all of these excavations are in direct line of the vein as developed upon the Bismark lode Sur. No. 7182, as projected west of the blue mud dike which strikes southeasterly through the Bismark lode Sur. No. 7182 from corner No. 2 of the Bismark Mill Site Sur. No. 9058; and further that there are many other excavations, ditches, &c., upon said mill site and that in none of them has there ever been a vein or piece of quartz in place found west of said mud dike; affiant further states that he has personally examined and inspected each and every excavation or opening upon said mill site Sur. No. 9058B, and also the other openings and surface indications in the vicinity thereof with the express idea in mind of placing thereon a quartz location as additional ground is needed, but has been unable to find anything like a vein upon which a valid location could be made.

Section 2337, Revised Statutes, under which title to said millsite claim is sought, provides that:

Where nonmineral land not contiguous to a vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent 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.

In the case of Yankee Mill Site (37 L. D., 674), the Department, after setting forth briefly the practices and customs of miners under the mining law of 1866 and previous rulings of the Department under the present law, said:

It seems to the Department, upon further consideration, to be but a logical conclusion, that when by the act of 1872, whereunder a definite superficial area was made available in the case of every lode mining location, a new provision for an additional area, "for mining or milling purposes," was made, with a limitation by acreage and not by dimensions, the prohibition in that connection against the contiguity of the so-called mill-site with "the vein or lode" was intended, in the light of the previously existing practice, to prevent the appropriation within any such area of a further segment of the actual vein or lode upon which the mining claim itself was to be predicated. In this view, it is in that sense that "the vein or lode" as first used in section 2337 would be taken; and it would follow that, if not so contiguous and if in fact embracing only non-mineral land, a mill-site in contact with the side line of a lode claim would be unobjectionable.

The case above cited involved the question as to whether a millsite claim abutting upon the side line of a lode mining claim could be lawfully entered under the provisions of the millsite laws, but the Department sees no reason why the rule announced in said decision should not be held to apply with equal force to a millsite claim which adjoins the end of a lode mining claim, provided it be clearly shown that the lode or vein along which the mining location is laid either terminates before the end abutting upon the millsite claim would

otherwise be reached or that it departs from the side line of the mining claim and the ground embraced in such adjoining millsite claim is nonmineral in character. It is true, as stated in the decision of the Commissioner, that a lode or vein is presumed to extend to and across both end lines of a lode mining claim located along its strike; such a presumption, however, is not conclusive but may be rebutted by evidence satisfactorily establishing a contrary state of facts. In *Anna Dillon* (40 L. D., 84), which involved an application to make soldiers' additional entry of a small tract abutting upon the end of a patented lode mining claim, it was said:

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.

The same principle would apply to the case of one seeking to acquire title under the millsite laws to a tract so situated.

Upon careful consideration of the showing made respecting the tract involved in the present case, the Department believes it may be accepted as establishing the nonexistence of the Bismark vein thereon and the nonmineral character of the land. This being true, it must be held to be disposable under the provisions of section 2337, Revised Statutes, notwithstanding the fact of its abutment upon the end of the lode mining claim.

The decision appealed from is accordingly reversed and, in the absence of other objection, the entry, as to the millsite, will be passed to patent.

JOHN WOODWARD ET AL.

Decided March 5, 1913.

TIMBER AND STONE CLAIM—PERSONAL INSPECTION OF LAND—WITHDRAWAL.

The filing of a timber and stone declaratory statement, not preceded by personal examination of the land by the applicant, does not constitute a "duly initiated" claim within the meaning of the excepting clause in the withdrawal of May 29, 1903, for the Heppner national forest, and is not sufficient to except the land embraced therein from the effect of such withdrawal.

PERSONAL KNOWLEDGE OF PARTICULAR TRACT REQUIRED.

A mere general knowledge, however intimate, of the locality in which a tract applied for under the timber and stone act is situated, does not meet the requirement that an applicant under that act must have personal knowledge of the particular tract he seeks to acquire.

BOARD OF EQUITABLE ADJUDICATION—DISCRETION OF LAND DEPARTMENT.

The reference of a case to the Board of Equitable Adjudication is a matter resting within the discretion of the land department and can not be claimed as a matter of right by an entryman.

ADAMS, First Assistant Secretary:

The Northwest Timber Company, transferee, has appealed from the decision of the Commissioner of the General Land Office, dated June 21, 1911, reversing the action of the local officers and holding for cancellation the timber and stone entry, made on July 27, 1903, by John Woodward, for the NE. $\frac{1}{4}$, Sec. 13, T. 6 S., R. 29 E., W. M., La Grande, Oregon.

This is one of twenty-seven contests prosecuted by the Government against that number of timber and stone entries, made under the same circumstances, at the La Grande land office. The case of John Mills was, by stipulation, made the leading one and the testimony submitted therein is a part of the record in this case and in each of the remaining twenty-five. After a careful consideration of all the cases, this proceeding against John Woodward's entry is found, by the Department, for the reasons hereinafter given, to present more clearly than the Mills case, the facts that control the disposition that must be made of each and every entry of the twenty-seven.

In his decision the Commissioner clearly sets forth the testimony upon which he bases his conclusion that this entry and all of the entries were speculative and made for the use and benefit, in part, of others than the entryman. It is unnecessary to review the testimony or to pass upon the correctness of the Commissioner's view of its probative value with respect to the charges upon which the hearing was ordered. The Department finds, from the testimony, that when the lands embraced in these entries were withdrawn, on May 29, 1903, for inclusion in the Heppner National Forest, a withdrawal made permanent, except as to the lands embraced in the entries of Tillard and Kirk, by the proclamation of July 18, 1908 (34 Stat., 3222), the sworn statement required by the timber and stone law had been filed in each of the twenty-seven cases, but that not one of the entrymen had then made personal examination of the specific tract of land subsequently entered by him. Some of them, including John Woodward, had a general knowledge of the locality in which their claims were situated, but it required the services of a locator, after the lands had been withdrawn, to ascertain the locus of each and every one of the twenty-seven claims. At best, therefore, the statements made in the sworn statements were based upon information and belief and not upon knowledge gained from personal examination by each applicant of the identical tract sought.

The withdrawal of May 29, 1903, excepted from its force and effect all claims that had theretofore been "duly initiated." The regulation of this Department requiring that the sworn statement of a timber and stone applicant must be upon personal knowledge, gained by a personal inspection of the land, not having been complied with in any of these cases, none of the entries under consideration was "properly initiated" (see Mary S. Ness, 37 L. D., 582). All the lands in controversy, therefore, became and, except those of Tillard and Kirk, remain a part of the National Forest. The defect in the sworn statements was not cured by personal examinations thereafter made, nor can any alleged equity in the present claimants and transferees have any saving efficacy in favor of claims which were not properly initiated before said withdrawal. It is true, as before stated, that this proceeding and the others were directed by the Commissioner of the General Land Office upon the charge that the several entrymen had applied to purchase the lands with the purpose of speculation, under unlawful agreements whereby title was to inure to the benefit of other parties; but it having been clearly established, by the testimony of the entrymen themselves, that their claims were not "properly initiated" prior to May 23, 1903, nothing remains for this Department but to cancel the entries, without regard to the truth or falsity of the charge upon which the hearing was ordered. It is not inappropriate, however, to observe that that charge finds strong support from the testimony. Counsel for the transferees cite the case of Theresa McManus (29 L. D., 653) and others to the effect that a timber land entry made in the absence of a personal examination of the land by the purchaser may be referred to the Board of Equitable Adjudication, if the defect is subsequently cured. In this case and in twenty-four of the remaining twenty-six, the adverse right of the Government has attached and bars the indulgence of equitable considerations on behalf of the claims were such considerations otherwise warranted by the facts, while in no case was there an *entry* until long after the land had been withdrawn from appropriation under the timber and stone law. Furthermore, the reference of any case to the Board of Equitable Adjudication is a matter resting within the discretion of the land department and can not be claimed as a right by an entryman.

This case of John Woodward has been chosen as the typical one of the group of twenty-seven, for the reason that he, of all the entrymen, appears to have the longest and most intimate knowledge of the general character of the land in the locality wherein all the claims are situated. While it was shown that he was well acquainted, generally, with that section of country, Woodward knew none of the section corners and the locus of no tract, including his own, until after the withdrawal. The description of the land applied for by him was

given him by one Ayers, and Woodward could not and, indeed, did not know whether his sworn statement, when filed, was true or false.

For the reasons above stated, the decision of the Commissioner of the General Land Office is modified and affirmed and a similar judgment will be entered against each of the remaining twenty-six entries.

JOHN WOODWARD ET AL. (ON REHEARING).

Decided September 30, 1913.

TIMBER LAND ENTRY—SPECULATIVE ENTRY.

Collusive arrangements through which persons are induced to make timber land entries with a view to sale of the body of lands so entered to another, the sole interest of the entymen being an expectancy in the profits of the transaction to an amount agreed upon from the beginning, are in violation of the statute; and entries so made, being purely speculative, must be canceled.

DECISION OF SUPREME COURT DISTINGUISHED.

United States *v.* Budd, 144 U. S., 154, cited and distinguished, and United States *v.* Bailey *et al.*, 17 L. D., 468, reaffirmed.

JONES, *First Assistant Secretary:*

The Northwest Timber Company, transferee, has filed a motion for rehearing of departmental decision dated March 5, 1913 [42 L. D., 437], affirming the action of the Commissioner of the General Land Office in canceling the timber and stone entry made on July 27, 1903, by John Woodward for the NE. $\frac{1}{4}$, Sec. 13, T. 6 S., R. 29 E., W. M., La Grande, Oregon, land district.

The record has again been reviewed in connection with the pending motion and the material facts of the case are found to be as follows:

Early in the spring of 1903, one John L. Ayers of Heppner, Oregon, agreed to locate upon timber lands in that vicinity certain of his neighbors, among others Thomas J. Harvey, Cecil T. and Arthur E. Humphreys, and Oliver S. Andrews. It was agreed that Ayers should receive a fee of ten dollars from each party so located.

Soon after Ayers entered into an agreement with Dr. McSwords, also of Heppner, and Frank Melvin, an attorney at Portland, Oregon, under which it was proposed to locate parties upon such lands for a fee of one hundred dollars. It would seem that both of these schemes contemplated the location only of those able to pay the expense of location and entry, and that the agreement between Ayers, McSwords, and Melvin looked to the location of people from Portland who were to be secured by Melvin. Ayers enlisted the services of his brother-in-law, Harrison Hale, to "run out the lines" and point out to the

prospective entrymen their claims for the sum of twenty-five dollars for each location.

After reaching the agreement with Ayers and McSwords, Melvin went to Portland and found a number of people willing to take timber claims and pay one hundred dollars each as a location fee. Returning to Heppner he and Ayers proceeded to the woods, where they were met by Hale. After remaining in the woods for several days they returned to Heppner and learned from a newspaper clipping secured by McSwords in their absence that a withdrawal of these lands for forestry purposes was impending.

It is clear from the record that knowledge of the proposed forestry withdrawal wrought an entire change in the plans of Ayers, McSwords and Melvin. In order to anticipate the reservation of the lands by the Government, haste became essential; Portland was too far away and solvent entrymen were too few or too slowly obtained. Heppner people, without regard to their ability to pay for the lands, or even the expenses of location and entry, were secured to make entry by the representation that there was \$200 in the scheme for each of them. Whether this representation was in the form of an assurance or a promise on the part of Ayers, McSwords and Melvin is not clear, nor is it material whether it was an assurance or promise. It was relied upon, accepted and acted on. Ayers, McSwords and Melvin, through McSwords, arranged with the First National Bank of Heppner for the loan of the necessary funds to McSwords, who, in turn, was to advance the money to the entrymen upon their several notes secured by mortgages on the lands entered.

It appears from a report of the local officers that one hundred and twelve sworn statements were filed under these circumstances, of which seventy-six passed to entry. Patents issued in forty-nine cases and suits have been instituted by the Government for the cancellation of such patents. Twenty-seven entries, including that of John Woodward, here under consideration, are involved in these proceedings by the Government. Of these twenty-seven entries, sworn statements in twenty-five were executed between April 20 and April 24, one on May 12, and the other on May 14, 1903. In every instance the sworn statement was filed at the suggestion of Ayers, McSwords and Melvin, who furnished the description of the land. In no case did the applicant have specific knowledge of the tract he was seeking to acquire, and, although some of them appear to have had general knowledge of the locality, it required the services of a locator and the use of instruments to fix the locus of the particular tracts. No fee was paid by the applicants or any one of them to the officers before whom the sworn statements were executed, it having been obviously within the scope of their understanding with Ayers, McSwords and

Melvin that those three would secure the necessary money and attend to all the details leading to entry.

On May 29, 1903, all of these lands were temporarily withdrawn for inclusion in the Heppner National Forest and the withdrawal, except as to the lands embraced in the entries of Tillard and Kirk, two of the twenty-seven persons referred to, was made permanent by the proclamation of July 18, 1908 (34 Stat., 3222).

On June 14, 1903, the town of Heppner was destroyed by cloudburst, and Ayers and McSwords were drowned. At that time notices of the intention of this claimant and of the twenty-six others, above referred to, to submit proof were being published and Melvin was seriously ill. The First National Bank of Heppner then needed all of its funds for other uses and declined to advance any money for the completion of the entries. S. W. Spencer, one of the twenty-seven applicants and a brother-in-law of Ayers, after consultation with other applicants and as their representative, arranged to borrow the necessary funds from one Scriber, cashier of a national bank at La Grande, Oregon.

It is unnecessary to do more than refer in this decision to the facts with reference to the taking of proof in each of the twenty-seven cases; the issuance of final certificates thereon; the efforts of Scriber and Spencer to sell the lands; Melvin's activity in the same behalf, at first independent of, if not hostile to, Scriber and Spencer, but supported by Harrison Hale; the organization of the Northwest Timber Company; the sale of each and every one of these claims to said company; the division of profits between Melvin, now of counsel for the transferee and Scriber; the solicitude of these parties that the entire transaction be kept from the ears of the Government's officers, and the attempted propitiation of Harrison Hale by the payment to him of \$500 and an agreement to pay \$2,000 more. For the purposes of this case it is necessary only to refer to the circumstance that, through Spencer, Scriber paid the purchase money and fees upon each entry secured by note and a mortgage upon the land, none of which was placed of record, and that when the sale to the Northwest Timber Company was effected by Scriber and Melvin, each entryman was given \$200 in bonds of said company as his share of the proceeds, the notes and mortgages being then canceled and returned.

On July 23, 1909, the Commissioner of the General Land Office, acting upon sundry reports of special agents, directed proceedings against each of the twenty-seven entries hereinbefore referred to, upon identical charges, which were, in effect, that the claimants did not apply to purchase the land in good faith for their own use and benefit, but for purposes of speculation and under an agreement with and for the sole use and benefit of Ayers or McSwords or persons whom they might designate.

At the hearing all of the entrymen appeared as witnesses and were examined, except George Tillard, who had died, William Ayers, who was insane, and George Whities.

Testimony was duly submitted on behalf of the Government and the transferee in each of the twenty-seven cases; and it was stipulated that the testimony in each case should be considered, so far as applicable, in the disposition of the others. On December 27, 1910, the local officers rendered decision, holding that the Government had failed to establish its charges against the entries, and on June 21, 1911, the Commissioner of the General Land Office reversed their action and held each entry for cancellation, which action was affirmed by the Department, as hereinbefore stated.

In its said decision, the Department rested its conclusion, that this entry and the others should be canceled, solely upon the proposition: that, when the lands embraced in these entries were withdrawn, on May 29, 1908, for inclusion in the Heppner National Forest, a withdrawal made permanent except as to the lands embraced in the entries of Tillard and Kirk, by the proclamation of July 18, 1908 (34 Stat., 3222), the sworn statement required by the timber and stone law had been filed in each of the twenty-seven cases, but that not one of the entrymen had then made personal examination of the specific tract of land subsequently entered by him. Some of them, including John Woodward, had a general knowledge of the locality in which their claims were situated, but it required the services of a locator, after the lands had been withdrawn, to ascertain the locus of each and every one of the twenty-seven claims. At best, therefore, the statements made in the sworn statements were based upon information and belief and not upon knowledge gained from personal examination by each applicant of the identical tract sought.

Following the rule announced in the case of Mary S. Ness (37 L. D., 582), the Department held that none of the entries under consideration "were properly initiated," and held each of them for cancellation.

Upon reconsideration, it is obvious that these entries were fatally defective, not only for the reason assigned by the Department in its decision of March 5, 1913, but because there can be no reasonable doubt from the testimony that the scheme carried out by Spencer, Scriber, and Melvin was the consummation of the one conceived by Ayers, McSwords, and Melvin, though the minor details were changed by the Heppner flood. It is true that there is no evidence that Spencer and Scriber had authority to represent Ayers and McSwords, or that they accounted to the heirs of Ayers and McSwords for the location fees that are alleged to have been earned by the latter, or for any sum whatever; but the part that Ayers, McSwords and Melvin were to have played was performed by Spencer, Scriber and Melvin; the entrymen were the same wax figures in the hands of the latter that the agreement between the former contemplated, and the assurance or promise that induced the filing of the sworn statements having

been redeemed to the letter by the payment of two hundred dollars, or its equivalent, to each entryman, they conveyed the land as suited the interests and at the instance of Spencer, Scriber and Melvin. There is no essential difference between the transaction as disclosed and one in which a party employs another for a specific sum to make an entry, the land to be held and disposed of as directed by the employer to whom the proceeds of sale are to be paid.

It is strongly urged on behalf of the transferee that the understanding between Ayers, McSwords and Melvin made a one-hundred-dollar location fee their sole interest in each entry. There is not the slightest evidence that the hurried plan formed after they learned of the impending forestry withdrawal looked to any specific sum as a measure of their reward. Not one of the entrymen at the hearing had knowledge of such a fee, and there is no evidence that a single one-hundred-dollar fee was paid to Melvin and the heirs of McSwords and Ayers, nor had any agreement for its payment been made. The payment of \$2,500 to Harrison Hale, made without the knowledge apparently of any entryman except Spencer, can be regarded in no other light than as an effort of Scriber and Spencer, who made the payment, to propitiate an ally of the then hostile Melvin, since not a dollar of that \$2,500 was deducted from the sum paid to the several entrymen, in accordance with the original assurance or promise given them. The payment to Hale also tends strongly to show that Scriber, Spencer and Melvin undertook to carry out and did carry out the plan originally conceived by Ayers, McSwords and Melvin. The Department is of the opinion that the measure of the interest of Ayers, McSwords and Melvin, or their successors, in the scheme, in each entry, whether one hundred dollars or an independent sum, has no controlling effect upon the validity of such entry.

While it may be competent for a prospective entryman to engage the services of a locator and agree to pay therefor, whether from the proceeds of the sale of the land when sold, or otherwise, there is no warrant in the law for his allowing himself to be made a tool in the hands of another for the acquisition of title to lands, in the disposition of which he is to remain wholly passive and without interest, except to the extent of a sum determined upon from the beginning. It is no defense that the details of such a scheme are not all worked out as agreed upon, or are changed in process of accomplishment. No such plan as is disclosed by the testimony can be regarded otherwise than as an effort to forestall the Government's appropriation to a public use of a large body of timber land through the medium of fraudulent and speculative timber and stone entries.

In the case of *United States v. Bailey et al.* (17 L. D., 468), a situation essentially like the one under consideration was presented to the Department. In a very able and comprehensive decision Secre-

tary Smith announced, in that case, the law governing timber land entries made under such circumstances, which has had, at the hands of the Supreme Court of the United States, in *Hawley v. Diller* (178 U. S., 476), the sweeping endorsement that "there was no misconstruction of the law by the Land Department." Notwithstanding the fact that in the *Bailey* case the case of *United States v. Budd* (144 U. S., 154), was cited and distinguished, there is evidence of a tendency in later departmental decisions, notably in that of *Annie M. Donahue et al.* (32 L. D., 349), to so interpret the decision in the *Bailey* case as to rob it of any distinctive meaning and to confuse it with the decision in the *Budd* case.

In the *Budd* case the court was considering, under a bill in equity, the rule that should govern the character of evidence that would justify the cancellation of a patent upon the charge that the entryman had fraudulently made an agreement whereby the title he was to acquire should inure to the benefit of another. "Here," as was stated in the *Bailey* case, "the government is inquiring into all matters connected with these entries, and is not limited, as in that case, to the issues made by the pleadings." Moreover, the rule of evidence announced in the *Budd* case is inapplicable to a proceeding like this, where the departmental determination upon questions of fact, in the absence of fraud, is conclusive upon the courts, as established by repeated decisions. See *Hawley v. Diller*, *supra*.

The charges made in the cases here under consideration, as has been before stated, attack the validity of the entries, upon the ground that they were speculative as well as because of an illegal agreement with *Ayers, McSwords, Melvin, et al.* Although it is reasonably clear that an illegal agreement was entered into between these parties, in which the entrymen suffered themselves to be used, even if they did not intelligently participate, it may be said, as in the *Bailey* case, that the connection of *Ayers, McSwords, Melvin, et al.*, "with these purchases may be eliminated from the case, and the acts and motives of the entrymen alone considered, and their entries can not be sustained if any meaning is to be given to that part of the statute which forbids the making of such entries 'on speculation.'"

In the *Bailey* case, it was held:

Lohr shows by his testimony that these several entrymen were engaged in different pursuits and were induced by him to make these purchases, he telling them that he would buy their claims and give them fifty dollars more than any one else would; that this promise was made to the parties as an inducement to take his word and knowledge as to the quality and quantity of the timber, and that while he does not remember loaning any of these entrymen money, yet it is probable he did; that when he did so, he sometimes took notes and sometimes trusted to their honor. From this and other similar testimony he leaves no doubt in my mind that he procured these entries to be made purely on speculation; that none of these entries were made for the purpose of appro-

priating the land or timber to the use of the entrymen, but on the promise or representations of Lohr that such act on their part would result in a profitable speculation—that is, they would be able to make an immediate sale of the land at a price greatly in excess of the cost to the entryman.

Entries made in this way and for this purpose are in violation of the spirit and letter of the law; for the applicant to purchase is required to make affidavit that "he does not apply to purchase the same on speculation."

This interpretation of the statute does not imply that a timber-land entryman is not authorized to sell the entry at any time he may choose after he has made his proof and received his certificate; but when, as in these cases, it is clearly shown that prior to taking any steps to secure the land, they had first satisfied themselves that these entries could be sold at a profit and thereupon they made their entries for the sole purpose of securing the profit thus in view, to my mind they bring themselves within the inhibition of the statute.

The Department much prefers this clear and lucid definition of speculation to the lengthy discussion of that term in the case of Annie M. Donahue *et al.*, *supra*, especially in view of its affirmance in Hawley *v.* Diller, *supra*.

Applying that definition to the case under consideration, there can be no doubt that Woodward's entry and all of the other twenty-six involved in this proceeding were speculative and should be canceled.

The motion is denied.

INSTRUCTIONS.

INDIAN ALLOTMENT—DEATH OF ALLOTTEE—ACT OF JUNE 30, 1913.

The same rules and regulations should govern in the making of additional allotments to Fond du Lac Indians under the provision in the Indian appropriation act of June 30, 1913, as are applicable in the case of original allotments; and where one otherwise entitled to an additional allotment under that provision 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 make allotment based upon his right.

First Assistant Secretary Jones to the Commissioner of Indian Affairs, October 1, 1913.

You have asked to be advised as to the construction that should be placed upon a clause contained in the Indian appropriation act of June 30, 1913 (Public, No. 4), which reads:

That any Indian allottee of the Fond du Lac Reservation who has not already received eighty acres of land in allotment shall be entitled to take by allotment of any unappropriated land of said reservation sufficient, with the land already allotted to such Indian, to make eighty acres of land, such allotment not to interfere with existing timber contracts.

The question presented is as to whether or not, in making the additional allotments provided for in this clause, they must be con-

fined to members of the Fond du Lac tribe *now living* who have heretofore received less than eighty acres of land, and reference is made to the case of Willie Dole (30 L. D., 532).

The Fond du Lac Reservation was set apart by the treaty of September 30, 1854 (10 Stat., 1109), under which certain lands were ceded to the United States, and which also provided for allotments in severalty to the Indians. But members of the tribe were mostly allotted under the act of January 14, 1889 (25 Stat., 642), which provides that allotments shall be made "in conformity with the act of February 8, 1887" (24 Stat., 388). In other words, the provisions of the act of 1887, as to the manner of making allotments, were thus carried into the act of January 14, 1889.

In the absence of anything to the contrary in the clause under consideration, it must be concluded that additional allotments thereunder are to be made in the same manner and under the rules and regulations which govern in the case of original allotments. The case of Willie Dole, *supra*, involved an Indian agreement as to allotments, the provisions of which were practically the same as those found in the act of February 8, 1887, known as the general allotment act. It was held in said case that there was no provision of law for a selection or allotment of land on behalf of a deceased person.

The act providing for allotment of lands in severalty to the Indians of the Umatilla Reservation, provides practically the same manner for making such allotments as are provided in the act of 1887. In the instructions issued to the allotting agents on that reservation, approved by the Department, it was said:

My attention has been called to a recent inspection report at the Umatilla agency, by Inspector Gardner, in which he observes that a question which greatly concerns the Indians is "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." The inspector states that he informed the Indians that in his opinion deceased parties had no right and that allotments would only 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.

In numerous departmental decisions it has been held that the various acts of Congress authorizing allotments of Indian lands, contemplate that they shall be made only to living persons; that where one otherwise 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.

You are accordingly advised that the same rules should be applied in making additional allotments to Indian allottees of the Fond du Lac Reservation under the act of June 30, 1913, as are applicable in making original allotments.

RECLAMATION—SUNNYSIDE UNIT, YAKIMA PROJECT.

PUBLIC NOTICE.

DEPARTMENT OF THE INTERIOR,
Washington, October 2, 1913.

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 Sunnyside Unit, Yakima Project, Washington, under the provisions of the Reclamation Act beginning in the irrigation season of 1914 for the public land farm units "G" to "Y" inclusive, excepting "I" and "O" in E. $\frac{1}{4}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 26, T. 9 N., R. 23 E., W. M., as shown on plat of the said township approved August 15, 1913, and filed in the local land office at North Yakima, Washington. Copies of the said plat and also of a supplemental list showing the irrigable areas of the said farm units are also on file in the office of the Reclamation Service at Sunnyside, Washington.

2. All persons entitled to preference rights of entry upon lands covered by this public notice will be notified by the local land office by registered mail that they will be allowed to make homestead entry for one farm unit, covered by their preference right under the terms of the Reclamation Act and this public notice, within thirty days from the date of such notification. Such homestead entries must be accompanied by applications for water-rights, and as hereinafter provided, by the appropriate payment of the charges for building, operation and maintenance. Upon rejection of any homestead application under this public notice by the local land officers, an appeal to the Commissioner of the General Land Office must be filed in the usual manner and no motion for rehearing of the departmental decision rendered on such appeal will be considered. The rules of practice are modified accordingly, so far as they relate to cases arising hereunder.

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. Said farm units vary in size from 10.35 to 19.12 acres of irrigable land.

4. A large proportion of the lands comprised in these farm units is above gravity flow from the system of the Sunnyside Unit, Yakima Project. A private pumping plant has been installed in the vicinity of this land of sufficient capacity to raise the water for irrigation to these lands. Entrymen must, however, assume all responsibility for and bear all expenses of, raising said water from the system of the Sunnyside Unit as now constructed to the lands to be irrigated. Such fact shall not, however, affect the charges to be paid to the United States for water-right upon said lands.

5. The charges which shall be made per acre of irrigable land in the said entries are in two parts, as follows:

(a) The building of the irrigation system, \$52 per acre of irrigable land, payable in not more than ten annual instalments, each payment not less than \$5.20 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 General Reclamation Regulations approved by the Secretary of the Interior.

(b) For operation and maintenance 95c. per acre of irrigable land per annum, until further notice, whether water is used thereon or not. As soon as data are available, the operation and maintenance charges will be fixed in proportion to the amount of water used, with minimum charge per acre, whether water is used thereon or not.

6. All entries made under preference rights, as provided in paragraph 2 hereof, and also all homestead entries made under the provisions of the Reclamation Act, shall be accompanied by applications for water-rights in due form, and by the first instalment of charges for building, \$2.50 per acre of irrigable land, and for operation and maintenance, 95c. per acre of irrigable land. The second instalment of the building charge, not less than \$5.20 per acre and the appropriate charge for operation and maintenance, shall become due on March 1, 1915. Subsequent instalments of the charges for building, operation and maintenance shall become due on March 1 of each year thereafter until fully paid.

7. Homestead entries, accompanied by applications for water-rights and, as hereinafter provided, by the appropriate payment of the charges for building, operation and maintenance, may be made under the provisions of said act for the farm units covered by this notice, for which preference rights of entry have not been exercised under the provisions of paragraph 2 hereof in the manner hereinafter provided.

8. Homestead applications for the farm units shall be made only in the manner following: any person qualified to make homestead entry may execute such application on and after November 15, 1913, up to and including November 21, 1913, 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 a postoffice money order drawn to the order of the special fiscal agent of the United States Reclamation Service at Sunnyside, Washington, for the amount of the first instalment of water-right charges for building, operation and maintenance, viz.: \$6.15 per acre of irrigable land, and also by a certified check on a National Bank or postoffice money order drawn to the order of the receiver of the United States Land Office, North Yakima, Washington, for the amount of fees and commissions amounting to \$6.50 per entry.

9. The homestead application, the water-right application and the certified checks, or money orders, and all other papers necessary to show the applicant to be qualified to make homestead entry shall be enclosed in a sealed envelope, addressed to the register and receiver of the United States Land Office 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 "Sunnyside 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 November 21, 1913, 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 a. m. of that day will be returned without opening, and all applications filed after 4:30 o'clock p. m. of that day will be held until all applications filed between 9 o'clock a. m. and 4:30 o'clock p. m. are disposed of, when, if there are any vacant farm units for which delayed applications are filed, they will be considered in the order of their filing.

10. Warning is hereby expressly given that no rights can be obtained by settlement made on the land since the date of its 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.

11. 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 November 24, 1913, at the United States Land Office at North Yakima, Washington.

12. 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.

13. It shall be the duty of the register and receiver and the project manager of the Sunnyside Reclamation Project to arrange all envelopes containing applications presented hereunder in alphabetical order, according to the names of the several 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 representing applications for one particular farm unit shall be assembled together.

14. 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 the regulations thereunder, they will be given a serial number, and upon approval, of the water-right application by the project manager the homestead application will be allowed by the local land officers, but no receipt will be issued until the certified checks, where such accompanied the application, have been paid. While applicants may be present at the time right of entry is awarded, yet such presence is not necessary, as the application of successful persons will be immediately allowed on the papers already filed and notice at once mailed the successful applicants.

15. 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.

16. 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.

17. 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 November 15, 1913.

18. 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 shall become due on March 1, of the calendar year following the date of entry; and subsequent instalments shall become due on March 1 of each year thereafter until fully paid. In the case of entries made in the calendar year 1913 the second instalment will become due March 1, 1915. 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.

19. 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 in full.

20. 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 forfeiture of all rights under the Reclamation Act, as well as of any moneys already paid.

21. All charges are payable to the special fiscal agent of the Reclamation Service at Sunnyside, Washington.

ANDRIEUS A. JONES,
Acting Secretary of the Interior.

VENTURA COAST OIL COMPANY.

Decided October 3, 1913.

PLACER MINING CLAIM—APPROXIMATION.

The rule of approximation permitted in entries under the homestead and other public land laws providing for the disposal of nonmineral lands is equally applicable to placer mining locations and entries upon surveyed lands; but in dealing with placer claims the rule should be applied on the basis of ten-acre legal subdivisions.

CONTRARY DECISION OVERRULED.

Chicago Placer Mining Claim, 34 L. D., 9, overruled.

JONES, *Acting Secretary:*

The Ventura Coast Oil Company has appealed from decision of the Commissioner of the General Land Office of March 11, 1912, holding for cancellation its mineral entry for the Watauga Oil Placer Mining Claim, embracing lots 3 and 4, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 32, T. 4 N., R. 18 W., S. B. M., Los Angeles, California, returned by the official plat of survey as containing 102.6 acres.

In the decision appealed from it is said:

The application is based upon a location made January 1, 1909, by five persons. The claim was then supposed to contain 98.6 acres and was duly conveyed to claimant company on January 18, 1910. On September 16, 1909, township plat of the fractional SW. $\frac{1}{4}$, Sec. 32, was approved by the Surveyor General, containing 102.6 acres, and on April 21, 1910, the company made an amended location, to conform to the legal subdivisions there described. The total area of the claim, 102.6 acres, is in excess of the statutory limitation of twenty acres per locator. See Sec. 2331, Revised Statutes, and paragraph 28, Mining Regulations, and Chicago Placer Mining Claim (34 L. D., 9). The claimant will, therefore, be limited to one hundred acres, the exact area to be determined either by a survey in the field or by the elimination of enough area to render the residue proper legal subdivisions or lots. (See 34 L. D., 260.)

In the appeal it is contended that a resurvey of the land involved will demonstrate the area returned upon the Government plat to be in excess of the actual area of the land, and appellant expressed willingness to take steps to support said allegation.

I am advised by the General Land Office that the original survey of the township established the north and west lines of section 32. The eastern boundary of the section is identical with the western boundary of a surveyed private land grant, while the southern boundary was established by the survey of an adjoining township. Whether the plat of survey constructed on the basis of the three surveys described states the correct area or not would be immaterial were it not for the limitation imposed by statute upon the area which may be located by an individual or association of individuals, as under a patent issued the patentee takes the land described in the survey whether it contains a greater or less area than that returned. The integrity of the Government survey duly made and approved can not be overcome by the allegations of appellant, and a mere difference in opinion as to actual area contained in a given subdivision or section is not of itself ordinarily sufficient to warrant the making by the United States of a resurvey of the land. However, it is believed that the case should be disposed of on grounds other than those set forth in the appeal.

Section 2331, R. S., cited by the Commissioner, provides that no location of a placer mining claim "shall include more than twenty acres for each individual claimant." Section 2330, R. S., provides that no location "shall exceed 160 acres for any one person or association of persons, which location shall conform to the United States surveys." The same section authorizes for purposes of location and entry under the placer mining law the subdivision of the ordinary forty acre legal subdivisions into ten acre tracts. Section 2331, R. S., further provides that where placer claims are upon surveyed lands and conform to legal subdivisions, no further survey or plat shall be required. The section also requires that placer claims located upon unsurveyed lands shall conform as nearly as practicable to the United States system of public land surveys.

From the foregoing, it will be seen that the law contemplates that placer claims upon surveyed lands shall, if practicable, conform to the subdivisions of the public surveys. Appellants have complied with this requirement of the law and their entry appears to be regular, except that as hereinbefore noted the area returned by the Government survey exceeds by 2.6 acres the amount which five individuals could locate and enter if each were confirmed to a twenty-acre tract.

The Commissioner's decision is based upon the theory that the restrictive language "no such location shall include more than twenty acres for each individual claimant" is mandatory and leaves no room for a construction permitting the application of the rule of approximation ordinarily applied by the Department under the homestead and other public land laws. The words of the statute are, however,

not more restrictive than similar words of limitation of quantity in many other land laws: Sec. 2279, R. S., "no person shall have the right of preemption to more than 160 acres;" R. S. 2289, relating to homesteads "which shall not, with the lands so already owned and occupied, exceed in the aggregate 160 acres;" R. S. 2283 (Osage trust lands), "not exceeding 160 acres." The foregoing words of limitation are as explicit and restrictive as are those of section 2331, but entries made under the laws cited are, under the long-established practice of the land department, permitted to include an excess above the area limited by the statutes.

The rule of approximation applied by the Department in such cases is not based upon statutory authority, but arose from the fact that unavoidably the public surveys vary from the regular quantity that a section or its subdivisions should contain and to apply the limitations literally, allowing no excess, would frequently limit one having the right to enter to a less quantity than the law accords him, or force him, through special mineral survey, to encroach upon another subdivision of the public surveys.

In this case to refuse to apply the rule of approximation to the Watauga placer would necessitate the elimination of one of the subdivisions located and entered and lose to the claimant an area far greater than the excess of 2.6 acres; or it would be necessary for the Department to authorize a special mineral survey to mark, define, and return exactly 100 acres in the said fractional SW. $\frac{1}{4}$, Sec. 32, and eliminating therefrom the said 2.6 acres. The latter procedure is not deemed to be warranted in view of the provisions of section 2330, R. S., requiring such claims to conform to the United States surveys. Claimant company has entered and paid for the full 102.6 acres by the Government survey and no good reason appears why the same rule should not apply with respect to placer claims upon surveyed lands of the United States as has been applied by the Department to preemption, homestead, and other claims limited by statute to not exceed a specified area.

By reason of the statute authority in placer mining cases to subdivide 40-acre subdivisions into ten-acre tracts, the Department must, in applying the rule of approximation to placer claims, deal with ten-acre areas instead of forty-acre subdivisions, but with this difference no reason is seen for applying a different rule than that applied under the statutes hereinbefore cited. The Commissioner's decision is accordingly reversed and, in the absence of other objection, the Watauga Placer Mining Claim may proceed to patent. The case of the Chicago Placer Mining Claim (34 L. D., 9, 11) will be no longer followed.

INSTRUCTIONS.**APPLICATIONS FOR REINSTATEMENT OF CANCELED ENTRIES.**

Applications for reinstatement of canceled entries should be filed in the local land office of the district wherein the lands involved are situate.

Acting Secretary Jones to the Commissioner of the General Land Office, October 8, 1913.

The attention of the Department has been recently directed to several applications for the reinstatement of canceled entries for public lands which applications appear to have been filed directly in your office and not filed in and transmitted by the local land office having jurisdiction over the lands involved. For obvious reasons applications for reinstatement like other applications for or relating to public lands should be filed in the local land office in the district wherein the lands are situated.

Informal inquiry at your office elicits the information that you concur in this view, but that no formal order or regulation so requiring is in force. You are accordingly directed to prepare and promulgate to and through the local land offices a regulation requiring all applications for the reinstatement of canceled entries to be filed primarily in the local land office of the district wherein the lands involved are situate.

B. F. ADAMS.

Letter of October 9, 1913.

TUNNEL SITE—SECTION 2323, REVISED STATUTES.

Section 2323, Revised Statutes, confers upon tunnel site claimants merely the preference right, as against a subsequent lode claimant, to appropriate, in the manner provided by other provisions of the mining laws, any vein or lode, not appearing on the surface, which may be discovered in a tunnel projected under the provisions of said section within 3,000 feet from the portal thereof, provided the work thereon be prosecuted with reasonable diligence; but said section does not authorize the sale or patenting of any ground on the exclusive basis of a tunnel location, whether the tunnel be run for the development of veins or lodes already located or is projected for the discovery of "blind" veins or lodes.

First Assistant Secretary Jones to B. F. Adams, Esq., Albuquerque, New Mexico.

I am in receipt of your letter of September 25, 1913, wherein you suggest the propriety and advisability of such a construction of section 2323, Revised Statutes, as to permit areas embraced in so-called tunnel site claims, located under said section by a person or corporation for the development of lode mining claims owned by

such person or corporation, to be applied for and patented in connection with such lode claims, stating that you are informed that, under the present construction, there is no authority for the patenting of tunnel site claims.

The section referred to reads as follows:

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 prospected 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 purpose of said section would appear to be to give to a tunnel site claimant merely the preference right as against a subsequent lode claimant to appropriate, in the manner described by other provisions of the mining law, any vein or lode not appearing on the surface, which may be discovered in a tunnel projected under the provisions of said section within 3,000 feet from the portal thereof, provided the work thereon be prosecuted with reasonable diligence. The section does not authorize the sale or patenting of any ground or contemplate any disposal unless the ground be otherwise claimed or appropriated. This view is supported by the decision of the Supreme Court of the United States in *Creede and Cripple Creek Mining and Milling Company v. Uinta Tunnel Mining and Transportation Company* (196 U. S., 337), involving an area in conflict between a tunnel claim, under said section 2323, Revised Statutes, and a lode claim, in which decision the court said:

A tunnel is not a mining claim, although it has sometimes been inaccurately called one. As we have seen, it is only a means of exploration. The owner has the right to run it in the hope of finding a mineral vein. When one is found he is called upon to make a location of the ground containing that vein and thus creates a mining claim. . . . As the claimant of the tunnel he takes no ground for which he is called upon to pay, and is entitled to no patent.

With respect to purchase and patenting, I perceive no distinction to be drawn, by reason either of said section 2323 or the act of February 11, 1875 (18 Stat., 315), referred to by you, between a tunnel claim under which the tunnel is run for the development of veins or lodes already located and one pursuant to which the tunnel is projected for the discovery of "blind" veins or lodes.

I am of the opinion, therefore, that there is no warrant for the patenting of public lands of the United States on an exclusive basis of a tunnel location either in connection with a lode claim, or otherwise.

CARTER P. JOHNSON.*Decided October 9, 1913.***HOMESTEAD—MILITARY SERVICE—HONORABLE DISCHARGE.**

A private soldier or officer who served in the regular army for ninety days during the Spanish war or the suppression of the insurrection in the Philippines will be held to have been honorably discharged from such service, within the meaning of sections 2304 and 2305, Revised Statutes, when such war or insurrection ended.

JONES, First Assistant Secretary:

Appeal is filed by Carter P. Johnson from decision of November 1, 1912, of the Commissioner of the General Land Office, rejecting the final proof submitted on and holding for cancellation the original homestead entry made by said Johnson December 7, 1904, under the act of April 28, 1904 (33 Stat., 547), for the SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 24, T. 31 N., R. 54 W., SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 19, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 30, T. 31 N., R. 53 W., Alliance, Nebraska, land district, and his additional entry made April 7, 1909, under section 7 of the act of May 29, 1908 (35 Stat., 465), for the S. $\frac{1}{2}$ NW. $\frac{1}{4}$, of said Sec. 30, and the NE. $\frac{1}{4}$, Sec. 25, T. 31 N., R. 54 W., same land district, on both of which entries final proof was submitted November 28, 1911, certificate being withheld pending investigation.

Said proof shows this entryman established residence on said land May 30, 1905, and was at that time an officer in the regular army of the United States; that he continued actively in the army until April 1, 1910, and up to that date had spent several months, most of his leaves of absence from duty each year on the land, and since that date, when he was retired, had resided there continuously with his family until the submission of proof, and as appears from this appeal he still resides there; also, that he cultivated the land, 15 acres being planted to potatoes in the year 1905, and 10 acres to corn in the year 1910, and had run from 60 to 100 head of cattle and horses, owned by himself, on the land each year for the five years preceding the submission of proof. His improvements were extensive and valued at from \$1,900 to \$2,265. He stated he intended to make said land his permanent home, and upon being placed on the retired list April 1, 1910, he was ordered there.

The records of the War Department show said Johnson served as a private and noncommissioned officer from September 12, 1876, and as a commissioned officer from April 25, 1882, in the regular army, and in the volunteer army, under a commission one grade higher than his grade in the regular army, from September 19, 1899, to June 30, 1901, when "honorably mustered out" of that service; since which date he continued in the regular army until retired April 1, 1910, as stated.

Said proof was rejected for the stated reason that the entryman is not entitled to constructive residence for the service rendered by him during the war with Spain and the insurrection in the Philippines as he was not honorably discharged from the service; furthermore, because during his absence while in service his family did not reside on the land.

It is contended particularly in this appeal that said entries and proof are governed by section 2308, Revised Statutes, providing that the military service of a party who is at the date of his entry actually enlisted or employed in the army shall be equivalent to residence for the same length of time on such entry. It is settled, however, said section does not include persons serving in the regular army since the close of the war of the rebellion. *W. A. Jones* (1 L. D., 98); *Owen v. Lutz* (14 L. D., 472); Opinion of the Assistant Attorney-General (26 L. D., 672).

Section 2304, Revised Statutes, as amended by the act of March 1, 1901 (31 Stat., 847); provides that:

Every private soldier and officer who has served in the Army of the United States during the Spanish war, or who has served, is serving or shall have served in the said army during the suppression of the insurrection in the Philippines for ninety days and who was or shall be honorably discharged, . . . shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres.

And section 2305, Revised Statutes, provides that the military service of a homestead settler shall be deducted from the time heretofore required to perfect title, but that no patent shall issue to one who has not resided upon, improved and cultivated his homestead for a period of at least one year.

This entryman's volunteer service at least, from which he was honorably mustered out, entitles him to corresponding credit for residence on his entry. He is entitled, also, however, to credit for his military service in the regular army during the war with Spain and the Philippine insurrection, his service in each of which was honorably terminated, equivalently to an honorable discharge, when said war and said insurrection ended.

The Supreme Court of the United States in the cases of *North and Emory* (112 U. S., 510), construing the act of July 19, 1848 (9 Stat., 248), providing for extra pay to persons in the military service in the war with Mexico who have been "honorably discharged" from such service, stated:

Those of the regular army or navy who were "engaged in the military service of the United States in the war with Mexico" may be said to "have served out the term of their engagement," or to have been "honorably discharged," within the meaning of those terms as used in the act of 1848, when the war was over, or when they were ordered or mustered out of service.

Said decision of the Supreme Court was followed and applied by this Department in allowing pensions under the act of January 29, 1887 (24 Stat., 371), to those who had served and been "honorably discharged" from service in the Mexican War, this Department's decision being adopted and approved by the Attorney-General. William B. Johns (2 P. D., 393); also in allowing pensions under the act of June 27, 1890 (26 Stat., 182), containing similar provisions relative to the war of the rebellion. Placida M. de Ortega (14 P. D., 326); Andrew J. Holoway (16 P. D., 240).

No reason appears why the same rule should not apply in land cases. Following the decision of the Supreme Court, therefore, in the cases cited, it is held that a private soldier or officer who served in the regular army during the Spanish war or during the suppression of the insurrection in the Philippines for ninety days will be held to have been honorably discharged from such service within the meaning of sections 2304 and 2305, Revised Statutes, when said war or said insurrection ended.

The war with Spain commenced April 21, 1898 (act of April 25, 1898, 30 Stat., 364), and ended with the exchange of ratifications of the treaty between the two countries on April 11, 1899 (30 Stat., 1754). And the insurrection in the Philippines, which began February 4, 1899, while said war was yet subsisting, ended when the civil government was established July 15, 1903. James M. Esterling (36 L. D., 294).

It appears, therefore, from said proof that Johnson is entitled to credit for residence of four years on account of his military service and honorable discharge therefrom during the war with Spain and the Philippine insurrection, and having actually resided upon the land, improved and cultivated the same for at least one year, his proof should be approved, certificate issued, and entry passed to patent in due course, no other objection appearing.

The decision appealed from is accordingly reversed.

MAY O. LEE.

Decided October 9, 1913.

DESERT LAND ENTRY—REASSIGNMENT—QUALIFICATION.

The making and subsequent assignment of a desert land entry will not be held to disqualify the entryman from taking a reassignment of the same land from the assignee, such reassignment being regarded as a mere rescission of the assignment.

JONES, First Assistant Secretary:

June 17, 1909, May O. Lee made desert land entry 08513, for the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, T. 19 N., R. 28 E., N. M. M.,

80 acres, Clayton, New Mexico, land district. First annual proof was duly submitted and accepted. May 8, 1911, she assigned the entry to Jennie M. Keist, who, on July 17, 1911, executed a reassignment to the original entrywoman, May O. Lee.

By the Commissioner's letter "G" of January 5, 1912, the assignment to Keist was recognized and her proposed reassignment rejected on the ground that said May O. Lee had previously exhausted her right to either make a desert land entry or to take one by assignment, and was not, therefore, qualified to retake her former entry by assignment, or to make another entry therefor. This holding was again affirmed by the Commissioner's decision of August 19, 1912, and Lee has appealed to the Department.

It appears that some question having arisen as to the right of Lee to take assignment from Keist, she had filed application 014897 to make desert land entry for the same tract, accompanying such application with the relinquishment of the original entry by the assignee Jennie M. Keist, executed June 25, 1912, and filed July 3, 1912.

It appears from the record that the assignment of Lee to Keist of the tract involved was executed and received in good faith, but Keist was unable to make and made no payment upon the agreed price thereof, which was the sum of \$225; that finding herself unable to make payment, Keist, by agreement with Lee, reassigned the entry as a rescission of the assignment to her by Lee. If such reassignment, considered as a rescission of the transfer by Lee to Keist, is allowed, Lee will be able to perfect her original entry by making compliance with the provisions of the statutes and the regulations of the Department in connection with desert land entries, and this is considered a proper and equitable disposition of the case.

It is unnecessary to decide whether by the assignment of the entry there was "loss, forfeiture or abandonment." The good faith and lawful intent of both parties is clearly shown, and the Department is of the opinion that the relinquishment executed by Keist should be disregarded, and the original desert land entry 08513 made by Lee remain intact, as reassigned to her by Keist. The reassignment by Keist to Lee amounts to nothing more than a rescission of the assignment by Lee to Keist, and no formalities nor technicalities should interfere with this plainly just and equitable transaction on the part of Keist when she found herself unable to make payment to Lee for the entry assigned to her.

The decision appealed from is reversed and the case is remanded to the General Land Office for further proceedings in accordance with the views herein expressed.

LENA HEKTNER.

Decided October 11, 1913.

RECLAMATION ENTRY—SEC. 5, ACT JUNE 25, 1910—ACT FEBRUARY 18, 1911.

Under the proviso to section 5 of the act of June 25, 1910, as amended by the act of February 28, 1911, upon relinquishment of an entry made prior to June 25, 1910, within a reclamation withdrawal, the lands so relinquished became subject generally to settlement and entry under the homestead law, subject to the provisions of the reclamation act, and there is no authority for further limiting the right of entry of such lands.

CONFLICTING REGULATIONS MODIFIED.

Paragraph 4 of the regulations of February 6, 1913, as amended to September 6, 1913, modified to conform to the views herein expressed.

JONES, *First Assistant Secretary*:

April 23, 1912, Lena Hektner made homestead entry 026901, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 4, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 9, T. 24 N., R. 1 W., M. M., Great Falls, Montana, land district. The entry was made subject to the provisions of the reclamation act of June 17, 1902 (32 Stat., 388), and the act of February 18, 1911 (36 Stat., 917).

It appears from the records of the land department that March 21, 1910, Charles Charlebois filed homestead application 015903 for said tract, which application was allowed September 13, 1910, under departmental decision in the case of Charles C. Conrad (39 L. D., 432). The entry of Charlebois was relinquished September 20, 1911.

It further appears of record that September 21, 1911, Andrew Nygaard made homestead entry 023869, for the lands under consideration, basing his right to enter the same under the act of February 18, 1911 (36 Stat., 917), on the earlier entry of Charlebois. Nygaard's entry was canceled on relinquishment April 23, 1912.

November 7, 1903, the lands involved were withdrawn under the second form of withdrawal provided by the reclamation act of June 17, 1902 (32 Stat., 388), by the Secretary of the Interior, in connection with the Tieton River Project, and such withdrawal is still in force.

No farm unit plat has been approved in connection with said township 24, and no public notice has issued fixing the amount of water right charges and the date when water can be applied. Lands withdrawn under the reclamation act as susceptible of irrigation and subject to entry under the provisions of the homestead law only, since the passage of the act of June 25, 1910 (36 Stat., 835), are open to settlement or entry only after approved farm unit plats have been filed and public notice issued in connection therewith fixing the water right charges and the date when water can be applied, except as provided by the act of February 18, 1911, *supra*.

December 12, 1912, the Commissioner of the General Land Office held the entry of Hektner for cancellation, because the entry of Nygaard was made subsequent to June 25, 1910, and Hektner has appealed to the Department, claiming that the land is subject to her entry because entered by Charlebois, prior to June 25, 1910.

The proviso to section 5 of the act of February 18, 1911, *supra*, reads:

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).

Under this proviso, the lands having been entered by Charlebois, prior to June 25, 1910, and having been relinquished, the lands so relinquished became subject to settlement and entry under the homestead law. There is no other statute affecting this proposition. By departmental regulation of February 6, 1913, now reprinted as amended to September 6, 1913 [42 L. D., 349], section 4, page 19, the entry of Hektner was erroneously allowed. Said section 4 reads:

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. This act has no application where the cancellation of the entry made prior to June 25, 1910, was the result of a contest or relinquishment resulting from the same. (Fred V. Hook, 41 L. D., 67). The act is also inapplicable in the case of lands withdrawn under the first form and has reference only to lands covered by second-form withdrawals. (Annie G. Parker, 40 L. D., 406).

The action of the Commissioner is clearly correct under section 4, as above quoted. The land, however, is made subject to settlement and entry by the proviso to section 5, by the act of February 18, 1911, hereinbefore quoted. In such statute there is no limitation as to when the land entered and relinquished, as by Charlebois, shall be again entered, nor that such entry must be in pursuance of any agreement between Charlebois and the succeeding entryman, nor is there any provision limiting the right of entry to such land to one or more entries or entrymen. The words are "the lands so relinquished shall be subject to settlement and entry under the homestead law." In this condition of the statute it may not only be doubted, but seems clear and plain that no limitation to such right of entry to such land should or can properly be limited by depart-

mental regulation. In this case the entry under consideration was allowed by the local officers. Hektner entered upon the land and made considerable expenditures and valuable improvements thereon, and made compliance in every way with the requirements of the homestead law.

Under these circumstances and conditions, the Department is unwilling that the entry under consideration be canceled. The decision appealed from is reversed and the entry of Hektner will remain intact. Section 4 of the departmental regulations of February 6, 1913, as amended to September 6, 1913, will be amended in conformity with the views herein expressed.

DUBE v. NORTHERN PACIFIC RY. CO.

Decided October 14, 1913.

NORTHERN PACIFIC ADJUSTMENT—ACT OF JULY 1, 1898—"SUCCESSOR IN INTEREST."

The Northern Pacific *Railway* Company is the "successor in interest" to the Northern Pacific *Railroad* Company within the meaning of the adjustment act of July 1, 1898; but a *purchaser* from the *railway* company of lands granted to the *railroad* company is not a successor in interest within the meaning of that act and is not entitled to relinquish the purchased lands and select other lands in lieu thereof under its provisions.

JONES, *First Assistant Secretary*:

This is a motion, on behalf of the Northern Pacific Railway Company, for rehearing in the above-styled cause, wherein, by departmental decision of March 21, 1913 [not reported], it was held that the claim of Joseph Dube to lots 1 and 2 and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 3, T. 16 N., R. 3 W., Great Falls land district, Montana, is subject to adjustment, under the act of July 1, 1898 (30 Stat., 597, 620), at the option of the purchaser of said land from the company.

The land had been listed for relinquishment under said act but answer was made by the company that it had sold the land to one McGinnis and that, by the terms of the act, it was not bound to reconvey it. Upon suggestion on behalf of the settler claimant that McGinnis was willing to transfer his claim to other lands, it was held in said decision that:

If, in fact, McGinnis holds the railway company's title, he has the right under the act of July 1, 1898, . . . to relinquish the land settled upon by Dube and to take instead the same area.

The railway company complains of this ruling as being without authority of law. The point is well taken. The adjustment provision of said act here applicable reads as follows:

That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd numbered sections of unsurveyed public

lands within the said railway grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patent shall issue therefor.

Manifestly, the "prior railroad right" to this land may only be relinquished by the "railroad grantee or its successor in interest." The grantee was the Northern Pacific Railroad Company and, by reference to other provisions of the act, it seems clear that the grantee's "successor in interest" is the Northern Pacific *Railway* Company. There was no intention manifested on the part of Congress to designate a *purchaser* from the *railway* company as a successor in interest to the land grant rights of the *railroad* company. Indeed, such a provision would have introduced an element repugnant to the plain meaning of the act, taken as a whole, that in case of relinquishment *the company* might select an equal quantity of other land.

Said decision was, therefore, error and is here recalled. It is noted, however, that the company assures the Department that, if its purchaser consents, it has no objection to the exchange, provided the relinquishment and selection can be arranged in due form. The Department would be pleased to see the adjustment made and suggests that the company take up the matter with McGinnis to that end. As preliminary thereto the company will be again called upon to relinquish said tract.

**RIGHT OF WAY—PARAGRAPH 6 OF REGULATIONS OF JANUARY 6,
1913, AMENDED.**

REGULATIONS.

DEPARTMENT OF INTERIOR,
GENERAL LAND OFFICE,
Washington, October 15, 1913.

The SECRETARY OF THE INTERIOR.

SIR: By letter dated June 25, last, this office submitted to the Department, with favorable recommendation, a map filed by the Pacific Telephone and Telegraph Company, in connection with its application for a fifty-year easement for the telephone and telegraph line shown on the map, under the provisions of the act of March 4, 1911 (36 Stat., 1253).

Considering this matter, under date of July 14, last, the First Assistant Secretary of the Interior directed me to draft an amendment to the regulations making it obligatory on applicants in such

cases to construct, maintain, and operate their lines so as to obviate as much as possible interference with the use and development by subsequent entrymen and patentees of the lands traversed by the lines. To this end, I recommend that regulation 6 of the regulations approved January 6, 1913 [41 L. D., 454], be amended so that it will read as follows:

Reg. 6. Before any right of way is granted the applicant shall execute and file in or in amendment of his application a statement of the particular terms and conditions upon which and subject to which he asks to receive and agrees to take the grant of right of way; and he further agrees to construct, maintain, and operate the line or lines embraced by his application according to the usual standard of safety in such cases, and shall maintain the line or lines in such manner as not to menace life or property, and to interfere as little as possible with the use and development by subsequent entrymen and patentees of the lands traversed by the line or lines;—it being understood and agreed that less than 20 feet on each side of the center line is covered by the easement wherever such diminished right of way is found adequate for a proper use and enjoyment thereof; the grant may be made subject to these terms and conditions, in which case such terms and conditions, together with these regulations, shall define and limit the grant, which shall be effective only if and in so far as it is subject to such terms, conditions and regulations. Such original or amended application with the approval thereof by the Secretary of the Interior shall together constitute the grant and express the terms and conditions thereof, and the fact of such approval shall be noted on the application maps.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved October 25, 1913.

A. A. JONES,
First Assistant Secretary.

BERTHA C. PHILLIPS.

Decided October 18, 1913.

ISOLATED TRACT—ACT MARCH 28, 1912—MARRIED WOMAN.

A married woman, otherwise qualified, is entitled, upon proper application, to have offered and to purchase, under the provisions of section 2455, Revised Statutes, as amended by the act of March 28, 1912, an isolated or mountainous tract within the purview of that act.

JONES, *First Assistant Secretary:*

The Commissioner of the General Land Office has transmitted the appeal of Bertha C. Phillips from his decision of June 19, 1913, rejecting her application to have offered at public sale, under the first proviso to section 2455, Revised Statutes, as amended by the act of March 28, 1912 (37 Stat., 77), the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 27, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 28, T. 17 S., R. 28 E., W. M., Burns, Oregon, land district.

Said section, as amended, reads 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 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 subdivision 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.

The regulations of April 30, 1912 (40 L. D., 584), issued under said law, provide that 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, and that 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.

The tracts applied for herein embrace 160 acres, and, inasmuch as the applicant is a married woman and her husband has purchased lands sold at public auction, the Commissioner rejected the application.

There is no inhibition in the law against offering lands under said section, upon the application of a married woman. The Commissioner predicated his action upon that portion of the law which makes the offering dependent upon his discretion. There is no doubt, however, that the Secretary retains under this law, as under all laws pertaining to public lands, the supervisory power and authority to control the actions of the officers below, and the case has been submitted by the Commissioner for an expression of the views of the Department upon the question involved. The Commissioner states in his communication transmitting the appeal that the rule applied in this case is confined to applications for the sale of rough and mountainous tracts which have not the status of isolated tracts.

A married woman is permitted to make entry under the desert land law and under the timber and stone law. She is denied the privilege of making a homestead entry, which requires residence, for the reason that she is not free to select or maintain a residence separate and apart from her husband. The only law under which the wife has not equal rights with the husband to purchase or enter public lands is the homestead law, and that restriction is based solely

upon the requirements of residence. No residence is required of applicants or purchasers under section 2455, Revised Statutes, as amended, and therefore marriage should not be considered any disability in proceedings under that law.

If an applicant be found in all respects qualified under the provisions of law, it is not believed that the discretionary powers of the Commissioner are operative with reference to the personnel, condition, or status of the applicant, but should be confined to the question whether the land for some reason should be withheld from sale under that section upon any application.

The decision appealed from is accordingly reversed, and the case is remanded for appropriate action in the light of this decision.

FORT PECK INDIAN LANDS—INDEMNITY SELECTIONS BY STATES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, October 25, 1913.

REGISTER AND RECEIVER,
Glasgow, Montana.

SIRS: Section 1 of the act of May 30, 1908 (35 Stat., 558), provides:

That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the lands embraced within the limits of the Fort Peck Indian Reservation, in the State of Montana, and to cause an examination of the lands within such reservation to be made by the Reclamation Service and by experts of the Geological Survey, and if there be found any lands which it may be deemed practicable to bring under an irrigation project, or any lands bearing lignite coal, the Secretary of the Interior is hereby authorized to construct such irrigation projects and reserve such lands as may be irrigable therefrom, or necessary for irrigation works, and also coal lands as may be necessary to the construction and maintenance of any such projects.

The said act provides, among other things, for the making of allotments of said lands to all Indians belonging and having tribal rights thereon; for the reservation, by the Secretary, of lands for agency, school, townsite, religious and other purposes; for the issuance of patents in fee for certain lands; also for the appointment of a commission to classify, appraise and value the lands which have not been allotted to Indians or reserved—the lands to be divided into four classes, viz: agricultural, grazing, arid, and mineral lands (the mineral land not to be appraised).

Section 7 of the act provides:

That when said commission shall have completed the classification and appraisal of said lands and the same shall have been approved by the Secre-

tary of the Interior, the lands shall be disposed of under the general provisions of the homestead, desert-land, mineral, and townsite laws of the United States, except sections sixteen and thirty-six of each township, or any part thereof, for which the State of Montana has not heretofore received indemnity lands under existing laws, which sections, or parts thereof, are hereby granted to the State of Montana for school purposes. And in case either of said sections, or parts thereof, is lost to the State by reason of allotment thereof to any Indian or Indians, or by reservation or withdrawal under the provisions of this act or otherwise, the Governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral lands within said reservation, not exceeding two sections in any one township, which selections must be made within the sixty days immediately prior to the date fixed by the President's proclamation opening the surplus lands to settlement: *Provided*, 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 one dollar and twenty-five cents per acre.

The State's right of selection, under the provisions of this act of May 30, 1908, being restricted to "unoccupied, unreserved, non-mineral lands", attention is called to the fact that lands classified as coal lands, at fixed prices per acre, are not subject to selection by the State, nor is any provision made in the act for selection of such classified coal land, with reservation to the United States of the coal therein.

The President, in proclamation of July 25, 1913 [42 L. D., 264], names May 1, 1914, as the first day for making entries under the provisions of said act, and that date must be considered, for the purpose of State selection, as the date of the opening of the lands to settlement.

Selections should be made on the forms in use for the selection of indemnity school lands, so modified as to indicate that the applications are made under aforesaid act of May 30, 1908, and must be supported by the usual nonmineral, non-saline and non-occupancy affidavits.

In view of the fact that 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 selection are lost to the State by reason of allotments to Indians, or otherwise, no certificates of the county officers, showing nonsale and nonencumbrance by the State of such base tracts need be furnished.

The lists of selections, filed by the State, and 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 sections sixteen and thirty-six, or parts thereof, which have been allotted to Indians and for which the State of Montana has not heretofore received indemnity under existing laws. Lands in lieu thereof must be selected by the State.

All allotments to Indians, reservations made under authority of said act, and notice of the classification of certain tracts as coal lands at fixed prices, are matters of record in your office.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, October 25, 1913:

A. A. JONES,
First Assistant Secretary.

PRACTICE—POSTING OF CONTEST NOTICES.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 25, 1913.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES.

SIRS: Some misunderstanding exists as to whether copies of contest notices for posting shall include the dates of publication, where service of the notice by publication is authorized.

Under Rule of Practice 9 it is provided that a statement of the dates of publication must be published with the notice, while the last paragraph of Rule 10 requires that a copy of the notice "as published," which necessarily includes the dates of publication, as well as the other matters required, shall be posted in the office of the register and also in a conspicuous place upon the land involved, such posting to be made within ten days after the first publication of the notice.

It is the practice in some districts to post, both on the land and in the office of the register, carbon copies of the notice as issued for publication, which of course do not contain the dates of publication.

Contestants should be warned of the necessity of posting copies of the notice *as published*, and that it is necessary that the register be furnished with a copy of the notice as soon as published. Upon

receipt of such copy, the register will immediately post the same, noting the date, and afterwards make the required certificate of posting.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, October 25, 1913:

A. A. JONES,
First Assistant Secretary.

FRANK A. DEVAULT, JR.

Decided October 27, 1913.

NATIONAL FOREST LANDS—RESTORATION—NOTICE.

Where lands in a national forest, embraced within a pending entry, are restored to the public domain, and the entry is permitted to remain intact, publication of the usual formal notice of restoration should not be made.

JONES, *First Assistant Secretary:*

March 29, 1912, the Commissioner of the General Land Office held for cancellation homestead entry 04223, Lewiston, made by Frank A. Devault, Jr., for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 18, T. 30 N., R. 4 E., Idaho, because in conflict with power site reserve No. 209, created by Executive order of October 19, 1911.

Upon appeal to this Department and examination of the record, it was found that entryman settled upon and improved the land prior to the power site withdrawal, expending approximately \$1000 in improvements; that upon his application the lands (within the limits of the Nez Perce National Forest) were listed by the Secretary of Agriculture June 9, 1911, act of June 11, 1906 (34 Stat., 233), restored to entry by order of this Department dated October 11, 1911, and Devault allowed to make entry, as above stated, on November 21, 1911.

In view of the circumstances attending the case and the equities of entryman, the President on August 12, 1913, directed restoration of the lands. In view of this action the reason for holding the homestead entry for cancellation has been removed, the Commissioner's decision is reversed, and the entry will be allowed to remain intact in the absence of other objection.

In this connection the attention of the Commissioner is directed to the fact that notwithstanding the President's order stated and the records of his office showed the lands to be embraced in the pending homestead entry of Devault, formal notice of the restoration of said lands was given by public notice beginning September 2, 1913, ad-

vising that the lands, where not otherwise reserved, withdrawn or appropriated, would be opened to settlement on September 30, 1913, and to entry October 30, 1913. This appears to be an unnecessary expenditure of the appropriation made for giving notice of restoration of the land to the public domain. No good purpose is served by advertising notice in a case where all the lands restored are embraced in a pending uncanceled entry. In fact, the publication of such a notice may tend to mislead other prospective settlers and entrymen.

FREDERICK D. OLDFIELD.

Decided October 29, 1913.

SOLDIERS' ADDITIONAL RIGHT—WIDOW—SECTIONS 2306 AND 2307, R. S.

The additional right of entry accruing to the widow of a soldier, under sections 2306 and 2307, Revised Statutes, by reason of an entry for less than 160 acres made by her prior to the adoption of the Revised Statutes, is an unfettered right which she may exercise or dispose of before remarriage, during coverture, or after the death of a later husband, exactly as a soldier may exercise or dispose of his additional right under section 2306.

CONFLICTING DEPARTMENTAL DECISIONS MODIFIED.

John S. Maginnis, 32 L. D., 14, Inkerman Helmer, 34 L. D., 341, John M. Maher, 34 L. D., 342, and Charles W. Burdick, 34 L. D., 345, modified.

JONES, *First Assistant Secretary*:

December 23, 1912 [not reported], the Department affirmed the action of the Commissioner of the General Land Office holding for rejection the application of Frederick D. Oldfield to enter under sections 2306 and 2307, Revised Statutes, the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 2, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11, T. 16 N., R. 63 E., M. D. M., Carson City, Nevada, land district, containing 80 acres, based upon assignment of Augusta Romanoski, former widow of Frederick W. Romanoski. Motion for rehearing has been filed.

It appears that Frederick W. Romanoski performed military service during the Civil War for the required length of time in the army of the United States, and that Augusta Romanoski, his widow, made homestead entry at Boonville, Missouri, on July 10, 1869, for 80 acres, which was canceled July 10, 1880, for abandonment; that about the year 1874 she remarried, but under date of May 21, 1875, she executed powers of attorney in the name of Augusta Romanoski, authorizing Charles D. Gilmore to locate her additional right of entry on 80 acres of land in California, the description of which appears in the papers, and also authorizing the sale of the land to be so located, with full release of all claim to any of the proceeds of any sale or conveyance of the premises. The sum of \$100 was mentioned as consideration for said powers, and the power was made irrevocable, with the right of substitution.

The former departmental decision held that said paper did not constitute evidence of assignment of the additional right, and, furthermore, that inasmuch as the widow had remarried and was under coverture at the date of the execution of said powers, she was not authorized to transfer the right.

Under authority of the said powers of attorney above mentioned, N. P. Chipman located the additional right, as authorized in the power, upon the lands described therein, and entry was made in the name of Augusta Romanoski under date of October 1, 1875, as additional to the said Boonville, Missouri, entry, but was canceled September 22, 1885, for the reason that the original entry had been previously canceled, and under the rulings then in force right of additional entry did not accrue, because the original entry had not been perfected. Chipman claims the right by virtue of a decision of the Supreme Court of the District of Columbia, under decree in equity No. 6150. He has transferred his right, and it has passed through mesne conveyance to the applicant.

Two questions are here presented for consideration: First, did the former widow of the soldier have legal authority to transfer the claimed additional right after her remarriage and during coverture? Second, if so, did the powers mentioned constitute a transfer of such right?

The Department has held in numerous decisions that where a widow of a soldier made homestead entry for less than 160 acres prior to the adoption of the revised statutes, June 22, 1874, she thereby became entitled to an additional right of entry under sections 2306 and 2307, Revised Statutes, if otherwise qualified, and that such right when once vested is not forfeited by her remarriage. This rule has become so firmly established by repeated affirmance that it may be considered as having force as a rule of property. It has been further held, however, in the same connection, that while said additional right is not lost or forfeited by remarriage of the widow, it, nevertheless, cannot be exercised during coverture, but remains suspended or in abeyance during such disability, subject to revival and exercise or disposal by the widow upon removal of such disability, or by her heirs or legal representatives upon her death, as other personal property, in case she failed to exercise or dispose of the right in her lifetime. See case of John S. Maginnis (32 L. D., 14); Inkerman Helmer (34 L. D., 341); John M. Maher (34 L. D., 342); Charles W. Burdick (34 L. D., 345).

I am unable to see logic or authority for this theory of abeyance of such right during coverture. If the additional right vested in the widow by virtue of her original entry, and if her subsequent remarriage did not work an absolute forfeiture of such right, it is difficult to find in the language of section 2307, Revised Statutes, or elsewhere, any warrant for holding that such right cannot be exer-

cised or disposed of during the period of coverture. No residence is required upon the additional entry, and therefore coverture is no handicap to prevent the beneficiary from performing all the things required by law for the passing of title. Assuming that the right was earned by the widow and was not forfeited by remarriage, as held in the decisions referred to and others, it was her right, which could be exercised or disposed of by her before remarriage, during coverture, or after the death of her later husband, exactly as the soldier himself, under section 2306, Revised Statutes, may exercise such an additional right earned by him. Where such a right is based upon an original entry made by the widow, and not by the soldier, as distinguished in the decisions referred to, the right to exercise or dispose of the claim rests in her unfettered, precisely as the soldier's additional right is unfettered in him. The decisions above cited are therefore modified to meet the views herein expressed.

In the recent decision of July 10, 1913, in the case of Edward H. Rife, on motion for rehearing [42 L. D., 219], the effect to be given to such powers of attorney as those in this case was considered, and it was held that as between the beneficiary under the law and the claimant under the powers, such powers would be considered as an equitable assignment of right, where it satisfactorily appeared that the powers were given in blank as to description of the lands upon which they were to act. In this respect this case is similar to the case of Rife, and inasmuch as no adverse assignment or satisfaction of the right appears, the evidence is considered sufficient to show equitable transfer of the said additional right. The former departmental decision is hereby recalled and vacated, and, if no other objections appear, entry will be allowed.

COAL LANDS—RULE 7, CIRCULAR OF APRIL 24, 1907, AMENDED.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, October 30, 1913.

REGISTERS AND RECEIVERS,

United States Land Offices.

SIRS: Rule 7 of the circular of April 24, 1907 (35 L. D., 681, 682), is hereby amended so as to read:

When copy of notice is returned with endorsement not protesting the validity of the entry, the register and receiver will act upon the merits of the proof as submitted.

Where returned notice by Chief of Field Division or other officer protests the validity of the entry, the register and receiver will forward all papers to

this office without action, except in cases of mineral applications for patent. In mineral applications for patent the proof should be considered upon its merits and, if found regular, certificate issued, although a protest may have been filed, but the claimant should be advised in such a case that patent will be withheld by the General Land Office pending a report by the Chief of Field Division upon the *bona fides* of the claim.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, October 30, 1913:

ANDRIEUS A. JONES,
First Assistant Secretary.

JOHN T. BRUNSKILL.

Decided October 31, 1913.

NATIONAL FOREST LANDS—SETTLEMENT—ACT OF JUNE 11, 1906.

One who in good faith settled upon lands prior to their withdrawal for forestry purposes and who makes entry thereof under the act of June 11, 1906, is entitled to claim credit for residence from the date of such settlement.

JONES, *First Assistant Secretary:*

John T. Brunskill has appealed from the decision of the Commissioner of the General Land Office, dated February 13, 1913, rejecting the final proof submitted by him on December 11, 1912, upon his homestead entry, made on January 25, 1909, under the act of June 11, 1906 (34 Stat., 233), for a tract of unsurveyed land described as "what will probably be, when surveyed, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 3, T. 40 N., R. 36 E., W. M.," Spokane, Washington, land district. The proof was suspended by the local officers for the reason that the lands were unsurveyed, and the Commissioner's action was based upon that fact and the further reason that the lands did not become subject to settlement until January 25, 1909, while Brunskill claimed continuous residence thereon from and after September, 1906.

The land under consideration was withdrawn for forestry purposes by the Commissioner's letter "R" of October 22, 1906, and was included within the Colville Forest Reserve by executive proclamation of March 1, 1907 (34 Stat., 3288). As has been before indicated, it was opened to settlement, under the act of June 11, 1906, *supra*, on January 25, 1909, upon which date Brunskill made entry therefor.

While the Department, construing section 5 of the act of June 11, 1906, *supra*, has held that an entryman is not entitled to assert any rights as a settler, by virtue of occupation of forest reserve lands, subsequent to June 11, 1906, prior to the time such lands are formally

opened to settlement, as provided in that act, it is obvious that this rule has no application to a case where the entryman settled upon the lands prior to any withdrawal for forestry purposes. In fact, section 5 of the act of June 11, 1906, *supra*, expressly provides:

That nothing herein contained shall be held . . . to in any way impair the legal rights of any *bona fide* homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve.

The Department is advised by the Commissioner's letter of March 21, 1913, that the land in controversy has been surveyed and that the plat of survey was ordered to be filed in the local office on February 28, 1913. The decision appealed from is reversed and the case remanded to the General Land Office for consideration in harmony herewith.

OSCAR B. HENDRICKSON.

Decided August 16, 1913.

OKLAHOMA WOOD RESERVE LANDS—EXTENSION OF PAYMENTS.

Application of the extension act of March 26, 1910, to deferred payments on Oklahoma wood reserve lands maturing prior to date of that act, under purchases made under act of June 5, 1906, distinguished from the application of the former act to such payments maturing prior to date of that act under purchases made under the act of June 28, 1906, as held in the Albright case.

EXTENSION ACT OF APRIL 27, 1912—PURCHASES UNDER ACT OF JUNE 5, 1906.

The extension act of April 27, 1912, construed to apply alike to deferred payments under purchases made under act of June 5, 1906, and to deferred payments under purchases made under act of June 28, 1906, as held in the Albright case.

INSTRUCTIONS OF JUNE 8, 1912, MODIFIED.

Instructions of June 8, 1912, 41 L. D., 80, modified to accord to the views herein expressed.

JONES, *First Assistant Secretary*:

This case involves a purchase made by Oscar B. Hendrickson April 17, 1907, under the act of June 5, 1906 (34 Stat., 213), of the NW. $\frac{1}{4}$, Sec. 17, T. 1 N., R. 8 W., Guthrie, Oklahoma, land district.

This purchase was made at the appraised price of \$4,100, one-fifth of which, \$820, was paid at the time of purchase and one-fourth of the remainder of which became due each year thereafter, without interest, according to the provisions of said act.

The first deferred payment falling due April 17, 1908, was not paid and on June 13, 1908, Hendrickson paid \$32.80 for an extension of one year of said payment, in accordance with the provisions of the act of March 11, 1908 (35 Stat., 41), and on July 21, 1909, said first deferred payment as extended and the second deferred payment both falling due April 17, 1909, not having been paid, he paid \$65.60

for extension of one year, under the act of February 18, 1909 (35 Stat., 636), of both of said due deferred payments, both of which as thus extended and also the third deferred payment fell due April 17, 1910. None of these deferred payments nor the fourth deferred payment falling due April 17, 1911, was paid. On February 21, 1913, Hendrickson was called upon by the local officers to make payment April 27, 1913, of \$464.31, said amount being computed as due under the act of April 27, 1912 (37 Stat., 91), and instructions issued thereunder June 8, 1912 (41 L. D., 80), providing for further extension and subdivision into two parts of deferred payments falling due under purchases made under said act of June 5, 1906, and the act of June 28, 1906 (34 Stat., 550).

This appeal was filed accordingly by Hendrickson, contending that said instructions of June 8, 1912, in accordance with which said requirement of him for the payment of \$464.31 as due under said act of April 27, 1912, was made, are erroneous, and that his first deferred payment under that act legally falls due April 17, 1914, and will amount on that date to \$416.15.

This appeal was considered by the Department February 28, 1913, and although irregular for the reason that no decision had been rendered by the Commissioner of the General Land Office, was entertained by the Department in view of the fact that the case involves said instructions approved by the Department and is similar in some respects to other cases then under consideration by the Department, particularly the case of Charles S. Albright which was decided March 6, 1913 (41 L. D., 608), and was returned to the General Land Office for a report by the Commissioner as to the status of the case and the contentions made in the appeal. Said report having been made the case is now considered on its merits.

This case, like that of Albright, involves the consideration of a complicated situation arising under said purchase acts of June 5, and June 28, 1906, and said extension acts of March 11, 1908, and February 18, 1909, and also the extension act of March 26, 1910 (36 Stat., 265), and said act of April 27, 1912. Albright's case arose under said purchase act of June 28, 1906, which differs from the purchase act of June 5, 1906, involved in the present case, in that the deferred payments thereunder drew interest at the rate of 6 per centum per annum from the date of purchase, while the deferred payments under the latter act drew no interest thereunder. This difference affects to some extent the application of the later extension acts as hereinafter appearing.

It appears that the purchases made under said act of June 5, 1906, were during the months of March and April, 1907, the deferred payments maturing annually thereafter in the years 1908, 1909, 1910, and 1911, without interest. By the provisions of said act of June 5, 1906, failure to make an annual payment when due ended "all

rights in and to the land covered by (the) purchase . . . and any payments theretofore made shall be forfeited." By the provisions of said acts of March 11, 1908, and February 18, 1909, however, extension of one year was granted upon prepayment of an extension charge of 4 per centum, as to purchases made under said act of June 5, 1906, and by the instructions issued June 24, 1909 (38 L. D., 50), it was stated that such purchasers "will be deemed to have intended to avail themselves of the relief afforded, and will be required to pay the per centum fixed by law."

Said act of March 26, 1910, provided further that—

All payments heretofore due and extended, and the payments due or to become due during the year 1910 . . . are hereby postponed and extended as follows: One of said payments shall be made in 1911 at the time when a payment would become due under existing law or one year after such payment became due in 1910, and the other payments shall be made annually thereafter until all payments are made; provided, that all payments postponed and extended by the provisions of this act shall draw interest at 5 per centum per annum from the date of such extension.

The effect of these provisions was to extend all deferred payments referred to from the date they severally matured under prior existing law, with interest thereon at the rate of 5 per centum per annum from that date as to purchases made under said act of June 5, 1906.

The case of purchases made under said act of June 28, 1906, like that of Albright, *supra*, is distinguishable in the 5 per centum rate fixed by said act of March 28, 1910, taking effect, as to those purchases, only from the date of that act as applied to payments maturing prior thereto. To give effect to that act as fixing the 5 per centum rate, in that class of purchases, from any date prior to the passage of the act would be curtailing the 6 per centum rate fixed for that class of purchases by the original act under which the same were made, and would place those purchasers who had not paid the 5 per centum extension charge fixed, as to such purchases, by said acts of 1908 and 1909 in equally beneficial position as those who had paid such charge. Also, to give effect to said act of March 26, 1910, as fixing the 5 per centum rate, in purchases under said original act of June 5, 1906, from March 26, 1910, only, would likewise place such purchasers who had not paid the 4 per centum extension charge fixed, as to such purchases, by said acts of 1908 and 1909 in equally beneficial position as those who had paid such charge. The law does not warrant a holding leading to such inequitable results. Furthermore, said extension charge provided for by said acts of 1908 and 1909 was expressly required to be prepaid, prior to the extension granted by those acts; and there is no warrant of law for now accepting, long after the year to which such an extension would relate has expired, the 4 per centum rate, in one class, and the 5 per centum rate, in the

other class of purchases. A purchaser, in either class, who failed to secure such an extension, by paying the 4 per centum or the 5 per centum charge required, must now pay the 5 per centum interest, in one case, or 6 per centum interest, in the other case, as to such unextended payments maturing prior to March 26, 1910.

In the case of Hendrickson, such extension charge of 4 per centum was paid as to the first two deferred payments, thereby maturing same April 17, 1910, as above stated, from which date those payments, and also the third deferred payment maturing originally on the same date, drew interest at the rate of 5 per centum per annum, and the fourth deferred payment at that rate from April 17, 1911, when it originally matured, until they severally matured as extended by said act of March 6, 1910, in the years 1911, 1912, 1913, and 1914, respectively.

Such being the legal situation under said act of March 6, 1910, and prior acts, the act of April 27, 1912, *supra*, was passed, providing:

That the Secretary of the Interior is hereby authorized and directed to subdivide into two parts each of the deferred annual payments . . . and extend the time of payment from the date on which each payment so divided becomes due under existing law: *Provided*, That one of the parts into which each deferred annual payment is subdivided shall be paid annually thereafter until the entire amount due is paid, and that not more than one of such parts shall be required to be paid annually: *Provided*, That all interest due on such deferred payments on the date of the passage and approval of this act shall be added to the principal, become a part thereof, and, together with all deferred payments, bear interest at the rate of four per centum per annum until paid.

Such instructions of June 8, 1912, issued under this act, and approved by the Department, stated that the extension provided for in said act was from date of said act and that all deferred payments would be on that date subdivided and the subdivided parts thereof mature annually thereafter with interest from that date at the rate of 4 per centum per annum fixed in said act.

The Department construed said act in said case of Albright and held that the extension therein provided for operates, not from the date of said act, but from the date each deferred payment may mature under prior existing law, which is the date to which payment was extended, as above stated, by said act of March 26, 1910, and that the subdivision of deferred payments and the extension of the subdivided parts as provided in said act of April 27, 1912, is from such date of maturity under said act of March 26, 1910, and with interest as provided in said act of April 27, 1912, from the date of such subdivision. Said instructions were modified accordingly in the Department's decision in that case.

It is argued in the Commissioner's report on the present case that the deferred payments under said act of June 5, 1906, occupy a dif-

ferent status as to extension under said act of April 27, 1912, because of the fact the purchases under said purchase act were made, as above stated, in the months of March and April, 1907, the first deferred payment, as extended by said act of March 26, 1910, maturing, therefore, in March or April, 1911, and the second deferred payment in March or April, 1912, prior to the passage of said act of April 27, 1912. While this fact creates a complication, it is not sufficient warrant for disregarding the explicit provision of the last mentioned act that the extension thereby granted shall be "from the date on which each payment . . . becomes due under existing law," although the application of this provision according to its plain terms leaves one part of the first deferred and subdivided payment as due prior to the passage of that act. This application of said act, however, greatly curtails Hendrickson's obligation as then existing under prior laws. He was then in default, owing two matured deferred payments aggregating \$1640, and interest thereon, and his purchase was subject to forfeiture accordingly. So applying this act, however, there was then due, April 17, 1912, one-half only of the first deferred payment and interest due April 17, 1911, and then compounded and subdivided, with interest at 5% from that date; and three-fourths of his existing indebtedness due April 27, 1912, was extended at 4 per centum interest from that date and his purchase was relieved from forfeiture for prior default.

The second part of the first deferred payment thus due and compounded and subdivided April 17, 1911, matures, in like manner, April 17, 1913, with interest at 5 per centum to April 27, 1912, and at 4 per centum thereafter. The second deferred payment, maturing under the act of March 26, 1910, on April 17, 1912, will draw 5 per centum interest to that date, when the principal and interest then due will be compounded and subdivided and will mature, one-half on April 17, 1914, and one-half one year later with interest at 5 per centum to April 27, 1912, and at 4 per centum thereafter. The third deferred payment will mature April 17, 1913, under said act of March 26, 1910, with interest to that date at 5 per centum; and will mature, as then compounded and subdivided under said act of April 27, 1912, one-half on April 17, 1916, and one-half one year later, with interest at 4 per centum from April 17, 1913. The fourth deferred payment will mature, under the act of March 26, 1910, on April 17, 1914, with interest to that date at 5 per centum; and will mature, as then compounded and subdivided under said act of April 27, 1912, one-half on April 17, 1918, and one-half one year later, with interest at 4 per centum from April 17, 1914.

The Department, in construing and applying the several acts here involved, is aware of the difficulties under which these purchasers have labored and of the complications likely to result in the cases of

those who have failed to meet their payments heretofore maturing. The Department, however, has no power to consider said cases differently from any others, and can only construe and apply the law in the case under legal rules and according to its terms and intent as a general law applicable to all cases arising thereunder. As stated in the case of Albright, *supra*—

These acts are not to be construed in the interest solely of the purchasers. The Indians whose lands these were and for whom the Government was acting in making these sales only as trustee are parties equally in interest with the purchasers so far as these payments of the purchase money are concerned, and the provisions of law allowing interest on deferred payments and extension of such payments . . . must be construed, with the original purchase act, strictly under the legal rules of construction. There are no equities to be resolved, under the Department's general powers, in favor of one or the other of these parties in real interest as to the money payments involved.

Said instructions of June 8, 1912, are hereby modified in accordance with the foregoing views, and this case is remanded for consideration under such instructions as thus modified.

OSCAR B. HENDRICKSON.

Motion for rehearing of departmental decision of August 16, 1913, 42 L. D., 476, denied by First Assistant Secretary Jones, November 19, 1913.

F. E. ROBBINS.

Decided September 3, 1913.

MINING CLAIM—LAND EMBRACED IN SUBSISTING PATENT.

Land embraced in a subsisting patent issued upon a timber and stone entry is not subject to location and entry under the mining laws, notwithstanding the land was embraced in a valid subsisting mining location at the date of the timber and stone entry and was at that date known to be chiefly valuable for mineral.

MINING LOCATION—LOSS OF DISCOVERY.

The loss of the discovery upon which a mining location is based invalidates the location, unless, prior to application for patent or the assertion of adverse claim to the ground under the mining laws, a sufficient discovery is made within the remaining portion thereof.

VERIFICATION OF APPLICATION FOR PATENT FOR MINING CLAIM.

The verification of an application for patent to a mining claim by an attorney-in-fact for the claimant, at a time when the claimant himself is both resident and physically within the land district, is unauthorized, and entry allowed upon such application is invalid.

JONES, *First Assistant Secretary:*

This is an appeal by F. E. Robbins from the Commissioner's decision of June 20, 1912, holding for cancellation his mineral entry

06036, for the Marmion and Marmion Extension lode mining claims, survey No. 991, situate in Secs. 12 and 13, T. 36 N., R. 32 E., W. M. and Secs. 2 and 18, T. 36 N., R. 35 E., W. M., Spokane land district, Washington.

The application, upon which this entry was allowed, was presented October 7, 1910. Notice of the application appears to have been published and posted for the required period, commencing October 21, 1910, and entry was allowed thereon January 23, 1911. The application was verified and filed by one J. C. Caie, attorney in fact for the claimant.

Upon consideration of the case, the Commissioner, by decision of February 6, 1912, directed the attention of the claimant to the facts (1) that the claimant is shown by the record to have been a resident of the town of Ritzville, Adams County, Washington, at the date of the application, which town is within the land district wherein the claim is situated; but that the application was nevertheless verified by the attorney in fact and that the record failed to show whether the claimant was then within or without the land district; (2) that the abstract of title was brought down only to July 6, 1910, and was certified by the Republic Abstract and Realty Company, which did not appear to have complied with the requirements of paragraph 42 of the mining regulations; (3) that it appeared from the abstract that the Marmion claim was located by Paul J. and Frank Flanagan, October 25, 1896, who, on February 22, 1899, conveyed the claim to the Marmion Gold Mining Company; that the Marmion Fraction claim was located April 1, 1904, by said Marmion Gold Mining Company and that the abstract failed to show a subsequent transfer of either of said claims by the company; that while, on October 18, 1909, a notice of forfeiture had been served upon the company by J. C. Caie, respecting the failure of said company to contribute its apportionate share of certain expenditures made by Caie for the benefit of the claims for the years 1908 and 1909, there was no showing made that Caie was a co-owner of the claims at the times the said expenditures were made; and further, that the record failed to show that no contribution had been made by the company within the time specified by section 2324, Revised Statutes; (4) that the records of the General Land Office showed that a large portion of the area embraced in the application and entry had, on April 14, 1909, and long prior to the filing of the mineral application, been patented to one August H. E. Peterson, under timber and stone entry 0824, made by Peterson on September 3, 1908, and, for that reason, was not subject to mineral entry at the date of the presentation of claimant's application. The claimant was accordingly required to show cause why the entry should not, for the reasons stated, be canceled. By decision of February 26, 1912, the Commissioner further found and held that the claimant had failed to file, with his application for

patent, an affidavit showing that notice of the application had been posted upon the land, as required by the provisions of section 2325, Revised Statutes, and accordingly he required the claimant to show cause within sixty days from notice why the entry should not, for this reason also, be canceled.

March 11, 1912, the claimant filed the affidavit of the said J. C. Caie, who averred that:

he is the identical J. C. Caie, who as attorney in fact for F. E. Robbins, of Ritzville, Washington, did on or about January 23, 1911, make application for U. S. patent for the Marmion and Marmion Fraction Extension lode mineral claims; that he acted as attorney in fact for F. E. Robbins from the fact that it was understood that the said F. E. Robbins was seldom at his place of residence at Ritzville during that period; that prior to that date, to wit, about June 19, 1910, notices of application of patent and plat of the same were duly posted on said property; the abstract of title was brought down to July 6, 1910. A certificate will be furnished showing title to date. An affidavit will be furnished that the company was at the time they were advertised out of said claims by the said J. C. Caie delinquent to the said J. C. Caie and that the said J. C. Caie was at that time and prior to that time, interested in said claims since the year 1903 continuously. . . . Affiant further deposes and says that he knew nothing of the conflict with the timber and stone entry No. 0824 until receipt of the Assistant Commissioner's letter of February 6, 1912.

In said paper it was requested that the abstract of title be returned to affiant "that the same may be brought down to date and proper certificate attached thereto and other errors of the record be corrected."

By the Commissioner's letter of March 22, 1912, the local officers were directed to notify the claimant that it was contrary to the practice of the General Land Office to return abstracts of title to mineral applicants but that if the claimant so desired the abstract would be returned to the local office for his inspection.

Notices of the Commissioner's decisions of February 6 and 26, 1912, appear to have been promptly served upon the claimant, by registered mail, and the local officers reported, also under date of June 6, 1912, that the claimant was, on March 29, 1912, notified of the Commissioner's letter of March 22, 1912. They also reported that no further steps had been taken by the claimant looking to a compliance with the requirements made by the Commissioner. Thereupon, the Commissioner, by decision here appealed from, held the entry for cancellation.

It appears from the records of the General Land Office that, as found by the Commissioner, on April 14, 1909, a patent was issued to one August H. E. Peterson to lots 1 and 6, Sec. 13, T. 36 N., R. 32 E., and lot 3, Sec. 18, T. 36 N., R. 33 E., on timber and stone entry of said Peterson, and an examination of the official plat of survey of the claims in question shows that practically the entire area embraced

in the Marmion Fraction and approximately two-thirds of the area embraced in the Marmion are within the limits of the area covered by the patent to Peterson, which antedated by nearly a year and a half the presentation of Robbins's application. This being true, the patented portions of the areas embraced in the mining locations were clearly not subject to entry under the mining laws notwithstanding the fact, as is now asserted on behalf of the mineral claimant, that the area so patented was embraced in valid and subsisting mining locations at the date of Peterson's entry, and were at that date known to be chiefly valuable for mineral. It may be true, as urged in the appeal, that the claimant can show that the entry of Peterson was fraudulent in that it embraced mineral land covered by valid and subsisting mining locations, but the fact nevertheless remains that the patent conveyed to the entryman the full legal title to the ground and that that title was, at the date of Robbins's application and is still, outstanding. It is to be further noted in this connection that the asserted discoveries on both claims are upon those portions thereof which have been patented to Peterson and, so far as the present record shows, no valid discovery of mineral has been made upon the unpatented portion of either claim. It is well settled that the loss of a discovery upon which a mining location is based invalidates the location unless, prior to application for patent or the assertion of adverse claim to the ground under the mineral laws, a sufficient discovery has been made within the remaining portion thereof. *Gwillim v. Donnellan et al.* (115 U. S., 45); *Girard et al. v. Carson et al.* (44 Pac., 508); *Antediluvian Lode and Millsite* (8 L. D., 602); *Independence Lode* (9 L. D., 571); *Lone Dane Lode* (10 L. D., 53). It must accordingly be held that, on the present record, no portion of the ground embraced in either claim was properly subject to entry under Robbins's application.

The proceedings upon which the entry is based were also defective. In the first place, it appears that, while the application was verified by an attorney in fact for the applicant, the latter was a resident of the land district in which the claims are situated and the record fails to show that, at the date of said application, the applicant was outside the land district. As held by the Department in *Crosby and Other Mining Claims* (35 L. D., 434), syllabus:

There is no authority of law for an agent to make oath to an application for patent to a mining claim, except under the act of January 22, 1880, which provides for such oath by an agent only where the applicant is not at the time a resident of or within the land district where the claim applied for is situated; and where an agent makes oath to an application for mineral patent under conditions not within the terms of said act, the application and proceedings thereon are invalid, and the invalidity can not be cured by filing a new application sworn to by the applicant, nor can entry allowed upon such invalid application and proceedings be submitted to the Board of Equitable Adjudication, under sections 2450 to 2457 of the Revised Statutes.

See also case of C. C. Drescher (41 L. D., 614).

Ample opportunity has been afforded the claimant to make a showing in regard to the above mentioned defect, yet the only reason that has been assigned for the verification of the application by the attorney in fact of the claimant is that it was understood that the claimant was seldom at his place of residence at the time the application was filed. This showing falls far short of establishing such a state of facts as would warrant the verification of the application by the attorney in fact.

Another objection to the proceedings lies in the fact that Caie, under whom the claimant asserts title to the claims, is not shown to have had himself any title thereto. True, Caie claims to have acquired title by forfeiture proceedings taken presumptively under the provisions of section 2324, Revised Statutes, but said section provides for the institution of such proceedings only by a co-owner of a mining claim, and the record fails to show how or in what manner, if at all, Caie became a co-owner of the claims with the Marmion Gold Mining Company, upon which the purported forfeiture notice was served. As opposed to the theory that Caie was such a co-owner, he states in the application for patent that, on a date not mentioned, each of the claims was transferred from the Marmion Gold Mining Company to J. C. Caie, "by labor lien." A labor lien, however, does not, under the laws of Washington, operate in and of itself to divest the owner of the property to which it may have attached of any title thereto. That end can be attained only by the timely recordation of the lien upon the records of the proper county officer and the seasonable institution and prosecution of foreclosure proceedings leading ultimately to the sale of the entire interest of the delinquent debtor. That no such proceedings were taken in this case is evident from the fact that the notice of forfeiture was served upon the Marmion Gold Mining Company. This further clearly indicates that the record title to the claims is still in that company and that Caie had, at the date of his purported conveyance to the applicant, no title in or to the same. For these reasons and without regard to other defects mentioned by the Commissioner the entry must be canceled.

The decision appealed from is accordingly affirmed.

LLOYD SEARCHLIGHT MINING AND MILLING CO.

Decided September 8, 1913.

MINING CLAIM—SURVEY—TIE LINE—TWO-MILE LIMIT.

Paragraph 135 of the mining regulations contemplates that each individual claim of a contiguous group embraced in the same survey shall be connected with a public survey corner or United States location monument not more than two miles distant; and where only one claim of such group is

connected to a public survey corner within the two-mile limit, and the remainder are connected by tie lines more than two miles in length, an entry allowed for such group may be permitted to stand only as to the claim within two miles of the public survey corner and will be rejected as to the others.

JONES, *First Assistant Secretary*:

December 15, 1911, the Lloyd Searchlight Mining and Milling Company made mineral entry No. 06172 at Carson City, Nevada, for the Golden Rod, etc., lodes, survey No. 3936. Corners number 1 of the Golden Rod, Golden Rod Fraction and Golden Rod Nos. 2, 3 and 4 lodes were tied to the southeast corner of Sec. 12, T. 30 S., R. 64 E., M. D. M., situated over two miles distant. Corner No. 1 of the Golden Rod No. 1 was tied to the same monument, the tie line being less than two miles in length. By decision of July 11, 1912, the Commissioner of the General Land Office required the entryman to secure an amended survey for the Golden Rod, Golden Rod Fraction and Golden Rod Nos. 2, 3 and 4 lodes in order to show tie lines not more than two miles in length from a corner of the public surveys or a mineral monument, in default whereof the entry would be canceled as to such claims. An appeal to the Department has been perfected.

The appeal is taken upon the following grounds:

1. Where, as in this case, two or more locations are contiguous and are embraced in one application, the word "claim," as used in paragraphs 36 and 135 of the U. S. Mining Regulations, applies to the entire group and not to the separate locations; that is, the group as a whole is a "claim," and the separate locations are merely parts thereof.

2. The requirements of paragraphs 36 and 135 are satisfied if *any* corner of the "claim" or group be within two miles of the corner of the public survey or United States location monument to which connection is given; and it was error to hold otherwise.

The above contentions are disposed of by the express language of paragraph 135:

Corner No. 1 of each location embraced in a survey must be connected by course and distance with nearest corner of the public survey or with a United States location monument, if the claim lies within two miles of such corner or monument. If both are within the required distance, the connection must be with the corner of the public survey.

It follows that corner No. 1, of each location of a group of lode claims embraced in a mineral survey must be connected by tie line not longer than two miles with a corner of the public survey or a United States mineral monument.

It is true that in *S. H. Standart et al.* (25 L. D., 262), the Department accepted a tie line of a lode location which was more than two miles in length. Each corner of that location, however, was properly tied to the corners of other mineral surveys. The Department said at page 264:

While it is true that rule 45 of Mining Regulations demands that no connecting line with a public survey shall be more than two miles in length, yet under this rule I do not think a survey should be vitiated if a line should happen to be longer, as in this case, than that mentioned by the regulations. I see no reason why this requirement should render a resurvey necessary, if there is otherwise a substantial compliance with the rules. The presumption would be, I think, that the deputy mineral surveyor, in the performance of his duty as such, would have made the connection a shorter distance if there were any public surveys closer. Examination of the published notice shows that all four of the corners of the claim are tied to mining claims that have been officially surveyed. For instance, corner No. 1 is tied to corner No. 3 of survey No. 595; corner No. 2 is the same as corner No. 1, survey No. 587; corner No. 3 is tied to corner No. 535; and corner No. 4 is tied to No. 5, survey No. 549. It seems to me that this description sufficiently identifies the locus of the claim, so that any person seeking to ascertain its boundaries could do so with as great a degree of accuracy as he could if it were tied to what is stated in the regulations to be the public surveys. Hence, for the purposes of this case, I think that the fact that the Treasure Vault was not connected to the line of the public surveys within a distance of two miles, or to a mineral monument, should not be construed to require a new survey and publication by the applicants.

In the present case none of the corners of the locations except the Golden Rod No. 1, are properly tied to any monument.

Paragraph 135 of the Mining Regulations is necessary in order to secure a proper administration of the mineral laws. As groups of lode mining claims often cover a considerable area, it is indispensable that a corner of each of the locations be tied within a reasonable distance to an established survey monument in order to insure accuracy of survey, a correct locus of the locations upon the ground, full notice to any possible adverse claimants, and a correct depiction in the field notes and plats of the township and subdivisional surveys.

No reason is found for disturbing the Commissioner's decision and it is accordingly hereby affirmed.

JONES v. MACKEY.

Decided September 18, 1913.

ALABAMA LANDS—SETTLEMENT PRIOR TO OFFERING.

A homestead settlement upon lands within the act of March 3, 1883, prior to public offering, though subject to defeasance by public sale, may be recognized as between rival applicants.

SECOND HOMESTEAD—RELINQUISHMENT FOR CONSIDERATION.

The second homestead acts of April 28, 1904, February 8, 1908, and February 3, 1911, deny the right of second homestead entry to one who relinquished his former entry for a consideration in excess of the filing fees, but the second homestead act of June 5, 1900, contains no such limitation; and one who after relinquishment of a former entry made settlement prior to the act of June 5, 1900, and has continued to reside upon the land, is entitled, if otherwise qualified, to make second entry under that act, notwithstanding he may have received for his relinquishment a consideration in excess of the filing fees.

HOMESTEAD ENTRY—RELINQUISHMENT—ADVERSE SETTLEMENT CLAIM.

The homestead right is not exhausted by the making of a homestead entry which is subsequently relinquished because of a prior adverse settlement claim.

JONES, First Assistant Secretary:

James N. Jones has appealed from the decision of the Commissioner of the General Land Office, dated November 23, 1912, affirming the action of the local officers and rejecting his homestead application, filed on May 29, 1912, for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 35, T. 17 S., R. 10 W., H. M., Montgomery, Alabama, land district.

It appears from the record that Mackey, on March 28, 1887, made homestead entry for certain lands in Alabama, which was canceled by relinquishment on May 14, 1888.

On May 14, 1912, Mackey filed a homestead application for the land here in controversy subject to the provisions and reservations of the act of June 22, 1910 (36 Stat., 583), employing Form 4-007, in which it was made to appear that the applicant had never made any other homestead entry. As he had forwarded to the receiver, with his application, only \$7, the application was suspended and he was notified that he would be permitted to pay the balance due. On May 31, following, he appeared personally before the local officers, made the required payment of \$5, and filed an affidavit in which he alleged that he made the former entry, as above stated, and that he relinquished the same in consideration of \$50, which included the filing fees and his expenses in making the entry, in favor of a widow who had settled upon and improved the land entered by him.

Two days prior to this, to-wit, on May 29, 1912, James N. Jones filed his homestead application for the land applied for by Mackey, under the act of June 22, 1910, *supra*, and, at the same time, directed attention to the fact that Mackey had previously made a homestead entry and relinquished the same for a valuable consideration.

It is alleged by Mackey that he is seventy years of age and upwards; that he has resided upon the land in controversy for nearly seventeen years, and placed improvements thereon worth from \$500 to \$700.

In his decision the Commissioner held, in substance, that, inasmuch as Mackey had settled upon the land prior to the passage of the act of June 5, 1900 (31 Stat., 267), he was entitled to the benefit thereof and might, therefore, make a second homestead entry notwithstanding the fact that he had received for his relinquishment of a former entry a sum in excess of his filing fees.

The tract in controversy is one of those affected by the act of April 23, 1912 (37 Stat., 90), which, prior to that date, had been withheld from entry under the homestead law (though specifically made subject to disposal as agricultural lands) by the provision in the act of

March 3, 1883 (22 Stat., 487), that they should first be offered at public sale. There is no sound reason why a homestead settlement made upon such lands, though subject to defeasance by a public sale thereof, should not be recognized as between rival applicants.

Ordinarily, applications to make second entry are governed by the law in force at the date of their filing. The acts of June 5, 1900, *supra*, April 28, 1904 (33 Stat., 527), February 8, 1908 (35 Stat., 6), and February 3, 1911 (36 Stat., 896), were each a full and exclusive provision for second entries, as to all cases theretofore arising, and the later act modified and repealed all previous laws to the extent of any conflict therewith. *Cox v. Wells* (33 L. D., 657), and *William R. Burkholder* (37 L. D., 660).

If his statement be true, Mackey was a settler upon the land during all the time that the act of June 5, 1900, *supra*, was in force, and entitled to make a second homestead entry under its terms. The Department is clearly of the opinion that subsequent acts of Congress were not intended to and did not affect the right he thus acquired under the act of May 14, 1880 (21 Stat., 140), to make entry when the land became subject thereto, and that such right of entry could only be forfeited or waived by his own voluntary act.

Moreover, if Mackey's entry, made in 1887, was abandoned and relinquished because of a prior settlement claim, his homestead right was not affected thereby and he is entitled to enter the land in controversy without reference to the requirements of any act permitting second entries. See *Dyar v. Jones et al.*, 35 L. D., 499, and the cases therein cited.

Inasmuch, however, as Jones now asserts that Mackey settled upon the land only two years ago and that the latter did not relinquish his former entry for the reason alleged by him, the decision appealed from is modified and the record remanded to the General Land Office with the direction that a hearing be ordered to develop the facts in the case.

LOUIS W. BREUNINGER ET AL.

Decided September 20, 1913.

INDIAN ALLOTMENT—SECTION 4, ACT FEBRUARY 8, 1887.

The right to allotment under the 4th section of the act of February 8, 1887, is limited to recognized members of an Indian nation or tribe; and the mere fact that an Indian is descendant of one whose name was at one time borne upon the rolls, and who was recognized as a member of a tribe, does not of itself make such Indian a member of the tribe.

JONES, *First Assistant Secretary*:

Louis W. Breuninger, for himself and Mamie Halnore, Alexander Besaw, Jennie V. Milquet, Alexander G. Grignon, William N. Breun-

inger and August A. Breuninger, appealed from decision of the Commissioner of the General Land Office of December 19, 1912, rejecting their applications for allotments of public lands under the 4th section of act of February 8, 1887 (24 Stat., 388).

Applications were as follows, at Wausau, Wisconsin:

03375—For Louis W. Breuninger, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 8, T. 49 N. R. 5 W.

03511—For Mamie Halnore, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 14, T. 48 N., R. 7 W.

03465—For Alexander Besaw, N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 6, T. 49 N., R. 5 W.

03462—Genevieve Milquet, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 8, T. 48 N., R. 7 W.

03445—Alexander G. Grignon, E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 26, T. 47 N., R. 8 W.

03577—William N. Breuninger, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 14, T. 46 N., R. 10 W.

03376—August A. Breuninger, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 8, T. 4 N., R. 5 W.

August 22, 1911, Louis W. Breuninger filed application in the local office stating that he was a member of the Menominee Tribe, 18 years of age, and other applicants made like allegations respecting tribal relation, differing in regard to their ages. They each made affidavit that they had settled upon the particular lands for which each applied, above described. The Commissioner of the General Land Office referred the applications to the Commissioner of Indian Affairs, who reported, December 2, 1912, that these applicants have no rights as members of the Menominee Tribe of Indians. By that the Department infers that the Commissioner of Indian Affairs intended to say that these applicants are not recognized on the roll of the Menominee Tribe as members thereof. The Commissioner of the General Land Office therefore rejected the applications.

The appeal is prepared by August A. Breuninger on behalf of himself and all of the others, but no objection will be taken to lack of regularity in such an instrument prepared by persons of Indian blood seeking rights under the laws of the United States. The applicant, speaking apparently for himself alone, but presumably for all the others, states that their names or those of their immediate ancestors are borne upon the Menominee half-breed roll made in the year 1849 and prior to which time they were recognized members of the Menominee Tribe and participated in the payment in 1849 made to half-breeds at Fort Howard, Wisconsin, under the treaty of that year. Based on this fact, he asserts that they are still as much members of the Menominee Tribe of Indians as they ever were and have never lost their right. He deems it necessary that allotments should be made to them in order that they may acquire the status of citizens of the United States under the act of 1887, *supra*. Otherwise, they respectively will be "a man without a country," and desire to be re-

lieved from this anomalous condition. Section 4, act of February 8, 1887, *supra*, provides:

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.

To be entitled to an allotment under this section the applicant must show himself to be a member of an Indian tribe, that is to say, a member of one of those tribal organizations or "Indian nations." Such an Indian only is entitled to allotment under the 4th section. This is implied by the words that any Indian, for whose tribe no reservation has been provided, may take an allotment. The necessary implication is that he must be a recognized member of the tribe to claim an allotment under the 4th section. Instructions of May 3, 1907, 35 L. D., 549. The privilege of taking an allotment is offered tribal Indians to induce them to abandon the tribal relation and separate themselves from the tribe.

Not every Indian within the United States is a member of an "Indian nation" or tribe. There are many thousands of Indian descent living among the people of the United States who have wholly lost or abandoned their tribal relation and are no longer recognized by the Indian nation as a member of it. The Indian tribes are recognized as independent nations entitled to govern themselves and regulate their domestic affairs in their own way not inconsistent with the laws of Congress, that is to say, they are, in a measure, nations within a nation and subordinate to the supreme government of the United States. There are many Indians in the United States who are not members of an Indian tribe and many descendants of Indians in more or less remote degrees who are recognized as citizens of the United States with all rights of other citizens fully white, native born. The act of February 8, 1887, *supra*, made all such Indians citizens of the United States, providing in section 6:

And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

This section provides for two classes: first, every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or any law or treaty; and a second class, every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe therein and has adopted the habits of civilized life is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians. It follows that if Breuninger and those for whom he acts are, as he claims, descendants of members of the Menominee Tribe, whether ever recognized as members of it or not, and are now living apart from the Indians and have adopted habits of civilized life, they are not men without a country, but are Americans having all the rights of any white citizens of the United States. (Instructions of June 2, 1908, 37 L. D., 219.) Not being members of a tribe strictly speaking, if they settled upon public lands they are in the same situation and governed by the same rules, practice and decisions applicable to white settlers on public lands. (*Lacey v. Grondorf*, 38 L. D., 553). They are required themselves, or, if minors, by their parents, to settle on the lands they claim and make their home there. (*Cynthia Martha Sweeny*, 40 L. D., 148.)

It appears from the statement in the appeal that the tribal right of these applicants is of somewhat dubious character. They, or some of them, have at different times claimed rights at the Haskell Indian School, the Mount Pleasant Indian School and at other places, as Menominee, Cherokee and Ottawa Indians. They are of mixed blood and probably have lost all right to tribal membership with any tribe, but be that as it may, they are entitled as citizens of the United States, if born within the United States and descendants of Indian blood, to full rights of citizens under the act of February 8, 1887, *supra*, if they make settlements and take public lands, so that they are by no means without a country.

The brief contends that, as claimants' ancestors were at one time members of the tribe, they had an interest in tribal property and challenges an answer as to the manner in which it was lost.

The answer to this, in words of Chief Justice Nott of the Court of Claims, in *Journeycake v. Cherokee Nation*, 28 Court of Claims, 281, 302, is:

Communal property is an estate which is neither national nor individual; that is to say, where the fee is vested neither in a person, or number of persons in their own right, nor in a body corporate or politic. . . .

The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies his right of property does not descend; if he

removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners.

In other words, they lost it by ceasing to be members of the Menominee Tribe. The treaty of October 18, 1848, anticipated a removal of the Menominee Indians from Wisconsin to the western territories. Some of the Indians determined not to remove and some persons of mixed blood to remain in Wisconsin and sever their connection with the tribe. To the mixed bloods who intended to remain the fourth article of the treaty provided:

To such persons of mixed blood, and in such proportion to each, as the chiefs in council, and a commissioner to be appointed by the President, shall designate and determine, and as soon after the appropriation thereof as may be found practicable and expedient, forty thousand dollars.

The ancestors of these claimants were on the roll of mixed bloods who participated in this payment. That identified them, not as members of the Menominee Tribe, but as persons who were severing their connection with the tribe and to whom the tribe wished this payment to be made. It was by this separation or severance from the body of the tribe that they lost their rights in tribal property. The decision is affirmed.

GRACE COX ET AL.

Decided September 26, 1913.

INDIAN TRUST ESTATES—HEIRS—ACT OF JUNE 25, 1910.

The act of June 25, 1910, confers upon the Secretary of the Interior exclusive jurisdiction to ascertain and determine who are lawful heirs to Indian trust estates, and he is not bound by decisions or decrees of any court in inheritance proceedings affecting Indian trust lands.

DEPARTMENT OF THE INTERIOR,

OFFICE OF INDIAN AFFAIRS,

Washington, September 19, 1913.

MY DEAR MR. JONES:

In compliance with your request of June 21, 1913, that I let you know what I think about the Grace Cox inheritance case, I wish to say that I have heard arguments for and against the motion and have gone quite thoroughly into the matter myself.

The letter of the Indian Office of March 1, 1913, sets out the law points involved, which were in essence as follows:

That the act of June 25, 1910 (36 Stat., 855), conferred upon the Secretary of the Interior indisputable and exclusive jurisdiction to ascertain the lawful heirs to Indian trust estates.

That this carries with it the power to inquire into personal *status* of decedents and claimants and into any court proceedings, or acts preliminary to proceedings, intended to affect the title or descent of the lands or other restricted property.

That no decree of any court is binding upon the Secretary with respect to these estates, although such decrees and court records may be used as evidence.

That the Secretary is not only empowered to inquire into all phases of a proceeding affecting the domestic *status* of decedent and claimants, but that in his office of guardian of Indian interests it is his duty to so inquire.

That where the primary incidents of an adoption were in operation during the lives of the adopter and the adopted—that is, where the relations of parent and child had actually been entered upon and equities accrued—a liberal construction of the adoption statutes should be had.

As to facts and law the conclusions were, in effect:

That Grace Cox was incurably ill at the time of the alleged adoption.

That her deathbed statements, as related by Mrs. Merrick, whose testimony was undisputed, are sufficient indication of her ignorance of any proceedings or acts on her part with reference to her land.

That she was not competent, physically, mentally or intellectually, to initiate adoption proceedings.

That the parties were not in court, as recited in the decree.

That jurisdictional defects appear in the court record, and that they were of such character as to be fatal to a legal adoption.

That the record contained evidences of imposition and fraud and that the alleged *status* of Jennie Woodhull Cox was therefore not worthy of recognition.

That Grace Cox died unmarried and without issue, her nearest surviving kin being her nephew, Thomas P. Webster and her half-sister, Emily Walker, who became her sole heirs, entitled to equal shares in Grace Cox's estate.

Department decision of May 8, 1913, rejecting Office conclusions, proceeds on the theory that the Secretary of the Interior has judicial authority only to "ascertain" the heirs to an Indian trust estate, accepting without inquiry the *status* of decedents or claimants as already determined in the local courts and applying the descent laws of the State to such *status*. This doctrine with the consequent findings appears on page 3 of the decision, as follows:

In passing upon the validity of an adoption for the purpose of reaching a proper determination of the heirs of an allottee, the Department is bound by the statutes and decisions of the State as to adoption.

The record in this case shows that the adoption was consummated in a court of competent jurisdiction.

The Supreme Court of Nebraska in the case of *Ferguson v. Herr* (64 Nebraska, 663; 94 N. W., 542) states specifically that adoption statutes "being peculiarly beneficial and altruistic" are not to be strictly construed, and that acts of adoption consummated under them are to be upheld "if it be found that there was substantial compliance with the statute."

That there was substantial compliance in the adoption proceedings in question.

That the Department is therefore unable to go behind the adoption decree for the purpose of looking into the merits of the case.

That the status of Jennie Woodhull Cox as the adopted daughter of Grace Cox must be recognized by the Department.

The attorneys in this case made oral argument at a hearing before me and each had reasonable opportunity to present his views. We finally reduced the issues to one of law and one of fact—namely:

Whether or not the Secretary's judicial functions extend to an examination of all acts and conditions leading to a decree; or—to put it in the form used in the decision—

Whether he has power to go behind a court decree to look into the merits of the case—

Whether, having such power, the facts justify recognition of the status conferred on Jennie Woodhull by the decree.

Section 6 of the act of August 7, 1882 (22 Stat., 341, 342), under which the Omaha patents were issued, provides in part—

That the laws of descent and partition in force in the said State (Nebraska) shall apply thereto after patents therefor have been executed and delivered.

The Secretary, in his determination of heirs to Indian estates, must, therefore, apply the laws of descent to the facts disclosed by the evidence. In the case of *Fosburg v. Rogers* (114 Mo., 122), the Court said that the statutes of descent—

must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the *status* is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child or a widow or a husband or what is necessary to constitute the legal relation of husband and wife or of parent and child. The inheritable right of an adopted child does not conflict with the statute of descents. The statute touching adoption points out who are to be considered "children" within the meaning of the statute of descents.

It will be seen therefore that the law of descent is *general* in its terms and merely provides for a *class* of persons, such as brother and sister or husband and wife. The act of June 25, 1910 (36 Stat., 855), gives the Secretary of the Interior the *exclusive* right to decide (as will be more fully shown hereafter), from the evidence adduced by his personal representative in the field, *what persons are to fill* the status of "brother" or "sister," or "child" or "kindred." In the *Grace Cox* case we have one person claiming as a "child" of the decedent, and two other persons denying that claim and contending that they are the decedent's heirs as half-sister and nephew or the "next of kin." The adoption decree, the briefs of the attorneys, the proof of the relationship of the half-sister and the nephew, to the decedent, were all submitted in the form of *evidence* by the special examiner, together with his conclusions for the conclusion of the Office, and the final decision of the Secretary. It should be borne in mind that the departmental procedure, prescribed under the act of June 25, 1910, *supra* and promulgated October 12, 1910, and the duties of the Secretary as judge of the special tribunal created by the act, are not analogous to those of any court, State or Federal. The Secretary is, as it were, counsel for both

plaintiff and defendant as well as judge upon the bench. He does not wait for a case to be brought before him, but on the contrary, institutes the necessary proceedings through his representatives in the field, collects the necessary evidence which may be in the form of decrees of the State courts, *ex parte* or interrogatory affidavits, etc., and renders his decision on legal and equitable grounds. The act defining the scope of his duties specifically provides that his decisions shall be under "*such rules and regulations as he may prescribe.*" It is evident, therefore, that the Secretary is not "bound" by the decisions or decrees of *any court* in inheritance matters affecting Indian trust lands, and that it rests entirely in his discretion, from the evidence submitted, as to the determination of Indian heirs. In this connection attention is invited to the *uniform* decisions of the Federal Courts as to the power and authority of the Secretary of the Interior under the act of June 25, 1910. That act provides in part as follows:

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.

In the case of *Bond v. U. S.* (181 Fed., 613), decided September 12, 1910, the above law was, for the first time, construed by the United States Circuit Court for the District of Oregon. This suit was brought in 1907 by an Indian, Frank Bond, for a decree adjudging him to be the sole heir of one Calapooya Jack, an Indian to whom an allotment of land was made in the Grande Ronde Reservation in 1891, under the allotment act of February 8, 1887. Among other things the court said:

By this act (the act of 1887) the United States retained title to and control over the allotted lands during the trust period, without any right in the allottee to do more than occupy and cultivate them under a paper or writing, showing that at a particular time in the future, unless it is extended by the President, he would be entitled to a regular patent conveying the fee. The property did not cease, by the allotment, to be the property of the United States nor subject to its control, nor did the allottee cease to be a ward of the Government. The title still remained in the Government and the allottee remained in a condition of pupillage and dependency. The determination of all disputes concerning the allotment, its occupancy and possession and the general control of the Indian remained with the Secretary of the Interior. . . .

The title to the land and the consequent control thereof being in the United States, it was subsequently held in the *Smith* case, 194 U. S., 401, and the *Kalyton* case, 204 U. S., 458, that the sole authority for settling all controversies, necessarily including the determination of the title and incidently the right to the possession of the Indian allotments while the same were held in trust by the United States, resided in the Secretary of the Interior and were

not cognizable by any court, either State or Federal, except as such authority has been expressly conferred by act of Congress. . . .

If, however, Congress intended by the act of 1901 to confer upon the courts jurisdiction to determine questions of heirship and descent as it may affect allotted lands during the trust period, it was a jurisdiction which it could take away at any time. This it did by making the Secretary of the Interior a special tribunal to determine such questions and declaring that his decision shall be "final and conclusive," thus making the jurisdiction conferred upon him exclusive, and to that extent operated as a repeal, by implication, of the act of 1901, conferring jurisdiction on the courts. *U. S. v. Tynen*, 11 Wall., 88. *Eckloff v. D. C.*, 135 U. S., 240. And as there is no saving clause, the authority of the court immediately ceased over pending cases. In my judgment, therefore, the court has no jurisdiction of this suit but the question sought to be litigated must be determined by the Secretary of the Interior.

On January 12, 1911, the act received its second construction by the United States Circuit Court in the case of *Pel-Ata-Yakot v. United States* (188 Fed., 387). The court said in part:

The provision is comprehensive, and clearly evinces the intention of Congress to confer exclusive jurisdiction to decide such controversies upon the Secretary of the Interior. That being true, it must be held that by implication the existing act (of 1891) conferring jurisdiction upon the courts was repealed. *United States v. Tynen*, 11 Wall., 88, 20 L. Ed., 153. The repeal thus effected being without any reservation as to pending cases, the present case, although commenced prior to the passage of the repealing act, must fall with the act upon which it rested. *Railroad Co. v. Grant*, 98 U. S., 398, 25 L. Ed., 231. Precisely the same question was involved in *Bond v. United States* (C. C.) 181 Fed., 613, and with the conclusion there reached I am in accord.

The demurrer will be sustained, and the bill dismissed for want of jurisdiction.

The next case to construe the act was that of *Parr v. Colfax* (197 Fed., 302), in the Circuit Court of Appeals, Ninth Circuit, July 15, 1912. The court said:

Indians (Par. 18). Lands—Descent—Determination—Appeal. In a suit to determine heirship to an unpatented Indian allotment of the Umatilla Reservation, the court decided that the equitable title to the land was in the Indian's widow. Eleven days after an appeal taken Act Con. June 25, 1910, c. 431, 36 Stat., 855, was passed, providing that when an Indian allottee dies before expiration of the trust period and before the issuance of a patent, without a will disposing of the allotment, the Secretary of the Interior on notice and hearing, shall ascertain the legal heirs of such decedent, and his decision shall be conclusive. *Held*, that such act deprived the Circuit Court of Appeals of jurisdiction to entertain an appeal from a decree sued out after the statute went into effect, since it deprived the court of jurisdiction to enforce any judgment it might render on such appeal.

* * * * *

The question arises, What is the effect of that statute upon the appeal in this case? The contention is made that it has no application to a case which was begun before the date of the statute. But we do not think so. There is in the statute no clause reserving jurisdiction as to pending cases, and the meaning of the statute is clear that exclusive jurisdiction is given to the Secretary

of the Interior of all cases where an Indian, to whom allotment of land has been made or might thereafter be made dies or had died intestate before the expiration of the trust period and before the issuance of the fee-simple patent. That construction being given, the statute deprived the Circuit Court of jurisdiction to entertain an action such as is here under consideration, and thereby, as a necessary incident, it took away the jurisdiction of this court to entertain an appeal from the decree of the Circuit Court sued out after the statute went into effect, and this for the reason that the act deprives this court of the power to enforce any judgment it may render on appeal.

Under date of May 3, 1913, the Attorney General advised the Department that, in the Indian heirship case of *Harris v. U. S.*, United States District Court, Western District of Oklahoma, the court held that the act of February 14, 1913 (which extended the provisions of the act of June 25, 1910, *supra*, to Oklahoma), divested it of any jurisdiction it may have had to determine the question involved.

It will be seen, therefore, that the act of June 25, 1910, with its declaration that the Secretary's findings shall be final and conclusive, assures to him a judicial capacity and powers more extensive and complete, perhaps, than those exercised by courts having original or appellate jurisdiction. Even without this specific declaration by Congress and the uniform decisions indicated, the Secretary had power to look into all features of a matter coming before him for adjudication. *McKay v. Kalyton* (204 U. S., 458), *U. S. v. Wright* (11 Wall., 648), and other decisions, are declarative of the judicial powers of an executive officer. On August 25, 1911, in *Little Bill v. Swanson* (117 Pac. Rep., 481), the Supreme Court of Washington—

Held, in an action between an Indian claiming as heir of the original patentee to recover the land from the commissioner's grantees, that, irrespective of the adjudication of the probate court, the questions as to heirship and ownership were *res judicata*, since the decisions of the different departments of the United States Government on questions of fact within the scope of their authority are conclusive except on appeal within the departments.

With reference to a liberal construction of statutes of adoption in order to effect their beneficent and altruistic objects, and the case of *Ferguson v. Herr* (64 Nebraska, 663; 94 N. W., 642), cited in the decision, there does not seem to me to be sufficient similarity of facts or issues to give that case a controlling influence here. On looking into *Ferguson v. Herr*, I find that the Fergusons received from the poor-master a destitute child, but failed to set out in their petition to adopt that they wished to confer upon it the *rights of heirship*. The statute itself did not make inheritance an incident of the adoption but provided for a decree "in accordance with the terms and conditions of said consent and petition." The *decree* conferred upon the child rights of heirship. Apparently the child enjoyed for years the benefits of a good home and his *status* as

adopted child of the Fergusons was not questioned during the life of his foster parents. The main issue in the case was thus briefly stated by Commissioner Kilpatrick who delivered the opinion:

The pivotal point, therefore, is, did the probate courts have jurisdiction to decree that the adopted child should possess the rights of a child born in lawful wedlock?

Dwelling on the primary objects of an adoption the Commissioner said:

Adoption statutes are peculiarly beneficent and altruistic. Their purpose is wholly humane. By reason of their enactment much misery, otherwise inevitable, has been prevented; and the happiness of a most permanent and lofty character thereby engendered is practically incalculable. Childless parents have been provided with objects on which to bestow their affections, and orphans have been snugly entrenched in homes of comfort, and even luxury, brought thereby under the most valuable of influences, and perchance, saved from swelling the ranks of the vicious and criminal. . . . As has been aptly stated: "In cases of this kind it is not the duty of the court to bring the judicial microscope to bear upon the case, in order that every slight defect might be enlarged and magnified so that a reason might be found for declaring invalid an act consummated years before; but rather to approach the case with an inclination to uphold such acts, if it is found that there was a substantial compliance with the statute."

It is certainly to be assumed that the Fergusons knew that this decree had been entered, and knew what it provided. Throughout their lives they appear to have been perfectly satisfied therewith. This argues strongly in favor of the conclusion that the probate judge correctly reflected their own intentions in the decree.

An adoption by a citizen Indian can be affected, of course, only through the exercise of his personal right to go into the State court for the purpose, and any claim of this kind to heirship rights in restricted Indian lands must rest on the personal *status* thus bestowed. Ex-officio the Secretary is guardian of all Indian interests. Only on his recognition of the *status* of "child" created by adoption proceedings can an adopted child take restricted Indian property. If it be said that the responsibility declared in the several allotment acts is simply a trusteeship over the lands, and not over the individual Indian, inasmuch as he becomes a citizen of the State and subject to its civil and criminal laws as soon as the trust patent issues in his name, the answer is that the courts have repeatedly held that a personal relation did continue which they define as that of guardian and ward. *U. S. v. Rickert* (188 U. S., 432); *U. S. v. Celestine* (215 U. S., 278). It is only through the Secretary's wise supervision over the lands and investigation into needs and acts of his ward that each individual allotment may become of practical "use and benefit" to its owner. For this reason, if he find after due inquiry into the law and the facts that an alleged adoption was in accordance with law and meritorious; that the

adoptive parent and adopted child each realized appreciable benefit therefrom, or that equities arose through the adoptor's act which could not otherwise be satisfied, he is justified in overlooking minor and innocent irregularities in procedure and, if necessary, to invoke principles of morality and ethics in order to further a humane and beneficent purpose. (*Choctaw Nation v. United States*, 199 U. S., 1, 28.) In such cases only can substantial compliance become of pivotal importance. There is another feature of the decision in *Ferguson v. Herr* to which I desire to call attention. The probate decree in the adoption matter under consideration shows a jurisdictional defect on the face of it, in that the required number of days had not elapsed before the rendition of the decree. The Supreme Court of Nebraska in the case just alluded to, also passed upon the identical point of *proper notice under the statute*, saying:

We doubt whether a court would, after many years had elapsed, during which all parties appeared to have been content with the event of the proceedings, hear the objection that the notice required had not been published in exact compliance with the statute.

Decided on rehearing April 9, 1903, reversing the court's own decree of 1902, in which the District Court's decision was affirmed. (The underscoring is supplied.)

The inference here is plain that if no *unnecessary* time had elapsed after the rendition of the decree, and *two* of the *vitaly interested* parties had *opposed it continually* from the time it issued, the court would have required strict compliance with the statute. In the Grace Cox adoption case prompt steps were taken to annul the decree and extreme dissatisfaction felt by the blood-related heirs as to a stranger taking the whole of an inheritance valued at approximately \$20,000 by the creation of an artificial *status*. In this connection special attention is invited to the case of *Omaha Water Co. v. Schamel* (147 Fed., 502).

In the case of *Tucker v. Fisk* (154 Mass., 574), decided in 1891, the court said:

But for the alleged adoption, the petitioners, who were next of kin to Eliza, would have been her heirs at law. If the adoption proceedings should turn out for any reason to be invalid, they will be entitled to her estate as her heirs at law. They have, therefore, a direct pecuniary interest in the matter, like disinherited heirs in proceedings concerning their ancestor's will or heirs whose ancestor was fraudulently induced to make a conveyance of real estate. No law required that any notice should be given to them before the decree of adoption was passed. They were not parties to the proceeding, had no opportunity to be heard, . . . and are not concluded by the decree.

The circumstances here indicated are very similar to the adoption matter now under consideration. The court also said:

While the primary result of adoption is, like marriage, to create a different relationship and status as to the parties immediately concerned from that which

existed between them before, it may also indirectly affect, then or afterwards, the rights and interests of others; and in principle there would seem to be just as much reason that parties interested should be allowed to contest the validity of a decree of adoption, as that they should be allowed to contest the validity of a divorce and subsequent marriage by one of the divorced parties—

and it was decided that the case should stand for *hearing on the evidence*.

The last adoption case heard in the Supreme Court of Nebraska was that of *Tiffany v. Wright* (79 Nebraska, page 10), May 10, 1907. It is adverted to here merely to show the attitude of the court where *fraudulent acts were performed under color of law*. The case was heard in the District Court on an appeal from a proceeding of adoption, instituted in the County Court of Keya Paha County, Nebraska, in which Tiffany and his wife were declared and adjudged to have legally adopted an infant child, named Minnie Wright. The appeal from the order was prosecuted by the father of the child, Franklin P. Wright, under the provisions of section 801d of the Code, and on a hearing of the cause in the District Court, the appeal was dismissed and the judgment of the County Court affirmed. To reverse this judgment Mr. Wright appealed to the Supreme Court and judgment in his favor was rendered. In concluding the court said:

We are strongly impressed with the view that the pretended adoption proceedings were but a collusion and fraudulent attempt on the part of the Tiffanys to deprive the appellant of the natural guardianship of his child without just cause. The specious pretense of legal guardianship of the child, under which the appellee, Mrs. Tiffany, assumed to consent to the adoption gives the entire proceedings an appearance too clearly resembling an attempted kidnapping under cloak of the law to find favor in this court.

* * * * *

The conclusion is forced upon me by the evidence that the court proceedings were irregular and that the adoption idea did not originate with Grace Cox; that she did not initiate the court proceedings with any understanding of their import; that she was without advice from any other source than those who were to profit by the adoption directly or indirectly; that she was not capable or fitted in any way to assume a mother's responsibility toward any child. Moreover, her affliction made it undesirable to bring a child in close contact with her. Jennie Woodhull had a good home. She needed no other, and Grace Cox had none to offer. The parents in fact never relinquished their control over her. None of the beneficent incidents of an adoption were realized during the life of Grace Cox, and there are good reasons for believing that they could never have been realized. There was, therefore, no consideration of justice, expediency, or equity to be served by the adoption, or by recognition now of the relations declared in the decree.

Grace Cox's estate could easily bear the expense of her care and maintenance during her illness. If no bill therefor was submitted

and settled during the administration of her estate in 1905 an itemized account covering all legitimate charges for sustenance and nursing should now be submitted. Claims for reasonable expenditures of this nature receive favorable consideration in this Office and are paid out of rentals or other funds remaining to the credit of the estate.

I have gone into this matter at some length because there is vital principle in the administration of Indian estates involved, and title to an estate valued at approximately \$20,000 depends upon the conclusion to be reached. My review of the case reveals to me the need for just such authorization as Congress has given in the act of June 25, 1910, and for a liberal construction of his powers under that act in order that our adjudications, while conforming to legal principles and decisions, may not be void of equity or give effect to fraudulent or pernicious purposes.

Grace Cox was possessed at her death of her own allotment and a one-third interest in the allotments of her father, Luther Cox; her brother, Ou-ba-ne Cox; and her brother, Walter Cox, the last named being subject to a life interest in the allottee's wife, Maggie Cox (now Dick). She died unmarried and without issue, survived by her nephew, Thomas P. Webster, and her half-sister, Emily Walker, her nearest kin who, in my opinion, should be held to be her sole heirs under the laws of descent of Nebraska, entitled to share equally in all her property, real and personal; and as such heirs entitled also to all rentals or other moneys accrued therefrom; all as contained in the recommendation in Indian Office letter of March 1, 1913.

The decision of the Department of May 8, 1913, as it appears to me, rests entirely on untenable grounds. It is at variance with long-established principles of the Secretary's authority in Indian matters, and in addition to effectuating, in this instance, a questionable transaction, would, if sustained, materially limit the Secretary's powers under the act of June 25, 1910, and interfere with a consistent and strictly upright administration of Indian estates. I therefore recommend that it be vacated; that the doctrine of complete jurisdiction in the Secretary herein indicated, be adhered to; that the alleged *status* of adoptive parent and adopted child, as between Grace Cox and Jennie Woodhull, be not recognized; and that the sole heirs to the restricted estates of Grace Cox, Luther Cox, Ou-ba-ne Cox, and Walter Cox and their respective shares in each estate be declared as follows:

LUTHER COX:

Thomas P. Webster, grandson-----	$\frac{1}{2}$
Emily Walker, daughter-----	$\frac{1}{2}$

OU-BA-NE COX:

Thomas P. Webster, grandson of father-----	$\frac{1}{2}$
Emily Walker, daughter of father-----	$\frac{1}{2}$

WALTER COX:

Thomas P. Webster, grandson of father.....	1/2
Emily Walker, daughter of father subject to an estate for life in Maggie Cox (now Dick), surviving wife.....	1/2

GRACE COX:

Thomas P. Webster, nephew.....	1/2
Emily Walker, half-sister.....	1/2

Very truly yours,

CATO SELLS, *Commissioner.*

HON. A. A. JONES,

First Assistant Secretary,

Department of the Interior.

DEPARTMENT OF THE INTERIOR,

September 26, 1913.

The decision of the Department of May 8, 1913, in the inheritance cases of Grace Cox, Luther Cox, Ou-ba-ne Cox, and Walter Cox, deceased Omaha Indians, of Nebraska, is hereby vacated.

The recommendations of the Commissioner of Indian Affairs of September 19, 1913, are hereby approved; and I find that the sole heirs to each estate and their respective shares therein under the laws of descent of Nebraska, are as follows:

LUTHER COX:

Thomas P. Webster, grandson.....	1/2
Emily Walker, daughter.....	1/2

OU-BA-NE COX:

Thomas P. Webster, grandson of father.....	1/2
Emily Walker, daughter of father.....	1/2

WALTER COX:

Thomas P. Webster, grandson of father.....	1/2
Emily Walker, daughter of father, subject to an estate for life in Maggie Cox (now Dick), surviving wife.....	1/2

GRACE COX:

Thomas P. Webster, nephew.....	1/2
Emily Walker, half-sister.....	1/2

A. A. JONES,

First Assistant Secretary.

BELLE H. FEREE.

Decided September 27, 1913.

CANCELLATION OF ENTRY—MAY NOT BE QUESTIONED BY STRANGER.

Only the entryman himself, or some one claiming under him, may complain of the action of the land department in cancelling an entry, and a stranger will not be heard to question it.

JONES, *First Assistant Secretary:*

Belle H. Feree appealed from decision of the Commissioner of the General Land Office of November 6, 1912, rejecting her application

for desert-land entry for lots 1, 2, 3 and 4, Sec. 2, T. 16 S., R. 24 E., Roswell, New Mexico.

April 20, 1912, Feree filed application which the local office rejected for conflict with homestead entry of Joseph G. Ottjes made October 19, 1911, then of record in the local office. The Commissioner affirmed that action. The appeal contends that Ottjes's entry was improperly allowed and states the facts to be that February 17, 1909, one Homer B. Frasier made desert-land entry for these tracts, which he assigned April 28, 1910, to one Hurst who in turn assigned it September 14, 1910, to one Hughes, both of which assignments were filed in the local land office July 8, 1911. It is alleged in the appeal that no notice was given to Hughes, the last assignee, of proceedings instituted against same, and that such desert-land entry was therefore inadvertently canceled on September 19, 1911. From these facts Feree's appeal argues that her application should have been allowed because Ottjes's entry was improperly allowed at a time when the former entry should be regarded as in force.

The appeal cites many cases in the earlier land decisions, the last being that of *Castello v. Bonnie* (23 L. D., 162), to the general effect that a cancellation made on report of a special agent without opportunity of the entryman to be heard is void.

Admit such to be the fact without explanation or reservation, then Feree's application was properly rejected because Frasier's desert-land entry, later assigned to Hughes, must be regarded as still in force, and as though never canceled. This would necessitate affirmance of the action in rejecting Feree's application. The argument carried to its legitimate result refutes itself.

It will be seen, however, by referring to the cases cited, that language of this kind has never been used by the Department except upon an application by the entryman himself or his assignee seeking reinstatement on an entry improperly canceled.

The cancellation of an entry is not a void act. It leaves the record title unencumbered in the local office subject to entry by the first legal applicant. No one can question it except the one wronged whose prior entry was canceled without proper notice or hearing. It is not for a stranger to the former entry to become champion of such former entry in which he has no interest. If errors have intervened and an entry has been erroneously canceled, no one can question that cancellation but the aggrieved party. The question of error or not is one between the former entryman and the Government. As against all the world but him the cancellation said to have been inadvertent was good and as against all but Hughes, Ottjes's entry is good. Feree has no reason to complain of it and can take no advantage of any errors that may have supervened. The decision appealed from is affirmed.

FRANK RIDER.*Decided October 14, 1913.***COAL DECLARATORY STATEMENT—UNSURVEYED LAND.**

The coal land laws authorize filings and entries thereunder only upon surveyed lands; and a coal declaratory statement for a tract of unsurveyed land described by metes and bounds must be rejected.

JONES, First Assistant Secretary:

This is an appeal by Frank Rider from the decision of the Commissioner of the General Land Office, dated June 6, 1911, affirming the rejection of his coal declaratory statement.

December 28, 1910, the appellant presented at the local land office a formally executed coal declaratory statement for a tract of land described by metes and bounds, situated 23 miles south of the town of Saco, Montana, in the Glasgow land district. On the same day the local officers rejected said declaratory statement, for the reason that the land was unsurveyed and not subject to coal filing. Upon appeal, your office affirmed said action.

Section 2347, Revised Statutes, governing coal-land entries, provides for entry "by legal subdivisions."

Section 2349, Revised Statutes, with respect to filing of a coal declaratory statement, in part provides as follows:

When the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office.

Coal-land filings and entries can be allowed only after the land has been surveyed.

The rejection of the proffered declaratory statement was correct, and the decision appealed from is affirmed.

STATE OF IDAHO.*Decided October 27, 1913.***CAREY ACT SEGREGATION—WATER RIGHTS.**

The land department has authority to require a State to show that water is available and has been duly appropriated for the reclamation of all public lands sought to be segregated and acquired under the Carey Act; but has no authority to require relinquishment of water appropriation under State laws in excess of the amount necessary to irrigate the lands segregated under that act, all questions concerning such appropriation being within the jurisdiction of the State.

JONES, First Assistant Secretary:

August 20, 1909, the State of Idaho filed its Carey selection list No. 39, in the Hailey, Idaho, land office, asking the segregation of 20,242.73 acres of land.

July 14, 1910, a special inspector of the Department reported that the lands in question are all desert in character, and that in his opinion the water supply relied upon will be insufficient to reclaim the area applied for and not adequate for more than 8,000 acres of land.

The Commissioner of the General Land Office, under date of August 8, 1910, required the State to relinquish 12,242.73 acres of the area applied for or show cause why the application should not be rejected. The State finally consented to the elimination of the areas in question, but upon further consideration of the showing made as to the water supply, the Geological Survey and the General Land Office reached the conclusion that in view of the fact that as all of the natural flow of the streams relied upon had been appropriated by others, water measurements should be had to determine the approximate amount of flood waters available for storage for this project. Accordingly, by letter of July 12, 1911, the Commissioner allowed the State until January 1, 1912, to take measurements and submit evidence thereof.

Measurements were taken covering the period between March 21 and September 16, 1911, and upon consideration of the record thereof the Director of the Geological Survey reported that they are of little value because the record does not extend over the period during which most of the water for the project must be collected, namely, the nonirrigation season, and that, so far as he is able to ascertain from the data now before the Department, the water supply available is sufficient "for the irrigation of a few hundred acres at most." The Commissioner of the General Land Office thereupon held the application for rejection.

The State has appealed from this action, alleging that it is entitled to the approval of the segregation. It also complains of the requirement contained in Commissioner's letter of June 3, 1912, that the State release, relinquish, and abandon its water permit for the irrigation of lands over and above the 8,000 acres heretofore mentioned. It is contended also in the appeal that the Department should have accepted the opinion of the inspector that water was available for the reclamation of 8,000 acres of land.

The Department is of opinion that the action in requiring the company contracting with the State to relinquish its water appropriation for water for all lands in excess of 8,000 acres was unwarranted, the matter of acquisition of water rights being one within the jurisdiction of the State of Idaho, and it being no concern of this Department whether appropriations or attempted appropriations of water in excess of the amount necessary to irrigate the lands segregated under the Carey Act are allowed and maintained by the State. In other words, the United States is concerned in securing

evidence that water is available and has been duly appropriated for the reclamation of all public lands sought to be segregated and acquired under the Carey Act and not with additional or other appropriations of water made under State laws.

Upon consideration of the entire record, however, I am of the opinion that the segregation of the 8,000 acres in question would not be warranted upon the showing made by the State, as, taking into consideration the fact that this project must depend upon stored waters, the natural flow of the streams being practically all appropriated, the Department would not be justified in segregating the public lands until it appears that a sufficient supply of flood water can be secured and stored for their reclamation. This data can be secured by the State by measuring the flow of the streams during the year, but not by measurements conducted during only a part of the year, and particularly during the irrigation season. The action of the Commissioner in refusing to recommend the approval of the segregation upon the data submitted is therefore affirmed.

However, in view of the circumstances attending the case and of the repeated contention of the State that a sufficient supply of flood water will be found to be available, the State will be allowed sixty days from notice within which to amend its present application for segregation of the lands for a period of ten years, under the provisions of section 4 of the act of August 18, 1894 (28 Stat., 372), to an application for the temporary withdrawal of the lands under the provisions of the act of March 15, 1910 (36 Stat., 237), pending such further investigation and measurements as may be necessary to enable the State to present a properly supported application for segregation. This application will be allowed if the State will undertake, during the period of temporary withdrawal, to make such measurements of the flow of the streams in question during the entire year as will adequately apprise this Department of the amount of water available for the irrigation of the lands involved. The Commissioner of the General Land Office will so advise the State, and in the absence of such an application for amendment within sixty days from notice, the application for segregation No. 39 will be finally rejected.

INMAN v. McCAIN.

Decided September 30, 1913.

RELINQUISHMENT BY ENTRYMAN—RIGHT OF DESERTED WIFE.

Where a homestead entryman executes and delivers to another a relinquishment of his entry, with a view to deserting and dispossessing his wife, who is domiciled upon the land, the wife, upon the filing of the relinquishment, is entitled to make entry of the land in her own behalf as the deserted wife of the entryman, with credit for residence from the date of her settlement thereon with her husband.

JONES, *First Assistant Secretary*:

On February 13, 1908, George Inman made homestead entry for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 3, and W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 10, T. 10 N., R. 30 E., N. M. M., Tucumcari, New Mexico, land district.

On September 29, 1910, George W. McCain filed Inman's relinquishment of said entry together with his own homestead application for the land embraced therein together with other contiguous land. McCain's application was rejected by the local officers because of certain informalities therein, and on October 3, 1910, Susan Inman, wife of said George Inman, filed her homestead application for the land formerly embraced in her husband's entry, and, on November 15, 1910, she filed a protest against the allowance of McCain's application. The local officers rejected the contest for insufficiency and suspended her application pending final determination of McCain's application. Susan Inman appealed to the General Land Office from the action of the local officers and McCain perfected his homestead application, which was then suspended by the local officers pending Mrs. Inman's appeal. In her protest against McCain's application, Mrs. Inman alleged that her husband relinquished his entry without her knowledge or consent and immediately deserted her and left the country; that she had resided with her husband continuously since the date of entry upon the land relinquished, and she asked to be allowed to make entry for the land in her own right as a deserted wife.

On February 12, 1912, the Commissioner directed a hearing upon Mrs. Inman's protest. McCain, having filed answer to the protest, asserting that he bought the relinquishment of Inman's entry with the knowledge and consent of Mrs. Inman, a hearing was had before the local officers in July, 1912, at which both parties appeared with counsel and submitted testimony.

Upon consideration of the testimony the register rendered decision in favor of Mrs. Inman, while the receiver recommended that her protest be dismissed.

On October 22, 1912, the Commissioner of the General Land Office affirmed the action of the receiver and reversed that of the register, and Mrs. Inman has appealed to the Department.

The testimony is fully and fairly stated in the decision appealed from and need not, therefore, be repeated herein. Mrs. Inman testified emphatically that she neither had knowledge of nor consented to the relinquishment of her husband's entry, while McCain and one Manney testified with equal positiveness that she was a party to the sale of the relinquishment to McCain. It is not disputed that immediately upon effecting the sale of the relinquishment, Inman abandoned his wife and left the country, pursuant to a previously formed plan.

The Department can not agree with the suggestion in the decision of the Commissioner of the General Land Office that a homestead entryman has the right to relinquish a homestead entry without the knowledge of his wife under such circumstances as are here disclosed. The law grants the right of homestead to the head of a family. Ordinarily, the wife, not being the head of the family, is denied the right of homestead, but to compensate, in a measure, for this, the entry devolves upon the wife in the event of the death of the husband entryman. The Department has uniformly held that where a family is domiciled upon the land under a homestead entry, it is not within the power of the husband to relinquish the entry, abandon his family and deliver a relinquishment of entry to another with the view of dispossessing his abandoned family. Under such conditions, it is held that upon the filing of the relinquishment, the wife, domiciled upon the land, has the right in her own behalf as a deserted wife to make entry for the land.

The sole question presented in this case is, did the wife consent or participate in the sale of the relinquishment to McCain? Under the circumstances disclosed, it is the judgment of the Department that it was incumbent upon McCain to show by fair preponderance of the testimony that Mrs. Inman had, by her conduct, estopped herself from asserting her own claim to the tract in controversy. Upon this record the Department is unable to decide that McCain has discharged the burden thus laid upon him. It is true that McCain's statement of what occurred with reference to the sale of the relinquishment is corroborated by another witness, while Mrs. Inman's is not; but the local officers, who heard the testimony in the case and by noting the demeanor of the witnesses, were best able to pass upon their credibility, differed in their conclusions as to the weight of the testimony. The Department, thus deprived of their concurring decisions, must, therefore, hold that McCain has not satisfactorily shown that Inman's relinquishment was with knowledge and consent of the wife, who has, under the law, a claim to the land superior to that of any other person in her capacity as a settler and a deserted wife, the head of a family.

The decision appealed from is, accordingly, reversed, the application of McCain rejected, and that of Mrs. Inman allowed. She will be entitled to claim the benefit of her residence upon the land from the date of her settlement thereon with her husband.

INMAN v. McCAIN.

Motion for rehearing of departmental decision of September 30, 1913, 42 L. D., 507, denied by First Assistant Secretary Jones, December 10, 1913.

BENJAMIN CHAINEY.

Decided October 9, 1913.

RESIDENCE—PERSONAL PRESENCE.

The homestead law contemplates that an entry thereunder shall constitute the entryman's home and family homestead to the exclusion of a home elsewhere; and mere personal presence of the entryman upon the land does not meet the requirements of the law as to residence where he maintains a family residence elsewhere.

HOMESTEAD ENTRY—TIMBERED LANDS.

One who makes homestead entry of land so heavily timbered that the greater part is not subject to cultivation except at a very great expense for clearing, assumes a burden commensurate with such undertaking to establish his *bona fides* in making the entry for homestead purposes.

JONES, *First Assistant Secretary:*

Appeal is filed by Benjamin Chainey from decision of June 12, 1912, of the Commissioner of the General Land Office affirming the action of the local officers and holding for cancellation his homestead entry made June 7, 1909, based upon alleged settlement June 29, 1903, for the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 26, T. 47 N., R. 3 E., B. M., Coeur d'Alene, Idaho, land district, on which final proof was submitted October 5 and certificate issued October 15, 1909, for the stated reason, as charged in adverse proceedings directed April 7, 1910, that said Chainey had not established and maintained residence, in compliance with law, on said land.

These lands were temporarily withdrawn for forestry purposes March 21, 1905, and were reserved by proclamation of November 6, 1906 (34 Stat., 3256), which excepted therefrom prior valid claims.

The township plat of survey of these lands was filed June 7, 1909, when this entry was made.

Said proceedings included a charge, also, that the entry was not made for a home but for speculating purposes, and hearing was duly had, the Government being represented by a special agent and by an assistant solicitor for the Department of Agriculture and the entryman appearing in person with counsel. Upon the testimony presented, concurring decisions were rendered, as above stated.

The Department has carefully reviewed this record and concurs in the conclusion reached upon the entryman's compliance with law as to residence on this entry. The facts are fully stated in the decisions of the local officers and the Commissioner and need not be stated herein. The entryman's improvements appear to be considerable in value but his cultivation of the lands was meagre. His personal residence on the land was during the summer season mostly. The remainder of the period covered by the proof was spent 100 miles away at the town of Coeur d'Alene where he maintained, during the

homestead period, both a business, in which he was engaged, and a residence for himself and his family, consisting of a wife and nine children, who maintained no residence on this land prior to 1907, except that his wife was there for a few days in the year 1906, and during the three years next prior to the submission of proof were on the land for a few months only during the summer time. It is manifest the entryman did not maintain a home on this land to the exclusion of a home elsewhere, as required by the homestead law. The personal presence on an entry of the entryman is not alone sufficient to comply with the requirements of the homestead law when he maintains a family residence elsewhere. The homestead law contemplates that the entry shall constitute the entryman's home and family homestead. Furthermore, an entryman who makes entry for lands which are so heavily timbered as to be for the much greater part not subject to cultivation, except at very great expense for clearing the land, has the burden commensurate to such undertaking of establishing his *bona fides* in making such an entry for homestead purposes under such extremely adverse conditions. Under all the circumstances shown in this case, it is the confident conclusion of the Department that this entryman did not make entry in good faith for the purpose of making of this land an agricultural home and homestead for himself.

The decision appealed from is accordingly affirmed.

BENJAMIN CHAINEY.

Motion for rehearing of departmental decision of October 9, 1913, 42 L. D., 510, denied by First Assistant Secretary Jones, December 13, 1913.

THE THREE-YEAR HOMESTEAD LAW.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, November 1, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: The following instructions under the "three-year homestead law" of June 6, 1912 (37 Stat., 123), will supersede those contained in Circular No. 208, dated February 13, 1913 (41 L. D., 479). Paragraphs 5 and 6, relating to reduction of cultivation, are identical with the instructions approved by the Acting Secretary of the Interior on

September 6, 1913 [42 L. D., 343], promulgated by Office Circular No. 269, dated September 15, 1913.

RESIDENCE.

(1) By the act of June 6, 1912 (37 Stat., 123), the period of residence necessary to be shown in order to entitle a person to patent under the homestead laws is reduced from five to three years, and the period within which a homestead entry may be completed is reduced from seven to five years. The three-year period of residence, however, is fixed not from the date of entry but "from the time of establishing actual, permanent residence upon the land." It follows as a consequence that credit can not be given for constructive residence for the period that may elapse between the date of the entry and that of establishing actual, permanent residence upon the land.

(2) Honorably discharged soldiers and sailors of the War of the Rebellion and also of the Spanish War and the suppression of the insurrection in the Philippines, entitled to claim credit under their homestead entries for the period of their military service, may do so after they have "resided upon, improved, and cultivated the land for a period of at least one year" after they shall have commenced their improvements. This is the requirement of section 2305 of the Revised Statutes, which is in nowise affected by the act of June 6, 1912. Respecting the cultivation to be required under said section, it has been heretofore administered as requiring such showing as ordinarily applies in other cases preliminary to final proof, and, as the new law exacts showing of cultivation of at least one-eighth of the area before final proof, a showing should be exacted of a like amount for at least one year before final proof.

CULTIVATION.

(3) The law requires that the claimant "cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth beginning with the third year of the entry, and until final proof, except that in the case of entries under section 6 of the enlarged-homestead laws, double the area of cultivation herein provided shall be required, but the Secretary may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation."

(4) The enlarged-homestead acts here referred to (35 Stat., 639; 36 Stat., 531) authorize entries of 320 acres of lands designated for this purpose by the Secretary of the Interior, and require proof "that at least one-eighth of the area embraced in the 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." The residence provisions of the homestead law (and now of the new act) were applicable to these entries, with an exception relating to certain lands in the States of Utah and Idaho, with respect to which the requirement of residence is omitted, and in lieu thereof the entryman is required to cultivate twice the area required under the general provisions of the act. The new law reduces the required area of cultivation to not less than one-sixteenth during the second year of the entry and not less than one-eighth during the third year of the entry, and until final proof, except that in the case of entries under section 6 of the enlarged-homestead laws, where residence is not required, one-eighth of the area of the entry must be cultivated during the second year and one-quarter beginning with the third year of the entry, and until final proof. In other words, the effect of the new law with respect to the enlarged-homestead acts, except in instances where residence is not required, is generally to reduce by one-half the amount of cultivation which had previously been required. Further information with respect to the requirements for final proof in the case of an original entry under section 2289, United States Revised Statutes, to which an additional entry under section 3 of said enlarged-homestead acts has been made, may be found in Circular No. 218, dated March 17, 1913 (42 L. D., 345), containing instructions under the act of February 11, 1913 (37 Stat., 666).

REDUCTION OF CULTIVATION.

(5) The Secretary of the Interior is authorized, upon a satisfactory showing therefor, to reduce the required area of cultivation. The homestead laws were enacted primarily for the purpose of enabling citizens of the United States "in good faith to obtain a home" and the provision of the statute in regard to reduction in the required area of cultivation will not be permitted to so operate as in any manner to relax the rule that the entryman must so reside upon, use, occupy, cultivate, and improve the tract of land entered by him as to satisfactorily show that he in good faith at the time of such entry intended to make the land his bona fide home and that it has been his home to the date of final proof. However, if the tract of land entered is so hilly or rough, the soil so alkaline, compact, sandy, or swampy, the precipitation of moisture so light as not to make cultivation practicable to the extent of the required amount, or if the land is generally valuable only for grazing, a reduction in the area of cultivation may be permitted. The personal or financial disabilities or misfortunes of the entryman existing at the time of entry will not be considered sufficient cause for reduction in the area of cultivation; but if after entry and actual settlement,

through circumstances which at the time of entry could not reasonably have been foreseen, the entryman has met with misfortune which renders him reasonably unable to cultivate the prescribed area, upon satisfactory proof thereof at the time of making final proof, a reduction in area of cultivation may be permitted during the period of disability following such misfortune, provided notice of such misfortune and the nature thereof shall be submitted under oath within 60 days after the occurrence thereof to the register of the land office of the district in which the land is situated. Tilling of the land or other appropriate treatment for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year will be deemed cultivation within the terms of the act where that manner of cultivation is necessary or generally followed in the locality.

No reduction in area of cultivation will be permitted on account of expense in removing the standing timber from the land. If lands are so heavily timbered that the entryman can not reasonably clear and cultivate the area prescribed by the statute, such entries will be considered speculative and not made in good faith for the purpose of obtaining a home.

The authority to make reduction in the prescribed area of cultivation relates to enlarge homestead entries as well as ordinary homesteads made under section 2289, Revised Statutes, and applications for reduction of area of cultivation under enlarged homestead entries will be made or refused in accordance with the provisions of this paragraph.

PROCEDURE TO OBTAIN A REDUCTION IN AREA OF CULTIVATION.

(6) A showing should be made in each case as to the difficulties attendant upon the cultivation of that particular tract. To this end the entryman should show in detail the special physical conditions of the land which he believes entitles him to an order of reduction, describing its topography, whether hilly or level; its quality and character as adapted to cultivation, whether light or heavy, sandy, loamy, rocky, or alkaline, together with the prevalent climatic conditions in the matter of annual snows or rains, as affording sufficient moisture for the production of crops one year with another. The presence or absence of springs or permanent streams on or in the immediate vicinity of the land should be shown. The natural products of the land without tillage, and the effect of tillage on the soil, should be shown, as well as the use to which the land is best adapted. It is desirable that the entryman should, wherever practicable, know in advance what, if any, reduction can properly be made, and, therefore, as a general regulation governing applications for reduction in

area of cultivation, it is directed that all entrymen who desire a reduction shall file applications therefor during the first year of the entry and upon forms to be prepared and furnished by the Commissioner of the General Land Office and distributed through the land offices, which will be forwarded, *without action*, to the Chief of the Field Division, and report made in accordance with Circular 195, on Form 4-007b.

Applications for reduction in area of cultivation will be acted upon by the Commissioner of the General Land Office, who may in appropriate cases defer action until final proof, but his decision in granting or refusing applications for reduction in area shall be subject to review, upon appeal, by the Secretary of the Interior.

EXCEPTIONS.

(7) The requirements as to cultivation do not apply to entries made for lands within a reclamation project, under the act of June 17, 1902 (32 Stat., 388), nor to entries made in the State of Nebraska under the act of April 28, 1904 (33 Stat., 547), commonly known as the Kinkaid Act. In such instances the existing requirements as to cultivation made by the acts named continue in force.

ENTRIES NOT REQUIRING RESIDENCE.

(8) In all entries made under section 6 of the enlarged-homestead acts (35 Stat., 639, and 36 Stat., 531), under which residence is not required, the entryman must cultivate at least one-eighth of the land in the second year after date of the entry and one-fourth of it during each year thereafter until he makes proof, and the existing period of cultivation required under said acts is not reduced by the act of June 6, 1912.

PERMISSIBLE ABSENCE FROM THE HOMESTEAD.

(9) The law clearly requires that the homestead entryman shall establish an actual residence upon the land entered within six months after the date of entry. Where, owing to climatic reasons, sickness, or other unavoidable cause, residence can not be commenced within this period, the Commissioner of the General Land Office may, within his discretion, allow the settler such additional period, not exceeding in the aggregate 12 months, within which to establish his residence. It is not meant thereby that because, for the reasons stated, residence may not be commenced within the six-month period, that the settler is authorized to delay the commencement of residence beyond the required period and after the cause no longer exists.

An application for such extension must, as a general rule, be filed in the land office for the district in which the land lies within six months from date of entry. It must be in the form of an affidavit, corroborated by two persons having actual knowledge of the facts, and should set forth in detail the grounds upon which extension of time is asked, including a statement as to the probable duration of the hindering causes and when residence may reasonably be expected to be established. The oath of the applicant and witnesses may be executed before any officer authorized to administer oaths and having a seal of office.

These applications will be forwarded by the local officers to the General Land Office by special letter and will be acted upon with as little delay as possible. Should an extension of time be granted it will relate back to the date of entry and protect the entryman from contest on the ground of failure to establish residence within the usual six months unless it shall be further charged and shown that the order of extension was fraudulently obtained. Should a contest be filed against a homestead entry solely on the ground of failure of the entryman to establish residence within six months from date of entry and the records show that an application for extension of time is pending before the General Land Office the local officers will suspend action on the contest pending the disposition of the application for extension, but should the further charge be made that entryman has materially misrepresented the facts in connection with his application for extension the local officers will promptly report the contest to the Commissioner of the General Land Office and wait instructions.

The failure of an entryman to apply for an extension of time will not forfeit his right to show, in defense of a contest, the existence of conditions which might have been made the basis for such application.

(10) After the establishment of residence the entryman is permitted to be absent from the land for one continuous period of not more than five months in each year following, provided that upon absenting himself for such period he has filed in the local land office notice of the beginning of such intended absence. He must also file notice with the local land office upon his return to the land following such period of absence. A second period of absence immediately following the first period, even though the two periods occur in different years reckoned from the date of the establishment of actual residence, will not be recognized, as it was never contemplated that an absence was permissible in excess of six months, in view of the specific provisions for contest provided for in section 2297 of the Revised Statutes. There should be at least some substantial period of actual, continuous residence upon the land separating the periods of absence

accorded under the statute. Only those protracted absences with respect to which notice has been given as required by the statute will be respected either in case of contest or on final proof. This law does not repeal or modify the acts of March 2, 1889 (25 Stat., 854), June 25, 1910 (36 Stat., 864), and April 30, 1912 (37 Stat., 105).

COMMUTATION.

(11) The privilege of commutation after 14 months' actual residence, as heretofore required by law, is unaffected by this legislation, excepting that a person commuting an entry subject to said act must be at the time a citizen of the United States. Commutation proof can not, however, be made on entries under the enlarged-homestead laws, the reclamation act, or on entries made under any other homestead law which prohibits commutation. As a rule of administration it will be required that upon submission of commutation proof in support of an entry made subject to the act of June 6, 1912, the cultivation of not less than one-sixteenth of the area embraced in the entry must be shown, that being the least amount of cultivation contemplated by Congress in connection with entries made under said act, unless the area capable of cultivation has been shown to be less than that amount, and for that reason the specific requirement made by the statute has been reduced.

DEATH OF THE HOMESTEAD ENTRYMAN.

(12) Where the person making homestead entry dies before the offer of final proof those succeeding to the entry in the order prescribed under the homestead law, in order to complete such entry, must show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land. It follows as a consequence that where the entryman had not complied with the law in all respects prior to his death the entry will be forfeited and, upon proof thereof, such entry will be canceled. This will apply to all entries made under the new law.

EFFECT OF NEW LAW ON ENTRIES MADE PRIOR THERETO.

(13) An entryman whose entry was made prior to June 6, 1912, may avail himself of the provisions of section 2291 as amended; however, if he desires to submit proof in accordance with the law under which his entry was made he may do so and need not have filed the election provided for in the last proviso to the amended section, the necessity for such election having been abrogated by a

provision in the act making appropriations for sundry civil expenses of the Government, approved August 24, 1912 (37 Stat., 455), but he must, in his published notice, state the law under which his proof is to be offered. Final proof under the new law must be made within five years from date of entry.

Under the act of March 4, 1913 (37 Stat., 912, 925), a person qualified to make homestead entry who, prior to June 6, 1912, settled upon unsurveyed lands subject to such entry, and makes timely assertion of such settlement after the filing of the plat of survey, may elect to perfect his entry under the act of June 6, 1912, or under the law existing at the time settlement was initiated, notwithstanding that entry may be made after June 6, 1912.

**RULE PRESCRIBED RESPECTING CULTIVATION TO BE SHOWN ON ENTRIES
MADE PRIOR TO, BUT ADJUDICATED UNDER, NEW LAW.**

(14) It may be that such prior entryman can not show that he had cultivated one-sixteenth of the area embraced in his entry beginning with the second year of the entry and one-eighth beginning with the third year of the entry and until final proof, although he may have had during the year preceding his offer of proof one-eighth or more of the area embraced in his entry under actual cultivation, and may have cultivated one-sixteenth during the previous year, thus accomplishing the amount of cultivation required as a general rule under the new law, but not in the order and for the particular years required by that law.

(15) Under the law the Secretary of the Interior is authorized to reduce the required area of cultivation, and pursuant thereto has prescribed the following rule to govern action on proof submitted under the new law where the homestead entry was made prior to June 6, 1912:

Respecting cultivation necessary to be shown upon such an entry, in all cases where, upon considering the whole record, the good faith of the entryman appears, the proof will be acceptable if it shows cultivation of at least one-sixteenth for one year and of at least one-eighth for the next year and each succeeding year until final proof, without regard to the particular year of the homestead period in which the cultivation of the one-sixteenth was performed.

**TIME FOR PROOF ON ENTRIES MADE BEFORE, BUT ADJUDICATED UNDER,
NEW LAW.**

(16) The new law also requires that the proof shall be made within five years from date of entry, and if the entry is to be administered under that law the department is not authorized to extend the period within which proof may be made, but when submitted after that time,

in the absence of adverse claims, the entry may be submitted to the board of equitable adjudication for confirmation.

(17) Respecting entries heretofore or hereafter made requiring payment for the land entered in annual installments extending beyond the period of residence required under the new law, the homesteader may make his proof as in other cases, but final certificate will not be issued until the entire purchase price has been paid.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary.

AN ACT To amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States relating to homesteads.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States be amended to read as follows:

"SEC. 2291. No certificate, however, shall be given or patent issued therefor until the expiration of three 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 himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years 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: *Provided*, That upon filing in the local land office notice of the beginning of such absence the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence as now required by law must be shown, and the person commuting must be at the time a citizen of the United States: *Provided*, That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death, and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land: *Provided further*, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry,

and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in the case of entries under section six of the enlarged-homestead law double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: *Provided*, That the above provision as to cultivation shall not apply to entries under the act of April twenty-eighth, nineteen hundred and four, commonly known as the Kinkaid Act, or entries under the act of June seventeenth, nineteen hundred and two, commonly known as the reclamation act, and that the provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required: *Provided*, That the Secretary of the Interior shall, within sixty days after the passage of this act, send a copy of the same to each homestead entryman of record who may be affected thereby by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this act."

"Sec. 2297. If at any time after the filing of the affidavit as required in section twenty-two hundred and ninety, and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then, and in that event, the land so entered shall revert to the Government: *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: *And provided further*, That where there may be climatic reasons, sickness, or other unavoidable cause, the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe."

Approved, June 6, 1912. (37 Stat., 123.)

NELLIE E. DEVLIN.

Decided November 3, 1913.

BOUNTY LAND SCRIP—ACT OF DECEMBER 13, 1894.

Bounty land scrip issued under authority of the act of August 31, 1852, in exchange for unsatisfied Virginia military bounty land warrants, is within the purview of the act of December 13, 1894, providing for the location and satisfaction of "unsatisfied military bounty land warrants under any act of Congress."

JONES, First Assistant Secretary:

On September 13, 1911, Nellie E. Devlin made timber and stone entry for lots 12 and 13, Sec. 7, T. 59 N., R. 11 W., and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 12, T. 59 N., R. 12 W., 4th P. M., Duluth, Minnesota, land district, containing 151.01 acres, tendering in pay-

ment therefor, under the act of December 13, 1894 (28 Stat., 594), a military bounty-land warrant for 160 acres, issued to Alfred B. Light for his services as a corporal in the Mexican War, and Revolutionary bounty land scrip for 142 6/27 acres, issued to Richard A. Cook as one of the owners of a Virginia military bounty land warrant, under the provisions of the act of August 31, 1852 (10 Stat., 143), in lieu of a duplicate Virginia military bounty-land warrant granted by the State of Virginia to William Cooper for service as gunner in the Virginia Infantry during the Revolutionary War.

The Commissioner of the General Land Office, in his decision of October 19, 1912, rejected the tender of the scrip issued to said Cook because it did not fall under the category of "unsatisfied military bounty-land warrants under any act of Congress," as contemplated by the act of December 13, 1894, *supra*, for the reason that it was predicated upon a warrant issued by the Commonwealth of Virginia and not upon any act of Congress. After deciding that it was not predicated upon any act of Congress, the Commissioner, in the next paragraph of his decision, holds that the scrip was issued under authority of the act of August 31, 1852, *supra*, in exchange for an unsatisfied Virginia warrant.

Scrip, issued under the act of 1852, is, in form and substance, a land warrant locatable on any public land of the United States "subject to sale at private entry," in lieu of a Virginia land warrant, which could have been satisfied only within the Virginia Military District in Ohio. Both the scrip and the State land warrant were predicated upon service in the Virginia State or Continental line in the War of the Revolution, notwithstanding the fact that the only evidence necessary in procuring the issuance of the scrip was proof of the existence of an outstanding Virginia warrant. It is unnecessary, in this connection, to review the historic facts which rendered the act of 1852 not a largess to Virginia or to her Revolutionary soldiers, but the redemption of solemn compacts with the State, whereby Virginia was induced to convey to the Federal Government, first, the Northwest Territory and, second, her claim to the lands in the Virginia Military District in Ohio. Congress having determined, by the act of March 2, 1889 (25 Stat., 854), to restrict private entry to public lands in Missouri, passed the act of December 13, 1894, *supra*, with the obvious purpose of protecting unsatisfied military bounty land warrants issued "under any act of Congress;" and it must be held, either that scrip issued under the act of 1852 is within the terms of the act of 1894, or that the United States has violated its compacts with Virginia. The act of December 13, 1894, will reasonably bear the construction that it embraces land warrants like the scrip herein considered, and that construction is compelled by the alternative of so holding or finding that Congress has repudiated the obligations

of the United States; a conclusion so repugnant to reason as to demand that every reasonable inference to the contrary be indulged.

The decision appealed from is, accordingly, reversed, and the case remanded for consideration in harmony herewith.

SOUTHERN PACIFIC LAND CO.

Decided November 8, 1913.

SOUTHERN PACIFIC GRANT—SUCCESSOR IN INTEREST.

The land department can not undertake to determine whether the Southern Pacific Land Company is the successor in interest to the land-grant rights of the Southern Pacific Railroad Company; and in the absence of legislative or judicial recognition of the land company as such successor in interest, patents under the grant to the railroad company will not issue to the land company.

First Assistant Secretary Jones to the Commissioner of the General Land Office.

I have considered your communication of the 22d ultimo, transmitting an application on behalf of the Southern Pacific Land Company that hereafter patents which may issue for lands granted to the Southern Pacific Railroad Company, by the acts of July 27, 1866 (14 Stat., 292), and March 3, 1871 (16 Stat., 573), in the States of California and Nevada, be issued to the Southern Pacific Land Company.

There are submitted in support of the application duly certified articles of incorporation of the Southern Pacific Land Company, and 17 deeds by the Southern Pacific Railroad Company purporting to convey to the land company all lands and rights in lands in said States, inuring under said acts of Congress or other acts amendatory thereof or supplemental thereto.

You recommend that the application be denied, and I am constrained to concur in this recommendation.

The question is purely one of administration. No obligation rests upon this Department to recognize the Southern Pacific Land Company as the successor in interest to the land-grant rights of the Southern Pacific Railroad Company. No act of Congress has accorded such recognition and no judicial decree is cited as proof of the validity of the transfer. This Department will not undertake to say that these deeds are sufficient to vest the Southern Pacific Land Company with equitable title to these lands.

The cases cited as precedents in support of the action now sought are not persuasive, even though it be admitted the action in those

cases was justified. In the cases of Union Pacific Railroad Company (29 L. D., 26), and the Union Pacific Land Company (*id.*, 94), a court of competent jurisdiction had decreed the validity of the transfer. In the matter of the recognition of the Northern Pacific Railway Company, as the successor in interest of the Northern Pacific Railroad Company, judicial notice was taken of certain mortgage foreclosure proceedings and recognition of the successorship was not accorded except upon the advice of the Attorney-General of the United States. See *Jones v. Northern Pacific Railway Company* (34 L. D., 105). In the case of the Great Northern Railway Company (36 L. D., 326), that company was recognized as the successor in interest of the St. Paul, Minneapolis and Manitoba Railway Company, but it appeared that the Great Northern had not only succeeded to the land-grant rights of the other road but to "all its rights of property;" so that the grantee company was apparently defunct, and for purposes of administration the action taken seemed to be advisable, if not absolutely necessary.

If the deeds here submitted are in all respects regular and serve the purpose for which they were executed, then title to lands carried by the patents when issued to the grantee company, will, by operation of law, inure to the Southern Pacific Land Company, and at the same time no interest of the United States will be put in jeopardy.

There is lack of apparent necessity for the action invoked, and besides it is thought that such action would set a precedent justifying the same action upon the application of any equitable owner of public lands and thereby entail upon the Land Department a mass of quasi judicial work which would seriously embarrass it in the administration of the public-land laws.

The application is denied.

SOUTHERN PACIFIC LAND CO.

Motion for rehearing of departmental decision of November 8, 1913, 42 L. D., 522, denied by First Assistant Secretary Jones, January 2, 1914.

INSTRUCTIONS.

SECOND DESERT LAND ENTRY—ANNUAL PROOFS.

The rule announced in *Herren v. Hicks*, 41 L. D., 601, that no expenditures can be credited on annual proofs upon a desert land entry unless made on account of that particular entry, applies to second entries as well as to original entries; and a desert land entryman who relinquishes his entry and makes second entry of the same land under the act of February 3, 1911, can not receive credit on annual proofs upon the second entry for expenditures made on account of the original entry.

First Assistant Secretary Jones to the Commissioner of the General Land Office, November 10, 1913.

In reply to your letter of November 1, 1913, in which you refer to the departmental decision in the case of *Herren v. Hicks* (41 L. D., 601) and request instruction with reference to the application and enforcement of the rule announced in said decision to cases of second entries under the act of February 3, 1911 (36 Stat., 896), you are advised that said rule is applicable alike to second and to original desert-land entries.

It appears from your letter that the question has arisen in the General Land Office in connection with a case wherein a desert-land entry was relinquished and a second entry, for the same land, made, under said act of February 3, 1911, by the party relinquishing. Statutes permitting second entries relieve parties from the disability arising from the fact that they had exhausted their right of entry and have no other effect. In removing such disability they confer no right or benefit not possessed by one who has never exercised the right of entry. Whatever claim of compliance with law might have been asserted under the original entry ceases with it and can not affect obligations, voluntarily assumed, with respect to the second entry. Proof of annual expenditures in desert-land cases is required, primarily, as a pledge of good faith, and to insure against a mere speculative withholding of public land; and, as was stated in the case of *Herren v. Hicks*, *supra*, the statute, in express terms, demands that the expenditures be made during the year of the entry for which they are claimed.

HOUSTON v. SPAULDING.

Decided November 12, 1913.

DESERT LAND—CHARACTER OF LAND.

Land which as a rule lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to unusual methods of cultivation, such as the system commonly known as "dry farming," is, if susceptible of irrigation, subject to entry under the desert land law.

JONES, First Assistant Secretary:

June 4, 1913, the Department affirmed the action of the Commissioner of the General Land Office, which likewise affirmed the decision of the local officers holding for cancellation the desert land entry of Benjamin W. Spaulding, made May 2, 1910, for the S. $\frac{1}{2}$ NE. $\frac{1}{2}$, and lots 1 and 2, Sec. 4, T. 1 S., R. 1 E., M. M., Bozeman, Montana, land district, upon the contest of Elizabeth L. Houston, filed November 17, 1911. A motion for rehearing has been filed on behalf of the

entryman, and oral argument has been heard in support of the motion, and in opposition thereto. A number of affidavits and exhibits have been offered since the hearing below, but only the evidence properly in the record will be considered.

The contest affidavit charged that said desert land entry was of illegal inception; that the entryman had abandoned the same; that he had failed to comply with the laws after entry; and that the land is nondesert in character.

However, the evidence was mainly confined to the one question as to the character of the land, whether desert or nondesert. The decisions heretofore rendered in the case have recognized this as the only question meriting attention upon the evidence submitted, and in counsel's brief for contestant it is stated:

We agree with counsel for contestee that there is really only one question in this case, and this is whether the land be desert or nondesert in character.

Testimony was submitted by the contestant to show that lands adjacent to the land in contest, and of similar character, had been for several years successfully farmed under the system of dry land farming. The contestant, on the contrary, introduced evidence that farming without irrigation in that region had not been successful. The preponderance of evidence in the record appears to be that such methods were usually and reasonably successful, especially in recent years. This, however, means that a crop is produced only each alternate season on the same tract, as, according to that system, the land is summer fallowed each alternate year, and furthermore, a resort to this system indicates meager precipitation.

It is not believed that land which can be successfully cultivated only by means of the so-called dry farming system, should be classed as of that character which excludes it from desert land entry. Under that system, crops are not produced "one year with another," but only every other year, where successful.

The case of *Pederson v. Parkinson* (37 L. D., 522), was much like that under present consideration, except, perhaps, successful dry farming is shown in this case to have extended over a longer period of time than that shown in the case referred to. In that case it was stated:

The testimony developed the further facts that summer fallowing is necessary to successful farming on these lands, so that when this method is employed the average yield per acre would have to be divided by two, thus reducing the average yield to half.

And it was held:

Lands that one year with another for a series of years will not without artificial irrigation produce reasonably remunerative crops are desert within the meaning of the desert land law.

Not only is it shown in this case that irrigation was carried on in this vicinity, but that in the absence of irrigation resort to the dry farming system was necessary to successfully grow crops. Many desert land entries have been made in this region, and patents have been granted thereunder.

By the acts of February 19, 1909 (35 Stat., 639), and June 17, 1910 (36 Stat., 531), commonly known as the Enlarged Homestead Acts, Congress provided for allowance of enlarged homestead entries of a certain class of lands in particular States mentioned therein. In the instructions of December 14, 1909 (38 L. D., 361), issued under the act first above referred to, the Department construed the act to permit such entry of nonmineral, nontimbered, non-irrigable public land—

which, as a rule, lacks sufficient rainfall to produce agricultural crops without the necessity of resorting to unusual methods of cultivation, such as the system commonly known as "dry farming," and for which there is no known source of water supply from which such land may be successfully irrigated at a reasonable cost.

If such lands be susceptible of irrigation, they may not be entered under said acts, but it is believed, and it is hereby held, that they may be entered under the desert land laws.

From the evidence submitted, the Department would not be justified in assuming that this land cannot be irrigated—in fact this was not an issue in the case. Assuming, therefore, that the land is susceptible of irrigation, it otherwise comes within the definition above given, and is proper for a desert land entry.

Upon these considerations, the former decision is hereby recalled and vacated, the Commissioner's decision reversed, and the contest dismissed.

HOME MINING COMPANY.

Decided November 12, 1913.

MINING CLAIM—APPLICATION FOR PATENT—VERIFICATION.

Section 2335, Revised Statutes, contemplates that applications for patent under the mining laws, and proofs to support the same, shall be verified within the land district wherein the claim applied for is situated; and an application verified outside the land district wherein the claim is situated, although before an officer authorized to administer oaths therein, is not properly verified within the meaning of that section.

NOTARY PUBLIC—ATTORNEY BEFORE EXECUTIVE DEPARTMENT.

The proviso in the act of June 29, 1906, amending section 558 of the Code of the District of Columbia, which provides that no notary public shall be authorized to administer oaths in connection with any matter before any of the executive departments in which he is employed as counsel, attorney, or agent, applies to all notaries public, in the District of Columbia or elsewhere, who practice as attorneys before any of the executive departments.

JONES, *First Assistant Secretary*:

The Home Mining Company has filed a motion for rehearing in the matter of its application 03429 for patent to the Board of Trade and other lode mining claims, survey 8968, wherein the Department, by decision of September 25, 1913, affirmed the decision of the Commissioner requiring the claimants to substitute for the present application and certain proofs new application and corresponding proofs.

It appears that the present application, proof of posting on the claim; proof of continuous posting and proof of charges and fees paid were verified before one W. J. Beecher, a notary public, who was also attorney for the applicant company, at Great Falls, Montana, and outside the land district wherein the claims are situated. The Department, in the decision complained of, held these papers to have been improperly verified, stating that section 2335, Revised Statutes, requires such papers to be verified within the limits of the land district.

It is urged in the motion that section 2335, Revised Statutes, requires merely that affidavits of the nature of those here in question shall be verified before an officer authorized to administer oaths within the land district, and it is shown that the notary public before whom the said papers were verified was authorized to administer oaths anywhere within the boundaries of the State of Montana. It is contended that, in view of the provisions of section 2335, Revised Statutes, and the laws of Montana, and of the fact that the affiants resided at Great Falls, which is practically isolated from any point within the land district, the said papers should be accepted as fulfilling the requirements of the law in the matter of verification.

In the case of *Mattes v. Treasury Tunnel, Mining and Reduction Company* (34 L. D., 314), the Department, after a full discussion of the laws respecting the verification of affidavits required to be filed under the mining laws, held, in substance and effect, that said section 2335, Revised Statutes, clearly contemplated that such papers should be verified not only before an officer authorized to administer oaths within the land district wherein the claim applied for is situated, but that they should actually be verified within such land district, and specifically overruled the decision in the case of *Loneragan v. Shockley* (33 L. D., 238) in so far as it held that an application for patent, verified outside the land district wherein the claim involved was situated but before an officer authorized to administer oaths therein, was properly verified within the meaning of the section.

It further appears, as above stated, that the papers herein referred to were verified before a notary public who was also the attorney for the claimant in the prosecution of said patent proceedings. In an opinion rendered by the Attorney General, April 18, 1907 (26 Ops. Atty. Gen., 236), it was held that the proviso in the act of June 29,

1906 (34 Stat., 622), amending section 558 of the Code of the District of Columbia, providing that no notary public shall be authorized to administer oaths in connection with matters in which he is employed as counsel, attorney, or agent in which he may be in any way interested before any of the Departments of the United States Government, in the District of Columbia, or elsewhere, applies not only to local attorneys but to all attorneys who are notaries who practice before said Departments.

It is clear, therefore, that, under the foregoing decisions, the application and proofs heretofore filed can not be accepted as appropriate bases for an entry and patent to the claims in question. The claimant, therefore, will be required to substitute for the present application and proofs corresponding papers verified within the land district wherein the claims are situated.

The decision complained of is accordingly adhered to and the motion denied.

JENSEN v. KENOYER.

Decided November 15, 1913.

PRACTICE—NOTICE OF APPEAL—SPECIFICATIONS OF ERROR.

It is not essential that the notice of appeal provided for by Rule 76 of Practice shall contain specifications of error, it being sufficient if specifications of error be filed within twenty days after service of notice of appeal, as provided by Rule 80.

RECLAMATION—RESIDENCE—MARRIED WOMAN.

By virtue of the acts of June 25, 1910, and April 30, 1912, one who made entry of lands within a reclamation project prior to the act of June 25, 1910, and in good faith established residence, is not subject to contest for failure to maintain residence prior to the time water is available for irrigation of the land, provided residence is established and application for water right filed within ninety days after the issuance of public notice fixing the date when water will be available; and where an entrywoman marries after establishing residence, and removes to the unperfected homestead entry of her husband, she does not thereby forfeit the protection accorded by these acts, where after final proof upon her husband's claim she returns and reestablishes residence upon her own claim within the time fixed therefor.

JONES, First Assistant Secretary:

This record is before the Department in response to departmental order of April 30, 1913, directing the Commissioner to certify the record upon the petition of Hans Jensen.

By decision of December 31, 1912, the Commissioner of the General Land Office affirmed the action of the local officers, and dismissed the contest of Jensen against the homestead entry of Annie F. Kenoyer. Notice of that decision was served upon the contestant January 6,

1913. On February 5, 1913, he served notice of appeal on attorneys for the contestee, and filed notice in the local land office with proof of service attached. In said notice it was stated that the grounds for the appeal would be set forth in a brief with specifications of error to be thereafter filed in accordance with the Rules of Practice. On February 19, 1913, the contestant served and filed in the local land office specifications of error setting up specifically the particular errors relied upon, together with brief in support thereof.

March 19, 1913, the Commisisoner declined to forward the appeal, holding that no sufficient notice of appeal had been filed, as required by Rule 76 of Practice, inasmuch as no specifications of error were set up in the notice. He accordingly closed the case.

Jensen then filed petition requesting that the Commissioner be directed to certify the record to the Department for consideration, and this request was granted and the record forwarded, as above stated.

The contestant served and filed notice of appeal within thirty days from notice of the Commissioner's decision, as required by Rule 76 of the Rules of Practice. He also within twenty days after service of notice of appeal, served and filed brief and specifications of error, as provided by Rule 80. Therefore, the Commissioner erred in refusing to transmit the appeal to the Department. See case of Jayne Reservoir (40 L. D., 130). Accordingly, the Department will now consider the case as upon appeal.

September 13, 1909, Annie F. Berry made homestead entry for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 7 N., R. 7 E., Bellefourche, South Dakota, land district, under the provisions of the reclamation act.

June 12, 1912, Jensen filed his contest affidavit against said entry alleging that claimant had never established or maintained a residence upon said land; that she had never placed any improvements of any kind thereon, but that there was a small shack built there by other parties; that the entrywoman shortly after filing upon said land married H. E. Kenoyer, and that she had lived with him since that time on his unperfected homestead entry.

A hearing was duly had, and the local officers found in favor of the entrywoman. The Commissioner by his decision of December 31, 1912, affirmed the action of the local officers.

It appears that one Nels Peterson formerly held this land as a part of his homestead, it being one of the farm units which he was required to eliminate from his entry, and he accordingly relinquished the same, for which this entrywoman paid \$150 and acquired the improvements thereon, which consisted of a dugout and some fencing. In August, 1910, the entrywoman placed some furniture in the dugout, with a view to establishing residence, and stayed there about two days, when she was called away to Iowa, her former home. She

returned to the vicinity of the land about September 1, 1910, and lived with her brother a short distance therefrom, and thereafter was engaged in teaching school about four miles from the claim. She boarded with her brother until about December 1, 1910, when her house was completed, and she took up her residence therein together with her parents. She resided there continuously and slept there every night for a month and had no other home. During this time she continued to teach school, going from her home in the morning and returning to her home on the homestead in the evening. In January, 1910, she boarded near the school, but returned to her homestead on Friday evening of each week and stayed until Monday morning. Her school term was completed April 7, 1911, and she continued residence on the homestead until she was married, on April 12, 1911, as above stated. Shortly after her marriage she moved onto her husband's unperfected homestead entry, where they both lived. She built a house 12 x 18 feet upon her land, a chicken house, and a barn, and paid for the lumber that went into the house out of the wages earned teaching school.

It appears that the husband of the entrywoman had made a homestead entry under the reclamation act on February 9, 1909, and had resided thereon continuously until about July 29, 1912. At the time of the hearing the entrywoman with her husband had returned to her homestead entry, the husband having completed the necessary residence upon his entry to meet the requirements of the three-year homestead law. The public notices that water was available for use upon this land were given and filed in the local land office on May 2, 1912, and within ninety days thereafter the entrywoman had reestablished her residence upon the land, and had executed and filed an affidavit in the local office showing that fact. On June 1, 1912, she filed an application for water right for the land, which was allowed on June 6. She has paid the fees, water right and maintenance charges, and received water for the irrigation of the land.

Contestee claims that she was excused from residence during the period of her absence after marriage. The acts of June 25, 1910 (36 Stat., 864), and April 30, 1912 (37 Stat., 105), are cited in support of this contention. The former act, as held in the case of *Roberts v. Spencer* (40 L. D., 306)—

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.

The latter act of 1912 provided:

That no qualified entryman who prior to June twenty-fifth, nineteen hundred and ten, made *bona fide* entry upon lands proposed to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two, the national reclamation law, and who established residence in good faith upon the lands entered by him, shall be subject to contest for failure to maintain residence or make improvements upon his land prior to the time when water is available for the irrigation of the lands embraced in his entry, but all such entrymen shall within ninety days after the issuance of the public notice required by section four of the reclamation act, fixing the date when water will be available for irrigation, file in the local land office a water-right application for the irrigable lands embraced in his entry, in conformity with the public notice and approved farm unit plat for the township in which his entry lies, and shall also file an affidavit that he has reestablished his residence on the land with the intention of maintaining the same for a period sufficient to enable him to make final proof.

Under the provisions of these acts, the entrywoman was not in default. It is contended, however, by the contestant that inasmuch as the entrywoman was living with her husband upon his unperfected entry, she was not entitled to the benefits of these remedial acts. In the case of *Anderson v. Hillerud* (33 L. D., 335), it was held that where a woman, having an unperfected homestead entry, marries a man having a similar entry, and thereupon leaves her claim to live with her husband upon his homestead entry until he offers final proof, and then returns to her claim prior to contest, she thereby cures her default in the matter of residence and is entitled to perfect her entry.

It will thus be seen that the mere act of marriage is no bar to completion of a homestead entry made by an unmarried woman. It is only in cases where the entrywoman is in default, whether by reason of marriage or otherwise, that contest will lie. Marriage is not condemned. On the contrary, it is looked upon with favor, and where it does not cause failure to perform the duties with reference to a homestead entry, the entry cannot be successfully attacked upon that ground.

As above shown, this entrywoman was not in default. She had been absent, but these absences were allowable under the acts above cited, and she reestablished residence within the time required by the said act of April 30, 1912. Her marriage did not interfere with her compliance with law, as she met all of the requirements exacted by law during the period in question.

The dismissal of the contest is affirmed.

LEWIS C. SMITH.

Decided November 19, 1913.

TIMBER LAND ENTRY—NONCONTIGUITY—EQUITABLE ADJUDICATION.

Where a portion of a timber land entry is eliminated for conflict with a prior school indemnity selection, and the remaining tracts are thereby rendered noncontiguous, patent may issue therefor, notwithstanding such noncontiguity, upon confirmation of the entry by the Board of Equitable Adjudication.

JONES, *First Assistant Secretary*:

Lewis C. Smith has appealed from the action of the Commissioner of the General Land Office holding for cancellation his timber entry, for the reason that it contains three noncontiguous tracts, allowing claimant, however, to elect to retain one of the tracts should he so desire.

The entry was made for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 13, T. 24 N., R. 11 W., M. D. M., San Francisco, California, land district.

Upon examination of the claim, the Commissioner found that the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12, was in conflict with a prior State indemnity school selection, and directed cancellation of that tract and issuance of final certificate for the three remaining tracts, which are noncontiguous, but touch at the corners. The local officers accordingly issued final certificates for the three noncontiguous tracts, and the Commissioner approved the proofs and listed the case for submission to the Board of Equitable Adjudication.

Under date of October 3, 1912, the Department instructed the Commissioner that this was not a proper case for submission to the Board, and it was directed that claimant be permitted to elect to retain any one of the 40-acre tracts, and that in case he failed to do so, the entire entry should be canceled. The Commissioner carried that order into effect, and the present appeal is from that action. Therefore the case as it now comes before the Department is in the nature of a motion for rehearing of its former order.

It has been held that where tracts in a homestead entry have been left noncontiguous by reason of the elimination of a portion of the entry for good cause, patent may issue for the remaining portion upon confirmation by the Board of Equitable Adjudication. See cases of *B. F. Bynum* (23 L. D., 389); *Akin v. Brown* (15 L. D., 119); *George H. Plowman* (38 L. D., 412).

There is even stronger reason for applying this rule in the case of a timber entry, where no occupancy or cultivation of the land is required.

Accordingly, the former departmental order is hereby recalled and vacated, and the Commissioner is directed to again list the case for consideration by the Board of Equitable Adjudication.

ERNEST WEISENBORN.

Decided November 19, 1913.

REPAYMENT—ACT OF MARCH 26, 1908.

The act of March 26, 1908, contemplates repayment of the purchase money paid under any public land law in all cases where the applicant fails to acquire title, in the absence of fraud or attempted fraud in connection with the application to purchase; and where commutation proof upon a homestead entry was rejected solely for the reason that notice thereof by publication was defective, repayment of the purchase money paid in connection therewith should not be denied on the ground that the defect might have been cured and the entry confirmed.

JONES, First Assistant Secretary:

Ernest Weisenborn appealed from decision of the Commissioner of the General Land Office of April 12, 1913, rejecting his application for repayment of money paid on commutation of his homestead entry for NW. $\frac{1}{4}$, Sec. 22, T. 7 S., R. 1 E., Oregon City, Oregon.

February 9, 1892, Weisenborn made entry and submitted commutation proof, which the General Land Office rejected because notice by publication was insufficient. He has made several prior applications for repayment and the present one is made under act of March 26, 1908 (35 Stat., 48). The Commissioner held that Weisenborn's entry was allowed on sufficient proof of compliance with the homestead law, but failed for the sole reason that notice by publication was defective, and the entry would have been confirmed on a showing that the defect in publication had been cured.

The act under which this application is made provides:

That where purchase money and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, 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 evident purpose of this act was to return to disappointed purchasers of public lands their purchase money in all cases where they fail to acquire title and had been guilty of no fraud or attempted fraud in connection with their applications to purchase. The obliga-

tion to repay is placed on the failure of consideration and is granted in all cases not tainted by fraud. The present case comes within benefits of the act.

The decision is reversed

WILBUR MILLS.

Decided November 20, 1913.

RECLAMATION HOMESTEAD—CULTIVATION.

The provisions of the three-year homestead act of June 6, 1912, respecting cultivation, have no application to entries made under the reclamation act; but the reclamation laws require, as a prerequisite to the issuance of final certificate and patent, that the entryman shall have reclaimed, for agricultural purposes, at least one half of the total irrigable area of his entry and paid all reclamation charges at that time due.

JONES, *First Assistant Secretary*:

December 19, 1907, Wilbur Mills made homestead entry No. 02190, subject to the provisions of the reclamation act of June 17, 1902 (32 Stat., 388), for farm unit D, or the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 18, T. 19 N., R. 31 E., M. D. M., Carson City, Nevada, land district, and on October 27, 1912, submitted final proof thereupon.

January 31, 1913, the Commissioner of the General Land Office rejected the proof upon the ground that evidence of cultivation is insufficient.

Final proof was offered under the provisions of section 2291, Revised Statutes, as amended by act of June 6, 1912 (37 Stat., 123), which act requires generally the cultivation of one-sixteenth of the area of the entry beginning with the second year and one-eighth thereof beginning with the third year and until final proof. Mr. Mills's testimony as to cultivation is to the effect that in 1910 he seeded 51 acres to wheat and barley and harvested 12 tons of grain, but in 1911 he did no farming except a small garden. In 1912 he put in no crop because he "was afraid to risk it on account of the water shortage." In a supplemental affidavit submitted with the appeal he testified that during the season of 1912 he was working his claim, plowing and leveling the land, and now has the entire 80 acres in good shape, ready for seeding.

The Commissioner's decision apparently overlooked the fact that the act of June 6, 1912, *supra*, expressly provides that its provisions as to cultivation shall not apply to entries made under the reclamation act; consequently, the fact that entryman failed to cultivate one-eighth of the area embraced in his entry during the years 1911 and 1912 does not in itself warrant the rejection of the final proof. The reclamation law requires that as a prerequisite to the issuance

of final certificate of entry and patent entryman shall show that he has reclaimed at least one-half of the total irrigable area of his entry, for agricultural purposes, and the circular approved February 6, 1913, as amended to September 6, 1913 [42 L. D., 349], provides that entryman in such cases must have cleared and leveled the land, provided sufficient laterals for its irrigation, and watered and secured the growth of at least one satisfactory crop upon not less than one-half the irrigable area of the entry.

The act of August 9, 1912 (37 Stat., 265), provides that after the proof of reclamation, as above set forth, and payment of all reclamation charges then due, final certificate and patent may issue reserving to the United States a lien upon the land and water rights for the payment of all sums still due the United States.

In this case the improvements are sufficient to evidence the good faith of the entryman; his residence has been practically continuous; and his cultivation sufficient to comply with the general provisions of the homestead law. The Commissioner's decision is accordingly reversed and the final proof accepted. Final certificate and patent, however, will not be issued until submission of satisfactory proof of reclamation of not less than one-half the irrigable area, as above set forth, and payment of all reclamation charges at that time due.

FERDINAND J. CLIFFORD.

Decided November 20, 1913.

HOMESTEAD—CULTIVATION—PLANTING OF FRUIT TREES.

The planting and care of fruit trees, in the development of a fruit farm, is cultivation to agricultural crops within the contemplation and purview of both the general homestead law and the three-year homestead act of June 6, 1912.

JONES, *First Assistant Secretary*:

Appeal is filed by Ferdinand J. Clifford from decision of February 11, 1913, of the Commissioner of the General Land Office rejecting the final proof submitted October 16, 1912, certificate issuing October 28, 1912, on his homestead entry made December 22, 1908, for lot 2, containing 10.20 acres, Sec. 21, T. 30 N., R. 24 E., W. M., Waterville, Washington, land district, for the stated reason said proof shows insufficient residence and cultivation to comply with the provisions of the act of June 6, 1912 (37 Stat., 123), under which same was offered; also, that "the planting of fruit trees is not recognized as cultivation."

Said proof shows good improvements on this small tract, consisting of a 3-room house, with basement of 2 rooms, barn, henhouse, and

fencing around 6 acres, all of the cultivable land. These improvements are valued by the entryman at \$800, by one witness at \$500, and by the other witness at \$300. There were 5 acres plowed and in cultivation, crops being raised in 1909 and 1911, and the land being fall plowed in 1910 and 250 fruit trees planted in the year 1912. The entryman established residence on the land March 16, 1909, and lived there with his family to December 25, 1909, and from November 18, 1910, to March 24, 1912, since which he has lived "in a tent on the river," a mile and a half distant from the land, "to be close to water." His absences were "for work;" and he states in this appeal that he was compelled to go away from the land in December, 1909, by the failure of his crops that year, and there was no work close at hand; that he had to take his wife because of sickness; and that the man he hired to look after the land betrayed his trust and all his household goods and personal property, including 4,000 feet of water pipe laid from a spring, were stolen or levied on unlawfully, to secure the return of which required litigation prosecuted to the Supreme Court of the State; these circumstances necessitating his continued absence from the land, as without this pipe line he had to carry water a considerable distance, which he stood for a while, but was "just a little past human endurance," and he was without money to repipe the land.

The Department is impressed from all the record with this entryman's good faith. While his proof fails to show a strict and literal compliance with the specific requirements of said act of June 6, 1912, it shows on the whole an aggregate residence of two years, one month, and fifteen days, more than the required aggregate residence under said act, and continued agricultural use of much more than the required area of cultivation under that act. While the entryman by his long-continued absences from the land without leave subjected his entry to forfeiture under the law and to contest, no forfeiture has been declared nor contest initiated; and he can not be held subject to the requirements of said act as to leave of absence for his absences occurring prior to the passage of said act. His absences do not indicate any bad faith, under the circumstances shown, nor does his manner or extent of cultivation. The land has been put each year to an agricultural use and to such use apparently as it is best adapted and as best suited the wishes of the entryman in making it his home and homestead, having taken the land, he says, for a fruit farm. The raising of fruit is strictly a horticultural rather than an agricultural use of land, but it is in the broad sense of the word an agricultural employment of the land, and the development of a good orchard, and the planting and care of 250 fruit trees as the beginning thereof, is such cultivation to agricultural crops as is within the contemplation and purview of the homestead law, whether

the entry be made or proof be submitted prior or subsequent to the passage of said act of June 6, 1912.

The regulations of September 6, 1913 (42 L. D., 343), relative to cultivation, further provide that:

Tilling of the land or other appropriate treatment for the purpose of conserving the moisture with a view of making a profitable crop the succeeding year will be deemed cultivation within the terms of the act, where that manner of cultivation is necessary or generally followed in the locality.

Upon review of the whole case, the Department is of opinion the entryman has substantially complied with the requirements of the law, and that the proof should be approved, the certificate held intact, and the entry passed to patent in the absence of other objection, which is hereby directed.

The decision appealed from is therefore reversed.

HELEN SERRET.

Decided November 22, 1913.

REPAYMENT—ENTRY VOID AB INITIO—ACT OF MARCH 26, 1908.

Where a desert land entry is found and adjudicated by the land department to be void *ab initio*, and is canceled for that reason, such entry is "rejected" within the meaning of the act of March 26, 1908, and the entryman is entitled to repayment of the purchase moneys paid in connection therewith, in the absence of fraud or attempted fraud in connection with the entry.

JONES, First Assistant Secretary:

Helen Serret has appealed from a decision of the General Land Office, rejecting her application for return of purchase money paid in connection with her desert-land entry, made July 7, 1903, for the S. $\frac{1}{2}$, Sec. 24, T. 5 N., R. 10 E., Helena, Montana, land district.

Final proof was submitted and certificate issued January 23, 1908, except as to the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, which had been canceled by relinquishment November 7, 1907.

Subsequently proceedings were instituted against the entry on the charge that the land was not desert in character, on which charge hearing was had, the local officers finding that the charge had been sustained by the testimony adduced. Their action was affirmed in decisions on successive appeals to the General Land Office and to the Department and the entry was canceled June 29, 1912.

Thereafter Serret filed application for repayment, accompanied with a relinquishment of the entry, which application was denied by the General Land Office on the ground that as the entry had not been erroneously allowed, on the proofs presented at the time

the application was made, and had not been canceled for conflict, the case is not one in which repayment is allowed by the act of June 16, 1880 (21 Stat., 287).

Section 1 of the act of March 26, 1908 (35 Stat., 48), provides for repayment of purchase money and commissions, paid under any public-land law, in all cases where the application, entry or proof has been rejected and the applicant has not been guilty of fraud or attempted fraud in connection therewith.

The cancellation of an entry is only the consummation or final step in the process of rejection. In the present case it has been found that the entry was void *ab initio*, and canceled for that reason. The entry may properly be considered as a rejected entry within the meaning of the statute last above cited and repayment allowed, if no fraud or attempted fraud in connection therewith be found. See *Mary Ward* (39 L. D., 495, 497).

The record has been carefully examined and on consideration of all the circumstances attending the making of the entry and the relinquishment, the Department does not find such clear disclosure of fraud or attempted fraud on the part of the claimant as would justify denial of her application for repayment under the said act of March 26, 1908. Repayment will, therefore, be allowed.

The decision appealed from is accordingly hereby reversed.

JOHN W. SCHOFIELD.

Decided November 22, 1913.

SCHOOL INDEMNITY SELECTION—SETTLEMENT ON BASE LAND PRIOR TO APPROVAL.

The legal title to a tract of school land relinquished as base for indemnity selection does not revert in the United States until the selection is approved, and prior to such approval the relinquished land is not subject to entry, selection, or other appropriation under the public land laws; but where settlement was made upon land so relinquished prior to approval of the selection based thereon, on the faith of statements by the State Land Commissioner that the State did not claim the land, and application to enter filed by the settler, such application should not be rejected outright but held and considered in connection with the selection, and if the selection be approved, the settlement right should be recognized and protected.

JONES, First Assistant Secretary:

John W. Schofield appealed from decision of the Commissioner of the General Land Office, of February 6, 1913, rejecting his homestead application for N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 36, T. 44 N., R. 4 W., B. M., Coeur d'Alene, Idaho.

The land is within the former Coeur d'Alene Indian reservation, opened to entry under act of June 21, 1906 (34 Stat., 336), by which

sections 16 and 36 in said township were granted to the State for support of common schools. May 2, 1910, approved township plat of survey was filed in the local office. October 23, 1912, Schofield filed application for homestead entry which the local office rejected because the tracts were school land and, November 15, 1912, Schofield appealed to the Commissioner, alleging the land was not school land "because the State land board of Idaho has relinquished the same and disclaims ownership." The Commissioner held that title inured to the State on identification by survey and the land department has no jurisdiction to dispose of it under the public land laws. The Commissioner held:

It is true, the State has applied to select other land in lieu of the land applied for by Mr. Schofield, but such indemnity selection has not been approved, and until approval thereof, title to the base land does not revert in the United States. Edwin Collins, 40 L. D., 444.

In support of his appeal Schofield shows that he settled on the land on letters of the State Land Commissioners of October 11, 1911, that "the land has been relinquished by the State," and December 31, 1909, that "the land does not belong to the State." These letters were written to him as reason for rejecting his application to lease the land.

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 the 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 Schofield by the mere relinquishment of the State. The title was merely *sub judice*, and it was due the State that the title should not be incumbered while its selection was pending, so that should it 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 Department notes that settlement and application for entry were made in faith of letter from the State Land Commissioner,

giving Schofield reasonable cause to believe that the State did not claim the land. The State before that time had relinquished the land and made an indemnity selection, which had not been passed upon by the Commissioner of the General Land Office at time of his decision rejecting Schofield's application. The Department therefore deems it just to Schofield that the State's application for selection should be decided before final rejection of his application to make entry, and that if the selection be approved, Schofield's homestead application should be allowed. In other words, the State's selection and the application for homestead entry should be determined at one and the same time, saving to Schofield his attempted rights by settlement made in faith of the State's representation to him.

The decision is therefore vacated and case remanded to the General Land Office, with direction to determine the two matters involving the same tract of land at the same time, recognizing Schofield's rights by settlement and homestead application in case the selection is entitled to be approved, with right to either party to appeal and bring the whole case to the Department, if either feel aggrieved by the conclusion reached.

GREGORY SCHOEN.

Decided November 22, 1913.

RESIDENCE—UNINHABITABLE LAND.

Where a homestead entryman, after the establishment of residence in good faith upon his entry, found it necessary to remove therefrom to a nearby tract owned by him, because of the fact that the land embraced in the entry was low and marshy and subject to overflow for a considerable portion of the year and rendered thereby unsuitable for a place of residence, but continued to cultivate and improve the homestead, such practically compulsory change of abode will not be held to break the continuity of his residence, and the entry may be submitted to the Board of Equitable Adjudication for confirmation.

JONES, *First Assistant Secretary:*

Gregory Schoen has appealed from the decision of the Commissioner of the General Land Office, dated February 20, 1913, holding for cancellation his homestead entry, made on December 29, 1902, for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 27, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 34, T. 44 N., R. 57 E., M. D. M., Carson City, Nevada, land district, upon which final proof was submitted on May 24, 1910, and final certificate was issued on May 25, 1910.

Proceedings against this entry, on behalf of the Government, were directed on August 30, 1911, upon the charge that the entryman had not established and maintained residence upon the land. A hearing

was had, in June, 1912, and, upon the testimony submitted thereat, the register recommended the cancellation of the entry, and the receiver, that the entry be held intact.

The material facts disclosed by the record are that the claimant built a house upon the land under consideration and established residence therein. He lived in this house for a few months and then removed to a point on private land, near his homestead, where he built a house and barn and made other improvements, of the value of about \$2,000. The homestead is a marshy tract which he has ditched and drained and converted into a valuable farm. It is satisfactorily shown that he changed his residence from the homestead because the land was subject to overflow for a considerable portion of the year, and was generally unsuitable for a place of residence. While some of the witnesses were of opinion that it would be possible for the claimant to live upon the higher ground within the limits of his homestead, it was convincingly shown that residence on any part of the land would be inconvenient and disagreeable on account of the flood water at certain seasons of the year. The delay in the submission of final proof is shown to have been due to the claimant's delay in securing his final naturalization papers.

It is well established that the absence of a claimant from his homestead, under circumstances which render such absence practically compulsory, does not interrupt the continuity of residence established and maintained in good faith. See Lewis Quarnberg (12 L. D., 199). Moreover, Rule 6, governing cases of suspended entries referred to the Board of Equitable Adjudication, provides for the reference to that board of—

preemption entries under laws requiring actual residence on public land, in which the residence was found to be on private property, but where the tract entered formed a substantial part of the farm of the claimant, and was improved and cultivated by him at the period required for residence.

Under the circumstances disclosed by the testimony in this case, the Department is of the opinion that the entry should be prepared for submission to the Board of Equitable Adjudication.

The decision appealed from is, accordingly, reversed.

REGULATIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 28, 1913.

REGISTERS AND RECEIVERS,
United States Land Offices.

SIRS: Paragraph 89, mining regulations, as amended July 1, 1913 (42 L. D., 204), is further amended so that the maximum rates for

the publication of mining notices therein provided shall apply to all land districts except Fairbanks, Alaska.

For such publications in the Fairbanks district the maximum rate is fixed at \$10 for each ten lines of space in a daily newspaper for the required period, and at \$7 for the same space and time if publication be had in a weekly newspaper.

Very respectfully,

CLAY TALLMAN, *Commissioner.*

Approved, November 28, 1913:

A. A. JONES, *First Assistant Secretary.*

AMAZIAH JOHNSON.

Instructions, August 11, 1913.

RECLAMATION—LANDS IN PRIVATE OWNERSHIP—WATER RIGHT.

Congress is without power to control or regulate the sale or acreage of lands in private ownership within reclamation projects, but so long as the projects are under government control, may determine the acreage for which water may be supplied through such projects to any one land owner.

RECLAMATION—WATER RIGHT—PROVISO TO SECTION 3, ACT OF AUGUST 9, 1912.

Under the proviso to section 3 of the act of August 9, 1912, no person shall, at any one time, acquire or own a water right, or be furnished water on account of a water right acquired from the United States, in excess of such quantity as may be necessary for the proper irrigation of one farm unit, as fixed by the Secretary of the Interior, unless all installments contracted to be paid on the additional supply to be purchased shall first be paid in full, and the water right purchased for the lands in excess of one unit shall be limited to a supply sufficient for one hundred and sixty acres.

RECLAMATION—WATER RIGHT—PROVISO TO SECTION 3, ACT OF AUGUST 9, 1912.

The limitation in the proviso to section 3 of the act of August 9, 1912, as to the area of lands for which water right may be acquired or owned by any one person, has reference to *irrigable* lands only.

JONES, *First Assistant Secretary:*

In your [Director of Reclamation Service] letter of July 29 you state that Amaziah Johnson has made proof on a farm unit under the Huntley Project, containing 155.15 acres, of which 69.95 acres are irrigable; that his neighbor has made proof on a farm unit under the same project, containing the same acreage, of which 56 acres are irrigable; that each has made four payments on the reclamation building charges and that one of the parties desires to purchase the unit of the other, including the appurtenant water rights. In order properly to be able to advise the parties, you ask for a construction of section 3 of the act of August 9, 1912 (37 Stat., 265). The part of the statute for which you call for an interpretation reads:

Provided, That no person shall at any one time or in any manner, except as herein-after otherwise provided, acquire, own or hold irrigable land for which entry or water-right application shall have been made under the said reclamation act of June seven-

teenth, nineteen hundred and two, and acts supplementary thereto and amendatory thereof, before final payment in full of all instalments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water-right may be purchased respectively, nor in any case in excess of one hundred and sixty acres; nor shall water be furnished under said acts nor a water-right sold or recognized for such excess.

Congress does not have the power to control or regulate the sale or acreage of lands in private ownership, but so long as the reclamation projects are under Government control, may determine the acreage of water to be supplied through its projects to any one land-owner. Bearing in mind this feature, the effect of the part of the act quoted is to provide:

No person shall, at any one time, acquire or own a water right, or be furnished water on account of a water right acquired, from the United States in excess of such quantity as may be necessary for the proper irrigation of one farm unit, as fixed by the Secretary, unless all installments contracted to be paid on the additional supply to be purchased shall first be paid in full, and the water right purchased for the lands in excess of one unit shall be limited to a supply sufficient for one hundred and sixty acres.

While the limitation of this act has reference to *irrigable* lands only, that feature becomes unimportant for the reason that the lands included in the contemplated purchase by either do not exceed the excess of one hundred and sixty acres permitted by the act. It follows, therefore, that either may purchase the lands of the other and be entitled to the water rights appurtenant thereto, on a showing to the effect that all installments on account of the water right contracted for in connection with the tract purchased or sold have been paid in full.

KEEBAUGH AND COOK.

Instructions, October 31, 1913.

RECLAMATION—WATER RIGHT.

Under the reclamation laws the same person or association of persons can, *prior* to the time all building and betterment charges have been paid, hold but one farm unit of public land and acquire a water right therefor, unless the water rights for any additional lands, not to exceed 160 acres, have been paid for in full; or, if not owning or holding a farm unit of public land, may own, hold, and obtain water for not exceeding 160 acres of private land within the project, without first paying in full the installments contracted for with reference to the water rights; but can not at the same time hold and obtain water rights for both a farm unit of public land and a tract of privately owned land, unless the installments on water right, either for the farm unit or for the private lands, not exceeding 160 acres, have been paid in full.

JONES, *First Assistant Secretary:*

I am in receipt of your [Director of Reclamation Service] letter of September 4, 1913, transmitting for instructions an application for

water right by Messrs. Keebaugh and Cook, for 78 acres of irrigable land in the W. $\frac{1}{2}$, NW. $\frac{1}{4}$, Sec. 7, T. 23 N., R. 56 W., North Platte project, Nebraska, filed in the project office April 26, 1913.

You state that Mr. Keebaugh has an approved water right application for 104 acres of irrigable land, farm unit G, Sec. 8, T. 23 N., R. 56 W., and that Mr. Cook has an approved water right application for 77 acres of irrigable land in farm unit D, Sec. 4, T. 23 N., R. 57 W., both of said applications having been made in connection with the respective homestead entries of the parties named.

The question presented by you is whether, in view of the applications last named, the parties as joint owners of the private land first described are entitled to file and have accepted a water right application for lands in private ownership.

The reclamation act of June 17, 1902 (32 Stat., 388), provides, in sections 3 and 4, for the entry of public lands under the homestead laws and the conformation of such entries to farm units which, in the opinion of the Secretary of the Interior, may represent the acreage reasonably required for the support of a family. Section 5 of the act recognizes that water rights may be obtained for privately owned lands in reclamation projects, but provides that "no right to the use of the water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner."

The foregoing act was amended August 9, 1912 (37 Stat., 265), section 3 of which act provides:

That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own or hold irrigable land for which entry or water right application shall have been made under the said reclamation act of June seventeenth, nineteen hundred and two, and acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges shall have been made on account of such land, in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said acts, nor a water right sold or recognized for such excess.

The foregoing provision of law, it will be noted, prohibits not only the acquisition but the owning of irrigable land *prior* to final payment of all installments of building and betterment charges in excess of one farm unit acquired under the homestead law or single ownership of private land. While this act refers to lands it has reference to the water rights to be applied upon the land, for while Congress may not control the ownership of land in any one individual it may control the ownership of a water right purchased under a Government project and from the Government. In neither case, whether it be under the homestead law or single ownership of private land, may the owner hold more than 160 acres *before* the payment of all of the installments contracted for with reference to a water right in excess of one farm unit, and this excess is limited to 160 acres, but in the case in hand,

the entire holding is limited to one farm unit, or 160 acres of private land, for the reason that the water rights are not paid in full. The language on this point is susceptible of but one construction, namely, that the same person or association of persons can, *prior* to the time all charges have been paid, hold but one farm unit of public land and acquire a water right therefor unless the water rights for the additional lands are paid for in full, and then not to exceed 160 acres for such excess. If they do not own or hold a farm unit of public land they may own, hold, and obtain water for not exceeding 160 acres of private land within the project without first paying up in full the installments contracted for with reference to the water rights. They may not hold and obtain water rights for both a farm unit of public lands and a tract of privately owned lands, unless the installments on water right for the private lands, not exceeding 160 acres, are paid in full.

The application at bar was not presented until April 26, 1913, and must, therefore, be considered and disposed of under the provisions of law just cited. Mr. Keebaugh and Mr. Cook have each acquired and are holding under the homestead laws irrigable farm units for which water-right applications have been accepted but upon which "all installments of building and betterment charges have not been made." They are, therefore, not entitled at this time to file an application for, or to acquire, a water right for an additional area of private land within the project owned by them jointly or severally. The application is herewith returned and you will dispose of same in accordance with the views hereinbefore expressed.

GROFTHOLDT v. McCOLLUM.

Decided October 31, 1913.

IMPERIAL VALLEY LANDS—ACT OF MARCH 3, 1909.

The act of March 3, 1909, providing for the sale of isolated tracts of public lands in Imperial Valley, has no application to lands which were, at the date of the passage of that act, included in a *bona fide* claim under the public land laws.

JONES, *First Assistant Secretary:*

Niels P. Groftholdt has appealed from the decision of the Commissioner of the General Land Office, dated October 8, 1912, allowing the desert-land application, filed on December 1, 1909, by Nellie M. McCollum, for lot 3, Sec. 8; lot 2, Sec. 16; lot 1, Sec. 17, T. 17 S., R. 15 E., S. B. M., containing 18.11 acres, Los Angeles, California, land district.

The action of the General Land Office was based upon McCullom's showing that she had occupied the land described in her application since June, 1908; had placed the same under cultivation, and had

built thereon a house, chicken house, and tool shed; had acquired title to sufficient water to effect its reclamation; and that the cost of the improvements placed upon the land amounted to \$1,000.

In his appeal, Groftholdt objects to the allowance of said application only as to a strip 160 feet from north to south and about 900 feet east and west along the north side of said lot 3, section 8, which he alleges is in his possession and has been reclaimed by him from its former desert character.

It appears from the record to be undisputed that McCollum's claim to the land under consideration, except that part thereof referred to by Groftholdt, attached in June, 1908, and has been diligently asserted and maintained. It further appears that, on December 23, 1904, Groftholdt made homestead entry for 80 acres of land described in terms of the so-called Imperial Survey as the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 8, T. 17 S., R. 15 E., S. B. M., containing 80 acres. On March 24, 1909, the plat of resurvey of said township was filed in the local office and Groftholdt's said entry was adjusted to describe lot 2 and the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, of said section, containing 88.8 acres. In this adjustment, to which he raised no objection, the narrow strip of land above referred to in lot 3 was excluded from his entry and 8.08 acres, not theretofore claimed by him, were added to the entry. Groftholdt has submitted final proof and received patent for the 88.8 acres, and has made additional homestead entry for lot 3 and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 9, of the same township, upon which he has likewise submitted final proof and received patent. Prior to his appeal in this case, he asserted no claim before the land department to lot 3 of section 8, or any part thereof.

In fact, in the appeal under consideration, Groftholdt asserts no claim to lot 3 under any of the public land laws but insists that that subdivision should be disposed of under the act of March 3, 1909 (35 Stat., 779).

The land department has had frequent occasion to consider the act of March 3, 1909, *supra*, and has uniformly taken the position that that act had no application to lands which were, at the date of its passage, included in a *bona fide* claim under the public land laws. In a report, dated February 2, 1912, to the Chairman of the Committee on Public Lands of the United States Senate, on Senate Bill 4785, to amend the act of March 3, 1909, *supra*, my predecessor stated:

In the consideration and settlement by the land department of the many contests and disputes growing out of the resurvey of the Imperial Valley, it has become evident that most of the tracts described in the act of March 3, 1909, and in this bill, are within the limits of entries made or of valid claims initiated prior to the resurvey. It is the judgment of the Department it was not the purpose of said act to deny or destroy any valid claim that had attached to such lands, and in adjusting the various claims in the Imperial Valley such construction of the law has been followed.

From what has been stated, it appears that there is no error in the action of the Commissioner in allowing McCollum to complete entry upon her application for the land under consideration. Whatever claim Grofftholdt may have had under his homestead entry has been, with his consent, adjusted to another and a larger tract and, if he has remained, as he alleges, in possession of a part of the land relinquished to the United States in the adjustment of his entry, such fact confers upon him no right to object to the *bona fide* appropriation of the entire subdivision by one qualified to make entry under the desert-land law. His possession of 3 acres of lot 3 is, upon the facts apparent of record, without claim or color of right, except under the act of March 3, 1909, *supra*, which had no application to that subdivision.

The decision appealed from is, accordingly, affirmed.

C. M. KIRKPATRICK.

Decided October 31, 1913.

RECLAMATION—WATER RIGHT APPLICATION—BETTERMENT CHARGES.

The provision in the forms for water right applications requiring payment by applicant of "betterment" or maintenance charges is a proper requirement under the reclamation laws, and the fact that at the time entry was made there was no specific mention of "betterment" charges in the water right application forms then in use will not relieve the entryman from payment of betterment charges legally assessed against his land.

WATER RIGHT APPLICATION—AGREEMENT NOT TO CONVEY TO DISQUALIFIED PERSON.

The provision in the form for water right application by private land owner requiring him to bind himself not to convey the land voluntarily to any person not qualified under the reclamation law to purchase a water right, upon condition that the application and any "freehold interest" sought to be conveyed shall be subject to forfeiture, is a reasonable and proper requirement, and an application from which such provision has been eliminated will not be accepted.

AGREEMENT BY APPLICANT TO GRANT CONTROL OVER DITCHES, ETC.

The provision in the form of water right application by private land owner requiring applicant to agree that the United States, or its successors, shall have full control over all ditches, gates, or other structures owned or controlled by applicant and which are necessary for the delivery of water, is in accordance with departmental regulations, and being a necessary incident to the proper management and operation of the project by the United States or its successors, is impliedly authorized by the reclamation act, and a water right applicant will be required to conform thereto.

AGREEMENT BY APPLICANT TO GRANT RIGHT OF WAY FOR DITCHES, ETC.

The provision in the form for water right application by private land owner requiring applicant to agree to grant and convey to the United States, or its successors, all necessary rights of way for ditches, canals, etc., for or in connection with the project, is a proper requirement, warranted by the spirit and intent of the reclamation act, and an applicant for water right will be required to conform thereto as a condition to allowance of his application.

JONES, *First Assistant Secretary*:

June 2, 1913, the Director of the Reclamation Service affirmed the action of the project engineer in rejecting water right application

offered by C. M. Kirkpatrick for lands in the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 10, and E. $\frac{1}{2}$ and SE. $\frac{1}{4}$, Sec. 3, T. 41 S., R. 11 E., Klamath reclamation project, Oregon, because applicant had omitted or stricken from the form of application certain material clauses thereof.

From paragraphs 3 and 5 of the application applicant eliminated all clauses which obligated him to pay charges assessed against the land for betterments; from paragraph 6, wherein he binds himself not to convey the land voluntarily to any person not qualified under the reclamation law to purchase a water right, upon condition that the application and any "freehold interest" sought to be conveyed, shall be subject to forfeiture, he has stricken out the words "any such freehold interest." Section 7, wherein applicants agree that the United States, or its successors, shall have full control over all ditches, gates, or other structures owned or controlled by applicants and which are necessary for the delivery of water, has been eliminated, as well as paragraph 9, wherein applicants agree to grant and convey to the United States, or its successors, all necessary rights of way for ditches, canals, etc., for or in connection with the project.

The land involved is in private ownership and is alleged to have been purchased by the applicant from a former owner who had applied for water right therefor prior to the adoption of the form of application now in use. Appellant, in substance, contends that by virtue of his purchase from the former owner and water-right applicant he secured a vested right in water for the irrigation of the land upon the same terms and conditions as the original applicant; that there is no legal authority for requiring him to pay betterment charges or to grant or convey to the United States a right of way across his lands for irrigation ditches, canals, etc. Furthermore, that he should not be required to agree that the United States shall have full control over all such structures, contending that he is not in position to make such a grant by virtue of certain deeds covering rights of way, executed by the former owners.

With respect to the so-called betterment charges, not only has the act of August 9, 1912 (37 Stat., 265), passed prior to receipt of Kirkpatrick's application, specifically required the payment of "building and betterment charges," but the Supreme Court of the United States, in the case of *Swigart v. Baker*, decided May 26, 1913, held that the operation of the Reclamation Act of June 17, 1902 (32 Stat., 388), "is not necessarily limited to building, but may include the preservation and maintenance of what has been built." The court further stated, with respect to the requirement of the law that the cost of the project be returned to the United States, that such cost represented "not only the expense of building but of maintenance up to the time it was surrendered to the water users." The word "betterment" is not construed so broadly as to include all costs of structures or buildings which might be erected in connection with the reclama-

tion project, but only such structures and improvements as are necessary for the proper construction and maintenance of the project. This being the case, the clause with respect to betterments, complained of by appellant, is not an unreasonable or unwarranted requirement but is a necessary and reasonable one, warranted and required by existing law.

Paragraph 6 of the application is in strict harmony and accords with section 3 of the act of August 9, 1912, *supra*, and is also warranted by the scope and intent of the original Reclamation Act. The United States must depend upon irrigable lands within the project limits to repay the cost of construction of irrigation works, and when lands are pledged or signed up by the owners, who thereby agree to take water and to pledge their lands for their proportionate share of the irrigation expenses, it is but a reasonable and proper requirement to further obligate them to dispose of the lands only to persons who are qualified to take and pay for a water right under the reclamation law; otherwise, by the simple expedient of transferring lands to disqualified persons, the security of the government for repayment of project costs would be lessened or destroyed.

Section 7 complained of, is in conformity with a rule laid down by this Department in circular approved February 27, 1909 (37 L. D., 468), and is impliedly authorized by the Reclamation Act and is a necessary incident to the proper management and operation of the project by the United States, or its successors. Without some such provision the proper distribution of water to interested water users might be interfered with or defeated.

Section 9 complained of, imposes upon privately owned lands within projects the same condition imposed specifically by the law upon lands therein entered under the homestead law. The owners of private lands are not required to subject such lands to the operation of the reclamation law or to take water therefor. Section 5 of the act of June 17, 1902, *supra*, extends to private landowners the privilege of acquiring water rights in government projects under certain conditions, and in administering the law in connection with the privilege so extended, it is believed to be entirely competent and proper for the United States, acting as the constructor and operator of reclamation works, to, through contracts with those who seek to acquire water, provide a way whereby water can also be furnished to other landowners, where it is necessary to traverse the intervening lands of the first applicants. Such an arrangement is for the good of all interested water users in providing a method whereby water can be conveyed to the lands as well as affording the United States the means by which such deliveries can be made. Applicant has no ground for assuming that this provision of the application or contract will be arbitrarily or unreasonably exercised.

With respect to appellant's contention that he is not in position to agree to vest in the United States any control over ditches and other structures, as provided in paragraph 7, attention is directed to the fact that said paragraph only obligates the applicant to the extent that such structures or lands are "owned or controlled by the applicant." Appellant acquired no vested rights to water for the irrigation of the land by purchase from parties who had filed water-right application under the reclamation law but who had not completed the contract by payment of all charges assessed thereagainst. The Department has equitably held that such an assignee may succeed the original applicant to the extent of securing water right at the construction cost fixed at date of the original application. This privilege is not denied appellant in the present case. Appellant can secure a water right upon the payment of the same charges and upon the same terms as the original water-right applicant who would, had his ownership of the land continued, have been required to pay all construction and maintenance charges assessed thereagainst.

The application or contract between the original water-right applicant and the United States was, however, not assigned, and under rules and regulations then and now existent such an assignee is required to execute his own water-right application and contract with the United States. The conditions expressed in the form of water-right application referring to rights of way, control of ditches, etc., are, as hereinbefore indicated, matters competently and properly included within such an application or contract.

The decision of the Director is accordingly hereby affirmed, and if applicant desires to secure a water right for the land involved he will be required to file his application in the form and manner required by existing rules and regulations.

POCATELLO GOLD AND COPPER MINING CO.

Decided November 5, 1913.

MINING CLAIM—DEFECTIVE PATENT PROCEEDINGS—AMENDMENT OF APPLICATION.

Where the notice of an application for patent under the mining laws as published and posted embraces a tract not covered by the application, the notice and all proceedings had thereon are null and void as to that tract; and the defect can not be cured and the entry permitted to stand by subsequent amendment of the application to include the omitted tract.

JONES, First Assistant Secretary.

This is an appeal by the Pocatello Gold and Copper Mining Company, Limited, from the Commissioner's decision of August 16, 1912, denying its petition for the amendment of its mineral application and entry 010130 embracing the North Star and other lode mining claims, survey 2513, situate in the Ft. Hall mining district, Black-

foot land district, Idaho, so as to include therein a certain excluded portion of the North Star claim.

The application for patent was presented April 20, 1911, accompanied by the official plat and field notes of the survey of the group. Said plat and field notes showed a conflict, to the extent of 4.004 acres, between the North Star and the unsurveyed Bornite Fraction lode mining claim. The application for patent expressly excepted and excluded therefrom "all that portion of the ground embraced in the * * * * Bornite Fraction lode (unsurveyed)." This is the only claim shown upon the plat as conflicting with the North Star, and it conflicts with no other claim of the group embraced in the entry. The published and posted notice of the application for patent made no reference to any excluded area, but in the "application to purchase," filed by the claimant after the expiration of the period of publication an exclusion of the Bornite Fraction area was recited, and the area was also excepted and excluded from the certificate of entry, which issued June 28, 1911.

Upon a review of the record, the Commissioner found, by decision of June 29, 1912, that the excluded portion of the North Star claim embraced the discovery shaft thereof, and required the claimant to show a valid discovery of mineral within the unexcluded portion of the claim, under penalty, on default, of suffering the cancellation of the entry, as to the North Star. In response to this requirement, the claimant filed affidavits with a view to showing a valid discovery within the unexcluded portion of the North Star, and, at the same time, asked that the application for patent, the application to purchase, and the certificate of entry be amended so as to eliminate therefrom all reference to any conflict with the Bornite Fraction claim. As the basis for an application to amend, it was sought to be shown that there is not, in fact, any conflict between the North Star and Bornite Fraction claims, notwithstanding the apparent disclosure of a conflict upon the official plat of survey and field notes thereof. To support the claim that no such conflict exists, there was filed the original notice of location of the Bornite Fraction claim from which, in connection with the official plat, it appears that said claim, as originally located, embraced a small triangular tract the westerly side line of which adjoined the easterly side line of the North Star and thus included ground no portion of which was embraced in the North Star claim. The showing consists, in part, of an affidavit by N. M. Eldridge, the attorney in fact for the entry company, who avers:

That at the time of filing application for patent said Bornite Fraction lode was the property of said company, the applicant for patent herein, and there was no possibility of conflict with said Bornite Fraction lode, and no reason whatsoever why any portion of the North Star lode should be excluded because of any alleged conflict. That in preparing the applications to purchase and for patent as aforesaid, a misunderstanding of the facts existed in the mind of the person who drafted the papers, and it was not

the intention of this affiant or of the applicant company to exclude any portion of the North Star lode because of conflict with the said Bornite Fraction lode. This affiant paid the full purchase price for the total area of the said North Star lode, as shown by survey 2513, and receivers receipts issued for such payment, and affiant thought that the application covered the entire area of said North Star lode.

The Commissioner, in the decision here appealed from, held that the application to amend could not be allowed and, apparently, without considering the showing as to the absence of any conflict between the North Star and the Bornite Fraction claim, held the showing, as to a discovery upon the unexcluded portion of the North Star, to be too indefinite, as to the alleged point of discovery, to warrant issuance of patent to said unexcluded portion. A further and more definite showing was, therefore, required.

In the appeal it is urged that the published and posted notice of a mineral application is the essential and controlling factor in patent proceedings, the sole purpose of which notice is to apprise all possible adverse claimants to a tract sought to be entered of the pendency of the proceedings to the end that they may protect such interests as they may have in or to the ground; and that, as the published and posted notice in this case made reference to no exclusion, and as the Bornite Fraction lode was the property of the appellant company, the rights of no other person or corporation could be jeopardized by the proposed amendment of the application and entry.

The application here in question, when read and interpreted, as it must be, in connection with the plat and field notes which accompanied it, expressly excepted and excluded therefrom an area of 4.004 acres, shown upon the plat and in the field notes to be in conflict between the North Star and Bornite Fraction claims. As to that area, no application has been filed.

While section 2325, Revised Statutes, under the provisions of which title to this ground is sought, makes the publication and posting of a notice by a register an indispensable prerequisite to the acquisition of patent to a particular tract claimed and located under the mining laws, it nevertheless authorizes and empowers a register to publish and post such a notice and otherwise proceed only in those cases where there is filed a verified application for patent to an area so claimed and located. It is held by the Department that proceedings had on an application for patent verified by an agent or attorney-in-fact of a claimant at a time when the claimant was both resident and physically within the land district in which the claim so applied for is situated, affords no valid or proper basis for an entry and patent; in other words, that such proceedings are a nullity, because not based upon a proper application. (*Crosby and Other Lode Claims*, 35 L. D., 434; *C. C. Drescher*, 41 L. D., 614). The same principle would apply, but with greater force, to a case like this, where, with respect to the particular tract in question, no application was filed. It must accordingly be held that the notice, in so far as it embraced and

included said tract, and all proceedings had thereon, were null and void, and hence that the defect can not now be cured by an amendment of the application in the manner sought.

It may be true that, as is now asserted on behalf of the claimant, there was not at the date of the application, any actual conflict on the ground between the North Star and Bornite Fraction claims, or, if there were, that the area so in conflict was, at the date of the application, and is now, claimed by, and in the exclusive possession of, the entry company. This does not alter the fact, however, that the area so shown to be in conflict was not covered by the application, and hence was not entitled to be included in the published and posted notice, and the resulting entry.

For the reasons stated the decision of the Commissioner, denying the position of the claimant for the amendment of the application to accord with the notice and entry is affirmed.

In this connection the attention of the Commissioner is directed to a further and more definite showing by the claimant as to the discovery of mineral upon the unexcluded portion of the North Star claim, which showing accompanied the appeal.

JAMISON ET AL. v. SANTA FE PACIFIC R. R. CO.

Decided November 8, 1913.

RAILROAD LANDS—LIEU SELECTION—ACT OF APRIL 28, 1904.

In determining whether lands selected by the Santa Fe Pacific Railroad Company in lieu of lands relinquished by it under the act of April 28, 1904, are "of equal quality" with the lands relinquished, the land department may accept the services of protestants who desire opportunity to disprove the allegation of the company that the relinquished and selected lands are of equal quality.

JONES, First Assistant Secretary:

May 1, 1911, the Santa Fe Pacific Railroad Company selected, under the act of April 28, 1904 (33 Stat., 556), the E. $\frac{1}{2}$, Sec. 20, T. 15 N., R. 18 W., in lieu of the E. $\frac{1}{2}$, Sec. 31, T. 14 N., R. 17 W., New Mexico, relinquished by the company.

July 29, 1912, Leo Leaden filed application to enter the SE. $\frac{1}{4}$, Sec. 20, under the coal-land laws, accompanying his application by a petition to contest the Santa Fe Pacific selection. November 13, 1912, H. B. Jamison filed a similar application to enter and to contest as to the NE. $\frac{1}{4}$, Sec. 20. The grounds of protest are substantially that the E. $\frac{1}{2}$, Sec. 20, and the base land offered by the company, E. $\frac{1}{2}$, Sec. 31, are not lands of equal quality, but that the selected land is, by reason of its character and situation, more valuable than the lands sought to be surrendered.

May 17, 1913, the Commissioner dismissed the protests and rejected the coal-land applications on the ground that applicants had acquired no rights to the land prior to the railroad selection, and

that the base lands and selected tracts have been returned by a special agent of the General Land Office as coal lands of equal value.

It appears from report of the special agent, dated January 16, 1912, that in his opinion the base and selected lands are "very nearly equal in quality," though he concludes that the lieu land is more valuable because situate near the town of Gallup and adjacent to a constructed railroad, while the base lands are 9 miles from the town and railroad; also that the lieu land is near a well-developed and thoroughly explored coal field, while no developments of the coal measures contained in the base lands have been made closer than 8 or 9 miles. Geologically, however, he concludes that both tracts were underlaid by the same coal measures, namely, the upper and lower measures of the Mesa Verde formation. With respect to the upper measures on the base land he estimates that they lie at a depth of about 800 feet; that the lower measures lie at a depth of about 1,300 feet, while with respect to the selected land the principal measures will, in his opinion, be found at a depth of less than 600 feet.

The act under which the lieu selection was made, April 28, 1904, *supra*, requires that the base and selected lands shall be "of equal quality," and in view of the sworn allegations of protestants that they are not of such character, the Department is not warranted in accepting the special agent's report as conclusive to the contrary; nor does the fact that the matter of investigating relative values in such cases is imposed primarily upon the Department preclude it from accepting the services of citizens who desire to be afforded opportunity to disprove the allegation of the selector.

The Commissioner's decision is accordingly reversed, and the case remanded, with instructions that hearing be ordered to determine the character, condition, and relative value of the base and selected lands here involved, due notice of the hearing to be given protestants Jamison and Leaden, and the Santa Fe Pacific Railroad Company.

McDONALD v. RIZOR.

Decided November 8, 1913.

RECLAMATION—SETTLEMENT UPON FARM UNIT.

Settlement upon any portion of a farm unit entitles the settler to claim, by virtue of such settlement, only lands contained in that farm unit.

ENTRY LIMITED TO FARM UNIT.

Lands platted to farm units can only be taken in accordance with the established units; and there can not be included in the same entry lands within a farm unit and other lands without.

JONES, *First Assistant Secretary:*

James J. McDonald has appealed from decision of October 10, 1912, by the Commissioner of the General Land Office, rejecting his application to enter the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 18, T. 24 N., R. 21 W.,

Kalispell, Montana, land district, and allowing the application of Mary Rizer in conflict therewith as to a portion of the land.

McDonald filed his application November 7, 1910, for said tracts, and on November 9, 1910, Rizer filed her homestead application for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, said section. Rizer claimed prior settlement and McDonald was called upon to show cause why his application should not be canceled to the extent of the conflict. Subsequently the local officers rejected both applications, for the reason that they did not conform to the established farm units. It appears that by farm unit plat, approved April 6, 1910, farm unit "A" embraced lots 1, 2, 3 and 4, constituting four subdivisions on the west line of said section, farm unit "B" embraced the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, and farm unit "C" embraced the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section. It is further stated that all of the lands in the south half of said section are included in a State school indemnity selection.

April 7, 1911, farm units "A," "B," and "C," above mentioned, were canceled and a new farm unit "D" was created, embracing the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, said section. McDonald filed an affidavit to the effect that he established residence on the land claimed by him on November 3, 1910, and has since continued to reside thereon. Both applicants have applied to amend their applications to embrace the land described in said farm unit "D."

A hearing was ordered between the parties to determine which was the prior settler, and their respective rights to the land in controversy. The local officers found in favor of McDonald upon the conclusion that Miss Rizer was unable to comply with the homestead law by reason of her age and lack of money. The Commissioner reversed the local officers and held that Miss Rizer was a prior settler and was entitled to complete her entry for farm unit "D."

The entire record has been very carefully considered and the Department concurs in the finding of the Commissioner that Miss Rizer settled upon a portion of the land claimed by her prior to the time McDonald settled upon any portion of the land claimed by him. Miss Rizer settled upon the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section. Under the well established rules she would have been entitled to claim all of the lands in that technical quarter section, had it not been for the prior establishment of farm units. After farm units are established, the units are to be looked to as marking out a definite body of land, which is to be considered as a tract to be disposed of under one claim or entry therefor, and adapting the old rule with reference to technical quarter sections to farm units, it would seem that a settlement upon any portion of a farm unit would entitle such settler to claim only lands contained in that farm unit by virtue of such settlement. By adopting such rule the settlement of Rizer would be confined to the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section. It does not appear

that she placed any notices outside of this farm unit, nor outside of the technical quarter section upon which she settled, nor that she has made any improvements on other lands. In fact, her improvements are confined to the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$. While it is a matter of some doubt whether McDonald performed an act of settlement on the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section prior to the time he knew of the aforesaid settlement of Rizer, yet, according to his own testimony, which is not sufficiently disproved by other testimony, he placed a load of lumber on that tract and laid a foundation for a house thereon about 9:00 o'clock on the evening of November 3, 1910, which is about three or four hours subsequent to the aforesaid settlement of Rizer upon the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$. Subsequently McDonald removed the lumber from the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and placed it upon the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, together with additional lumber, and he commenced to construct a house on the latter tract about the same time that Rizer commenced to construct a house on the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$. Each of them finished their respective houses and although it is attempted to show by each that the other has not sufficiently complied with the law as to residence, it is not sufficiently disclosed that either one has been in default.

It is further disclosed that McDonald and H. H. Smith, who appears to have been acting in behalf of Rizer, examined lands in this section together and afterwards each sought to take advantage of the other to procure prior claim. There was some talk of an amicable adjustment of the claims, but it appears nothing definite was decided upon.

From the above it appears that Miss Rizer has superior claim to the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and that McDonald has superior claim to the S. $\frac{1}{2}$ NW. $\frac{1}{4}$. However, as the matter stood at the time of the Commissioner's action, this would have involved division of the farm unit and would have permitted McDonald to take one tract outside of the unit and one tract which formed a part of the unit. Lands platted to farm units can only be taken in accordance with the established units. An entry may not embrace different tracts, some of which are within a unit and some without. In view of this situation, the Department called upon the Reclamation Service for report as to the advisability of dividing farm unit "D" so as to permit Rizer to enter the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and McDonald to enter the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of said section.

Under date of October 28, 1913, the Reclamation Service reported that it had been found that farm unit "D" could not be irrigated, and recommendation was made that the farm unit plat be amended by cancellation of said farm unit. This recommendation is approved and it is directed that Rizer be permitted to enter the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ of said section and any other contiguous lands, if any, subject to entry, sufficient to make up the area she is entitled to enter, not interfering, however, with the right of McDonald to take the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ of said

section. McDonald may take the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ together with any other contiguous vacant lands subject to entry, if any, sufficient to make up the area he may be entitled to enter, not interfering, however, with the right of Rizzor to make her entry as stated.

KERMODE v. DANKWARDT.

Decided November 19, 1913.

HOMESTEAD ENTRY—QUALIFICATIONS—OWNERSHIP OF LAND.

Departmental decision in Sorli v. Berg, 40 L. D., 259, overruled, and decision in Amidon v. Hegdale, 39 L. D., 131, holding that "under the maxim *de minimis non curat lex* the ownership of less than one acre in excess of 160 acres will not be held a disqualification to make homestead entry," reaffirmed.

JONES, *First Assistant Secretary*:

Charles Dankwardt has appealed from the decision of the Commissioner of the General Land Office, dated January 14, 1913, holding for cancellation his homestead entry, made on September 25, 1911, for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, S. $\frac{1}{2}$ NE $\frac{1}{4}$ SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 12; W. $\frac{1}{2}$ NW. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ NW. $\frac{1}{4}$, N. $\frac{1}{2}$ NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 13, T. 8 S., R. 72 W., 6th P. M., Leadville, Colorado, land district.

It appears from the record that, on October 30, 1911, James E. Kermode filed his affidavit of contest against said entry, charging the disqualification of Dankwardt in that the latter was the owner of more than 160 acres of land at the date of the entry. The local officers found, from the testimony submitted before them, in favor of the entryman and the Commissioner of the General Land Office, in the decision appealed from, reversed their action and held the entry for cancellation, as has been stated.

The material facts in the case are fully set forth in the Commissioner's decision and sustain his finding that Dankwardt was, at the date of his homestead entry, the owner of more than 160 acres of land. The only question, therefore, to be determined by the Department is, was he disqualified to make the entry under consideration by virtue of the fact that he was, at the date thereof, the owner of what is known as the "Old Sigel Ranch," containing 160 acres of land, together with several acres subdivided into lots in an addition to the city of Denver.

It was held by the Department, in the case of Sorli v. Berg (40 L. D., 259), overruling Amidon v. Hegdale (39 L. D., 131), that section 2289, Revised Statutes, prohibited the making of a homestead entry by one who is the owner of 160 acres of land and of a town lot 50 feet in width and 140 feet long. With the reasoning employed in Sorli v. Berg, *supra*, the Department finds itself unable to agree, and that decision is, accordingly, hereby overruled. The rule announced in Amidon v. Hegdale, *supra*, is not only a reasonable and just one but

is consistent with the practice of the land department, in the administration of the homestead law. Tested by this rule, Dankwardt was not qualified to make the entry under consideration, and the decision appealed from is, therefore, affirmed and the entry canceled.

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ANDERSON v. RUBY ET AL.

Decided November 20, 1913.

PRACTICE—CONTEST—NOTICE.

Under the rules and regulations of the land department it is the duty of a contestant to prepare for the approval and signature of the local officers the necessary notices to the defendant; and failure to furnish such notices, after notice to do so, is sufficient ground for rejecting the affidavit of contest and closing the case.

JONES, First Assistant Secretary:

This case involves the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 2, S. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$, Sec. 3, T. 34 N., R. 7 E., N. M., Havre, Montana, for which April 26, 1910, Walter A. Ruby made homestead entry 03115. Contests were filed against said entry as follows: April 18, 1912, by Ira R. Stephenson, alleging abandonment and failure to cultivate. Notice for personal service immediately issued. July 27, 1912, by Roy E. Anderson, addressed at Joplin, Montana, alleging substantially the same grounds as did Stephenson and further charging that the latter's contest was collusive and fraudulent. November 23, 1912, by C. L. Wright alleging abandonment. Notice issued on Wright's contest on day it was filed, calling for personal service.

November 26, 1912, entryman's relinquishment acknowledged before a notary public, November 15, 1912, was filed in the local office and the same was accompanied by Hiram B. Brown's homestead application for the land. Brown's application was suspended awaiting action by contestant Wright who was notified of such cancellation. Brown appealed. December 6, 1912, Wright filed homestead application 017367 for the land and the same was suspended awaiting action on Brown's appeal. In the meantime Stephenson's contest, the first filed in point of time, was dismissed and his case closed for failure to serve defendant with notice.

The Commissioner of the General Land Office April 9, 1913, reversed the action of the register and receiver holding that Wright's contest "abated absolutely" under showing made—finding that Anderson's prior contest was still pending and undetermined, and that the latter should be notified of his right to apply for the land; that in case Anderson applied in time given (thirty days), his application would be suspended and Brown would be allowed twenty days to apply for a hearing for the purpose of showing that Anderson's contest was not the cause of said relinquishment. Alternative right

was given Brown to enter the land on failure of Anderson to apply therefor in time given and to Anderson to make entry in case of Brown's failure to apply for a hearing. From that action Wright has appealed to this Department.

The register and receiver closed Anderson's contest because of his failure to furnish blank notices for service on contestant under Practice Rule 62, and his continued failure after he was given ten days notice. The Commissioner called on the register and receiver to report as to the form of notice sent to Anderson. The register and receiver December 27, 1912, reported that on October 19, of that year, contestant was notified by ordinary mail that his contest was then senior and he was required to file notice within ten days from date. Anderson made no response, and there is nothing in the record showing his further interest in the contest until after the Commissioner had decided the case in his favor.

Practice Rule No. 62 requires:

All notices and other papers not required to be served by the register and receiver must be prepared and served by the respective parties.

The regulations to registers and receivers of March 6, 1911, state:

All contestants and protestants will also be required, under Rule 62, to prepare and present for your approval and signature, all necessary notices of contest or protest upon blank forms furnished by you for that purpose in each individual case, and they will also be required to make all copies of applications to contest or protest which may be needed in serving notices thereunder.

It was clearly Anderson's duty to prepare for the approval and signature of the local officers the necessary notices to defendant entryman. This was not done. Both Wright and Stephenson did so following the rule. Had Anderson followed the rule his notice would have issued, if in correct form.

Anderson's contest, as observed, was filed July 27, 1912. He had not filed the required notice for service for nearly three months and when called on to do so—a call not required to be made by the register and receiver—he ignored the requirement. It is true, the notice was given without registry and, therefore, no positive proof appears that he received it. But sent as it was to the record address, presumably it was received, nothing being shown to the contrary. In all these proceedings he remained silent since he filed contest, except that after Commissioner's decision and instructions he filed his application for the land. Wright and Brown on the contrary have been vigorously prosecuting their claims.

Under the circumstances stated the register and receiver were right in closing out Anderson's contest for failure to comply with Rule 62 and especially for failure to respond to the requirements of those officers.

Anderson's application for the land filed herein since the Commissioner's decision will be rejected. Wright's application will be allowed unless Brown within twenty days from notice shall apply for a hearing and show thereat that Wright's charge "was not true, or that contestant is not a qualified applicant, or that the land is not subject to his application." Should Brown establish either one of these charges his application will be allowed. See Instructions (42 L.D., 71).

The action appealed from is reversed.

A. B. HAMMOND ET AL.

Decided November 22, 1913.

FOREST LIEU SELECTION—UNSURVEYED LANDS—ADJUSTMENT—EXCESS AREA.

The act of June 4, 1897, contemplates that a selection thereunder shall embrace an area approximately equal to the area of the base offered therefor; and where a selection is made of unsurveyed lands, described as what will be when surveyed certain technical legal subdivisions, and upon survey the designated legal subdivisions are found to be irregular and to contain abnormal areas, aggregating more than the area the selector is entitled to upon the base submitted, the selector will not be permitted to furnish additional base to support such excess, but will be required to eliminate from his selection sufficient legal subdivisions to make the selected and base lands approximately equal in area.

JONES, First Assistant Secretary:

A. B. Hammond, selector, and C. A. Smith Timber Co., transferee, appealed from decision of the Commissioner of the General Land Office, March 15, 1913, rejecting in part his application to adjust selection of unsurveyed land under act of June 4, 1897 (30 Stat., 36), Roseburg, Oregon.

November 21, 1900, Hammond filed selection in the local office under act of June 4, 1897, *supra*, for the surveyed SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 14, T. 32 S., R. 12 W., and the then unsurveyed land described as what will be, when surveyed, the W. $\frac{1}{2}$ and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 6, T. 32 S., R. 11 W., estimated to contain 440 acres, for which he filed his recorded deed and relinquishment of 440 acres of land in Priest River Forest Reserve, Idaho, described as S. $\frac{1}{2}$, W. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 5, T. 59 N., R. 3 W., B. M.

Plat of survey of township 32 south, range 11 west, was approved November 23, 1911, and was filed in the local office September 18, 1912.

The plat shows an abnormal area in section 6, comprising two extra tiers of forty-acre subdivisions in its northern part, indicated on the plat as lots 1 to 8, inclusive. Hammond applied to adjust his selection to the plat of survey so as to read lots 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 17, and 18 and E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said section 6.

The local office did not transmit the application for adjustment to the Commissioner, and the Commissioner did not perceive that it covers much more land than was implied by the selection. Under that impression the Commissioner, December 19, 1912, permitted the adjustment to include all the tracts. On being further advised, the Commissioner held in his decision of March 15, 1913, that the selection was intended to segregate only 440 acres of land or what would ordinarily be the normal area of the subdivisions indicated and described as selected. This was evident because the base land contained but 440 acres, and the selected land, being regularly surveyed as described in the application, would contain that area. The application as made includes an area of 298.56 acres in excess of the base surrendered therefor. The Commissioner recalled his letter of December 19, 1912, and denied the application for the excessive area, requiring Hammond to include in his application for adjustment lots 10, 11, 12, 13, 14, 15, 17, 18 and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, thus eliminating the excess area included in the selection. The adjustment as allowed by the Commissioner included an area of 450.59 acres, making an excess in the selected land of 10.59 acres, for which the selector was required to pay.

The selector submitted additional base to cover the lands sought by him on adjustment in excess of the 450.59 allowed him, but the Commissioner refused to accept such additional base as part of the original selection and ruled that it could be considered only as a new selection from date of attempted adjustment.

The appeal assigns error that the Commissioner refused to permit adjustment so as to include lots 2, 3, 4, 5, 6 and 7, as well as the other lots.

There was no error in the Commissioner's decision. The act of June 4, 1897, *supra*, contemplates the exchange of equivalents in area. One filing a selection for unsurveyed land and offering 440 acres of base must conclusively have intended to select only a like area. This was all he was privileged to do or claim, and if, by irregularity of surveys, other lands, nearly 300 acres in amount, are included in the section, it can not be supposed he intended to select such lands, because, had that been his intent, his selection would be void from the beginning. The adjustment made by the Commissioner includes a compact, contiguous body of land next adjacent to the surveyed tract which was part of the selection (SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 14, T. 32 S., R. 12 W.), and therefore it obviously carried out the selection according to its necessary original intent.

The decision is therefore affirmed.

GEORGE B. McFADDEN.

Decided December 9, 1913.

RIGHT OF WAY—IRRIGATION AND POWER PURPOSES.

Projects involving both irrigation and power possibilities, but wherein the power possibilities constitute the main factor of value, should be made the subject of permit under the act of February 15, 1901, and not of easement under the acts of March 3, 1891, and May 11, 1898; but where the reservoirs, structures, and canals essential for the storage and carriage of water for irrigation uses are separable from the reservoirs, structures, pipe lines, and ditches designed for development of electrical energy, they may be made the subject of separate applications, the former under the acts of 1891 and 1898, and the latter under the act of February 15, 1901.

JONES, *First Assistant Secretary*:

May 12, 1913, the Commissioner of the General Land Office called upon George B. McFadden to relinquish for nonconstruction within the statutory period, a right-of-way approved to him September 11, 1907, under the act of March 3, 1891 (26 Stat., 1095), as amended by the act of May 11, 1898 (30 Stat., 404), for the Roosevelt, Elk Horn and Stove Prairie reservoirs and pipe lines and ditches in townships 8 and 9 north, ranges 70 to 75 west, Denver, Colorado, land district. The Commissioner also rejected an amended map and application presented by McFadden May 27, 1909, under the same acts, for enlargement of the reservoir sites and for additional canals in said townships.

Appeal was taken to the Department, and on July 26, 1913, the Department affirmed the Commissioner's decision. It now appears that the decision was premature in that certain briefs and arguments filed within the time prescribed by the rules had not reached the Department. Accordingly, the previous decision of July 26, 1913, is vacated and the case will be considered *de novo*.

The record is somewhat meager as to the plans and purposes of the applicant but it would appear from an examination of the various papers submitted and the reports of field examinations made by officers of the Department of Agriculture, that the scheme embraces the Roosevelt Reservoir, proposed to be created by the construction of a dam across the Cache-Poudre River, creating a storage of 80,724 acre-feet of water; of the Elk Horn Reservoir, about 12 miles lower down on the same stream, with a capacity of 15,907 acre-feet and of the Stove Prairie Reservoir, two miles below the Elk Horn Reservoir, with a capacity of 26,484 acre-feet. These reservoirs are proposed to be connected by a series of pressure pipe lines and ditches and below the Stove Prairie Reservoir there is outlined approximately 8 miles of canal and pipe line for the conveyance of water to lands further down the valley of the stream. The elevation at the lower end of the Roosevelt Reservoir is 7,629 feet and at the lower end of the

canal and pipe line mentioned 5,447 feet, showing a fall of between two and three thousand feet. The grade of the pressure pipe line is shown on the map to be approximately 72.13 feet per mile.

According to the admissions of the applicant and the reports of field officers, no construction work has been performed upon the reservoirs, pipe lines or canals, but applicant alleges the expenditure of about \$33,604 in surveys, engineering works, stream gauging, and sinking of test pits. He also avers that one reason for not proceeding with construction work was that he was awaiting action upon his amended application filed in 1909. The latter application, as nearly as can be ascertained from the record and from the reports of field officers, is for a new location of pressure pipe lines and canals and provides a new method of transmission of the water to the point of diversion originally shown.

The applicant, however, expressly stipulates that he does not by the amended application intend to abandon or relinquish any rights under the application approved in 1907. He alleges in the appeal and brief filed before the Department, that certain irrigation districts have been organized and proposals made to him to supply such districts with water and specifically names the Greeley-Poudre districts, negotiations with which it is said are suspended because of litigation pending between the States of Wyoming and Colorado concerning the right of the latter State to divert water from streams flowing from Colorado into Wyoming.

According to reports of field officers, there is a considerable natural annual flow in the Cache-Poudre River, sufficient to develop approximately 50,000 horsepower per annum, but this water is largely, if not wholly, embraced in prior appropriations for irrigation uses. As this use is lower down the valley it would not, however, preclude the use by this applicant of the water for power purposes if passed through his reservoirs, pressure pipe lines and power houses and restored to the bed of the river above points of diversion by the irrigators. In addition, there is apparently a considerable amount of flood water available in the stream and it is apparently for the purpose of impounding this flood water and regulating its flow during the season that the reservoirs are sought.

If arrangements can be completed for supplying lands below the reservoirs with water for irrigation and the amount of flood water claimed by applicant is available for storage the project will possess undoubted value for irrigation purposes. However, the plans as disclosed by applicant, particularly in his amended application, indicate that a part of the rights-of-way sought, at least, is unnecessary for irrigation uses but will develop a large amount of electrical energy estimated from 157,000 to 200,000 horsepower annually. No showing is made that this amount of power or any considerable

portion thereof will be used in pumping water for irrigation, and in view of the lack of development and its proximity to the city of Denver, other towns in eastern Colorado, and of various railroads, it would seem to the Department that the chief value of the proposed development, if carried out, would be for the electrical power thereby developed. In fact, it would seem from applicant's own showing that the two features or values of the proposed project are clearly separable. The reservoirs, or part of them, can be utilized for the storage of flood waters, the water released carried in the bed of the stream to lower reservoirs and to the point of diversion for irrigation uses without the necessity of utilizing the pressure pipes and power house sites described in the application. It would be unnecessary to incur the expense of constructing the latter features of the project were it to be utilized solely for irrigation of lands by gravity. As already intimated there is no evidence that any large amount of lands are available or that any arrangements have been made for irrigating lands which can be reached only by pumping water through the use of electrical energy, though some mention is made in the papers of lands on the mesa that can only be reached through a pumping arrangement.

The amount of power which can be developed here is, however, so immensely in excess of any proven irrigation use that the Department must conclude that so far as the major part of the power susceptible of generation is concerned, the project is as to that feature not an irrigation development but a development for the generation of commercial power. The case is in many particulars identical with that of the Denver Power and Irrigation Company, the subject of departmental decisions reported in 38 L. D., 207, and 41 L. D., 524, the final result of which was to secure the relinquishment of a right-of-way granted under the act of 1891, as amended by the act of 1898, *supra*, and to enable the applicant to secure permission to develop under the act of February 15, 1901 (31 Stat., 790).

In the case at bar, however, it would appear that the structures and canals essential in storage and carriage of water for irrigation uses are separable from those structures, pipe lines, and ditches useful for the development of electrical energy, and that the latter could be utilized for the production of electrical energy from minimum flow of the river if no irrigation use were made of the flood waters.

The act of March 3, 1891, *supra*, confines the use of rights-of-way granted thereunder exclusively to irrigation. The amendatory act of 1898 authorizes the use of such rights-of-way for purposes of public nature defined as water transportation, domestic purposes, "or for the development of power, as subsidiary to the main purpose of irrigation." The word "subsidiary" is defined by Webster as "furnishing aid, assisting, auxiliary, helping, aiding in an inferior capacity." In this case it is evident that even if the stored water, remain-

ing after irrigation of lands by gravity, were to be pumped to other lands, there would still remain a large and extremely valuable quantity of electrical energy which could only be applied to commercial uses. If the estimates of the officers of the Department of Agriculture are accurate, the power value or feature of the project would far outweigh its value for irrigation. The Department must, therefore, conclude that the power development is not "subsidiary to the main purpose of irrigation" within the meaning of those terms as used in the acts of 1891 and 1898, but that this feature of the project falls clearly within the purview of the act of February 15, 1901, which was clearly enacted by Congress for the purpose of permitting the use of pipe lines and reservoirs for the development of electrical power but under a more limited and restricted tenure than it was seen fit to accord those persons who engage in the more permanent and vital business of reclaiming arid lands.

It would seem that this project, if it prove feasible, as contended by applicant, and is carried forward as proposed, would perform useful service both with respect to the supplying of water for the irrigation of arid lands and for the generation of electrical energy for commercial uses. The department stands ready to encourage private enterprise in the development of either of the aforesaid resources, and is not disposed to take advantage of Mr. McFadden's failure to complete the reservoirs and other structures and appurtenances, right-of-way for which was granted in 1907, provided he is willing to apply for the irrigation and power features of his project under the acts peculiarly applicable thereto and will assure the Department that if the grants and permits be made or issued he will proceed to utilize same with reasonable diligence. Accordingly, any action looking to the vacation of the right-of-way approved in 1907 will be held in abeyance for the time being and the Commissioner of the General Land Office will notify applicant that he will be allowed ninety days from notice within which to submit new and separate applications, the first to be made under the act of March 3, 1891, as amended by the act of May 11, 1898, *supra*, and to embrace only those reservoirs, structures, and canals actually necessary and useful for the storage and carriage of water for irrigation purposes; the second to be made under the act of February 15, 1901, *supra*, and to embrace all those reservoirs, pipe lines, ditches, and structures necessary or usable for the purpose of developing electrical power. With said applications applicant should also submit a relinquishment of the right-of-way granted him September 11, 1907. Upon receipt of these amended applications, the Department will, in the absence of objection other than now disclosed, take prompt action looking to the issuance of the necessary approvals and permits so that the development of the project may proceed.

ALFRED M. STUMP ET AL.

Decided December 13, 1913.

CONFIRMATION—PROVISO TO SECTION 7, ACT OF MARCH 3, 1891.

The proviso to section 7 of the act of March 3, 1891, operates upon entries against which there is no contest or protest pending at the expiration of two years from the date of the issuance of the receiver's final receipt; and in the absence of a valid contest or protest the Secretary of the Interior on that date becomes *functus officio* save for the single ministerial act of executing and delivering patent to the entryman or his assignee.

CONFIRMATION—SILETZ HOMESTEADS—PROTEST.

The letter of Special Agent Hobbs, dated November 11, 1903, challenging the validity of certain homestead entries in the former Siletz Indian Reservation, does not constitute a "protest" within the meaning of the proviso to section 7 of the act of March 3, 1891, and is not sufficient to take such entries out of the operation of said proviso.

FORMER DEPARTMENTAL DECISION VACATED.

Departmental decision of January 5, 1911, in this case, 39 L. D., 437, vacated. (See also 40 L. D., 278.)

JONES, *First Assistant Secretary.*

In the above-entitled case, my predecessor, on January 5, 1911, affirmed the action of the Commissioner of the General Land Office in holding for cancellation the homestead entry herein involved. This was in pursuance of a finding of facts made on the assumption that the Department had jurisdiction, the objection to jurisdiction on the ground that no protest or contest, within the meaning of the proviso to section 7 of the act of March 3, 1891, had been filed within two years from date of receiver's receipt, having been overruled.

Receiver's final receipt issued November 10, 1902. On November 14, 1908, the local land officers, after a hearing had on notice issuing January 20, 1907, recommended cancellation of the entry on the ground that entryman had failed to comply with the law in respect to cultivation and residence.

The charges against the entry were stated in the local officers' decision and restated by the Commissioner of the General Land Office in his decision on appeal, as—

(1) That entryman never resided on the land entered; (2) that he has not cultivated the land; (3) that said entry was made in the interest of one Howard Morley.

The Commissioner found entryman guilty as charged, except as to the third specification. On that point he found that there was no evidence showing that the entry was made in the interest of Morley or the lumber company.

These charges resulted immediately from the report of Special Agent McMechan, dated October 8, 1906, alleging lack of cultivation, as well as the fact that the entryman had never established residence on the land. The special agent, however, did report that there was no evidence that the entry was made in the interest of any party other than the entryman.

It will be observed that all these dates are subsequent not only to November 10, 1902, date of receiver's receipt, but to November 10, 1904, the date when the entryman's right to a patent accrued, under the proviso to section 7 of the act of March 3, 1891, unless on November 10, 1904, there was a pending contest or protest against the entry. In the absence of a valid contest or protest, the Secretary on that date became *functus officio* save for the single ministerial act of executing and delivering a patent to the entryman or his assignee. It would follow that the notice of hearing, the hearing before the local officers, and all the consequent proceedings in the General Land Office and in this office were without legal effect for want of jurisdiction.

Jurisdiction was assumed, however, and was sustained by my predecessor on the ground that there was a valid protest against the entry on November 10, 1904. I shall not repeat in detail the incidents narrated in the decision dated January 5, 1911 [39 L. D., 437]. The land involved is in the former Siletz Indian Reservation. Early in 1903, from sources other than the land department, the Secretary had been informed generally that a majority of the commuted homestead entries in the Siletz were made fraudulently for speculative purposes. March 25, 1903, the Secretary directed that immediate attention be given to the matter and that proper action be taken to prevent the alleged frauds. The following day Special Agent Patterson was instructed to investigate and report upon "all homestead entries in Ts. 6, 7, 8, 9, and 10 of Rs. 9, 10, and 11 west." Patterson made no report, and August 7, 1903, Special Agent Hobbs was directed to carry out the instructions. November 4 the latter requested, by telegraph, that further issuance of patents be stopped, as proofs on cash entries were practically all fraudulent. November 11, 1903, he, Hobbs, by letter, reported that 21 entries, specifically described by him, were made at or practically on the same date and that all had been deeded to one Howard Morley. He pointed out that 17 of the entries had been made on July 31, 1902, and that all 21 were sold at or near date of 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 one transferee, 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 investigation and report relative to the same.

The Stump entry herein involved was one of these entries.

Proceedings that would lead to issue of patent were suspended November 14, 1903. Ultimately, several years after, another special agent, McMechan, after the investigation contemplated in the Hobbs letter, reported specific charges against the entry, on which, as here-

tofore stated, a hearing was had, resulting in the order to cancel the entry.

Unless the Hobbs letter constitutes a protest within the meaning of the proviso, the department lost jurisdiction, save to issue patent, November 10, 1904. Exactly what existed on that date challenging the integrity of the Stump entry?

A letter reporting that Stump's entry had been made July 21, 1902, that final receipt thereon had issued November 10, 1902, and that he had conveyed it to one Howard Morley February 12, 1903, for \$2,000. From the fact that sixteen other entries had been made on the same day and that all had been conveyed to Morley, Hobbs thought it was "reasonable to believe" that the Stump and the other entries had not been made in good faith.

The entries were made on the same date because, and Mr. Hobbs overlooked this fact, the land in the township wherein these seventeen entries were made was not open to entry until July 21, 1902.

The action of the General Land Office, November 14, 1903, directing suspension of all entries in fifteen townships, including the one in which this entry was made, was based upon Hobbs's telegram of November 4, 1903, which was merely to the effect that proofs on cash entries were "practically all fraudulent"—not a single specification being furnished. His letter of November 11, 1903, manifestly not received until after the order of suspension, November 14, was not a factor in any action at that time taken by the General Land Office. The order of suspension issued on *request*, not on *protest*.

This was apparently the view taken July 18, 1907, when the Acting Commissioner of the General Land Office, in a letter to the Acting Chief of Field Division, Portland, Oregon, held that the Soesbe, Pierpont, Marchel, and Ward entries, included with the Stump entry in Hobbs's letter, were "confirmed" under the proviso and were approved for patent on the ground that while adverse reports had been submitted against these entries after the lapse of two years from issuance of receipt, yet prior to that time no "specific" charge of fraud had been brought against the entries. The Mahoney entry, also included in Hobbs's letter, was released by revocation of any adverse proceedings on the ground such had been instituted on reports submitted after the lapse of two years. Moreover, on the same date, the Luther, John Loy, Fred Loy, and Dernbach entries, likewise included in the Hobbs letter, were approved for patent as "confirmed"—a very erroneous expression, however—under the proviso.

In short, the Hobbs letter was not regarded as a protest as to nine of the twenty-one entries. Obviously if it were not a protest as to the nine, it was not a protest as to the other twelve.

The Stump case became the subject of litigation. In the Supreme Court of the District of Columbia, the court held that the Hobbs

letter, or any other proceeding or act had or taken within two years, did not constitute a protest within the intent of Congress. The Court of Appeals, on appeal [40 L. D., 278], held that the question of what is or what is not a protest is exclusively within the jurisdiction of the Secretary to decide, and that his decision involving, as it does, the exercise of judgment and discretion, is not reviewable by the courts. On writ of error, sued out by the transferee of Stump, the case was taken to the Supreme Court of the United States. That suit has just been dismissed by the plaintiff in error, and the question of whether, in any of the entries embraced in the Hobbs letter, there was a pending protest or contest two years from the date of receiver's receipts has been resubmitted to this Department.

On review and after careful consideration of the whole question—the law as designed by Congress and the facts pertinent to this case—I am unable to reach the conclusion that a valid protest or contest was pending against this and the other entries mentioned in Hobbs's letter at the end of two years from issuance of receiver's receipts. It follows that the adverse actions taken by the Department were beyond its jurisdiction and must be, and hereby are, vacated. You will forthwith pass to patent the land covered by the Stump and other entries, wherein patent has not heretofore issued, enumerated in the Hobbs letter of November 14, 1903.

MARGARET T. WHITE.

Decided December 13, 1913.

DESERT LAND ENTRY—EXTENSION OF TIME.

Desert land entrymen in southern California who in good faith made their entries relying upon what is known as the Imperial System for water to irrigate their lands, but who have been unable to effect reclamation because of delay in completion of that system, are held to be within the terms and purview of the acts of March 28, 1908, and April 30, 1912, and entitled to the extensions of time authorized by those acts, notwithstanding they may have no direct interest, by purchase of stock, in the local company by which said system operates.

JONES, *First Assistant Secretary:*

Appeal is filed by Margaret T. White, assignee of James S. White, Sr., from decision of December 11, 1912, of the Commissioner of the General Land Office, denying her application for three years' extension, under the act of March 28, 1908 (35 Stat., 52), of time for submitting final proof on the desert land entry made by her said assignor February 11, 1906, and assigned to her July 2, 1908, for lots 8, 9, 12, 13, 16, and 17, and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 30, and lots 4 and 5, and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 31, T. 14 S., R. 18 E., S. B. M., Los Angeles, California, land district.

Annual proofs showing the required expenditures were filed.

This application, filed February 7, 1912, sets forth that reclamation of these lands was prevented by the failure, without any fault and from causes beyond the control of the applicant, of the Imperial Water Company No. 5, within the corporate limits of which said lands are embraced and upon which the entry when made and when assigned depended for its water for irrigating purposes, to complete its irrigation system to said lands, which is expected, however, to be completed within three years from date of said application.

Allowance of this application was recommended by a special agent investigating the existing conditions and by the local officers, but was denied by the Commissioner solely because no direct interest in said Water Company is shown by the applicant.

The Department is aware of the unusual conditions prevailing as to the water supply in this locality, for the irrigation and reclamation of desert lands therein, of the fact of the general dependence of the entrymen in said locality upon the Imperial System when they made entry, relying in good faith upon the construction of such system in time to enable them by means of it to reclaim the lands entered by them within the lifetime of their entries, and of the fact that such entrymen have expended large amounts of money and labor in preparation of said lands for final reclamation, and also of the fact that said system has not been completed in time to effect such reclamation within the lifetime of the entry, through various causes in no wise the fault and beyond the control of the entrymen. It is known that the California Development Company, controlling the Imperial System, has been placed under receivership, and that its and said system's operations have been largely hindered thereby. The reliance placed by these entrymen in general upon that system was reasonable, and when their good faith is established they are fairly within the terms and purview of said act of March 28, 1908, and of the act of April 30, 1912 (37 Stat., 106), although, perhaps as in this case, without any direct interest, by the purchase of water stock, in the local company by which said system operates.

The three years' allowable extension under said act of March 28, 1908, expired in this case February 10, 1913. By the provisions of said act of April 30, 1912, however, a further extension for three years is allowable upon showing of substantially the same conditions preventing final reclamation as are required to be shown by the former act. This corroborated application shows such conditions as existing at its date, and that completion of the Imperial System relied upon herein will be made within three years from that date, so that final reclamation of the lands may be then effected.

In view of the foregoing, therefore, extension of time for submitting final proof on this entry is hereby allowed, expiring February 10, 1916.

The decision appealed from is accordingly reversed.

WILLIAM B. ROSSER.

Decided December 17, 1913.

COAL LAND APPLICATION—DILIGENCE—REAPPRAISAL—PRICE.

An applicant to purchase coal lands will not be held negligent in the prosecution of his application because of delay on the part of the local officers for a period of two months in designating the newspaper in which publication of notice of the application should be made, where he proceeds promptly with the publication and posting of notice after such designation, delay for that period not being considered unreasonable; and where in such case the land was reappraised at a higher figure prior to the posting and publication of notice, he will not be required to pay the higher price, but is entitled to purchase at the price existent at the time the application was filed.

JONES, First Assistant Secretary:

William B. Rosser has filed a motion for rehearing in the matter of his coal entry No. 07054, made August 7, 1911, at Salt Lake, Utah, for the SW. $\frac{1}{4}$, Sec. 14, T. 17 S., R. 7 E., S. L. M., at the rate of \$25 per acre, in which the Department, by its decision of August 21, 1913, affirmed the action of the Commissioner of the General Land Office of June 1, 1912, requiring an additional payment of \$20,000. The case has been orally argued.

Rosser's application to purchase was filed January 11, 1911. December 7, 1909, Charles L. Sampson filed coal declaratory statement No. 05206 for the S. $\frac{1}{2}$ S. $\frac{1}{2}$ of said Sec. 14, thus conflicting with Rosser's application as to the S. $\frac{1}{2}$ SW. $\frac{1}{4}$. In this statement, Sampson alleged possession of the land since November 10, 1909, the opening of a mine of coal November 14, 1909, and the expenditure of \$35 in an open cut exposing a 12-foot vein of coal.

Upon the filing of Rosser's application, the register and receiver notified Sampson thereof and allowed him 30 days to show cause why it should not be allowed. Sampson filed a relinquishment March 2, 1911. At the time of filing Rosser's application to purchase, the land was classified at \$25 per acre, having been so classified July 3, 1907. March 18, 1911, it was reclassified at \$150 per acre.

May 5, 1911, the register issued notice for publication upon Rosser's application, and, after due proceedings, Rosser, upon July 17, 1911, paid \$4,000, the purchase price of the land at \$25 per acre, the certificate of entry issuing August 7, 1911.

The tract was at all events free from all conflict March 2, 1911, the date when Sampson's relinquishment was filed, and further proceedings upon Rosser's application should then have been promptly instituted. Paragraph 17 of the coal land regulations provides:

Upon the filing of an application to purchase coal lands under the provisions of paragraphs 10 or 14 the applicant will be required, at his own expense, to publish a notice of said application in a newspaper nearest the lands, to be designated by the register, for a period of thirty days, during which time a similar notice must be posted in the local land office and in a conspicuous place on the land.

Until the register designated the newspaper for publication, Rosser was unable to further prosecute his application. The register delayed such action for a period of about two months, or until May 5, 1911.

The classification of the land on July 3, 1907, and its then opening to entry at \$25 per acre, constituted an offer on the part of the United States to sell the tract at that price, such offer to be accepted by the filing of a proper application, the publication and posting of notice, and payment of the purchase price, as required by the regulations. Rosser had performed the first step necessary for the acceptance of the Government's offer, but was prevented from performing the remainder until after the reclassification of the land by virtue of the delay on the part of the local officers. The question, therefore, is, whether he is to be prejudiced by such delay and should be required to purchase at the price existent at the time of filing his application, or at the higher valuation made after such filing.

In the decision of August 21, 1913, the Department said:

It is urged by appellant that he was not chargeable with the local officers' tardiness in the issuance of the notice, and hence that, inasmuch as he proceeded with due diligence to publish the notice when issued and thereafter to make payment for the land within the period required by the regulations, he should be permitted to purchase at the price at which it was subject to disposition when the application was filed. This contention does not impress itself with favor upon the Department. Something more is required of a coal applicant to entitle him to purchase at any particular price than the mere presentation of an application. He is required to exercise a fair degree of diligence in the prosecution of this claim and, if the same is not promptly acted upon by the local officers in the manner prescribed by the law and the regulations, when presented, he should demand that appropriate action be taken and, upon a further refusal of the local officers to so act, appeal. In this case, no steps whatever appear to have been taken by the applicant with a view to hastening action on his application. On the other hand, he permitted the local officers, without objection, to delay the issuance of notice until more than three months after the land became subject to disposition and until it had been reappraised at the higher figure.

As now advised, I am of the opinion that the reasoning there adopted is not altogether sound. The applicant had no control over the register and was unable to proceed further until he had acted on the matter of designating the newspaper for the publication of notice. After that action of May 5, 1911, Rosser promptly proceeded to publish and post his notice, make payment for the land, and in all respects complied with the regulations. He, therefore, should not be prejudiced by the delay occasioned by matters beyond his control, nor can it be said, even adopting the Department's position, as contended in its decision of August 21, 1913, that a period of two months was an unreasonable length of time to await the action of the local officers. It is not intended here to hold that there may not be cases where acquiescence by an applicant to purchase coal land in a long-continued delay on the part of the local officers, might make him

guilty of laches in the prosecution of his application and thus not entitle him to purchase at the price in existence at the date of application.

Rosser applied for the land while it was classified at \$25 per acre and promptly prosecuted his application to entry. He has accepted the offer of the Government and has complied with the conditions of the offer and should, therefore, even conceding the legal power on the part of the United States to demand a higher price, as a matter of fair dealing, be permitted to complete his purchase without additional payment.

The Department's decision of August 21, 1913, is accordingly vacated, the decision of the Commissioner of June 1, 1912, reversed, and patent upon the entry of Rosser will be issued in the absence of other objection.

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JOHN W. HICKCOX.

Decided December 17, 1913.

NATIONAL FOREST HOMESTEAD—ACT OF JUNE 11, 1906—SURVEY.

A survey and entry of lands in a National Forest under the act of June 11, 1906, need not include the entire body of land applied for, listed, and opened to entry under that act, but the entryman may take any portion thereof in compact form.

NATIONAL FOREST HOMESTEAD—ACT OF JUNE 11, 1906.

It is no objection to a homestead entry under the act of June 11, 1906, that it extends across a township line and lies partly in each of two adjoining townships.

JONES, *First Assistant Secretary:*

John W. Hickcox has appealed from decision of September 19, 1912, by the Commissioner of the General Land Office, making certain objections to the survey of his homestead entry in the Tonto National Forest, and requiring certain amendments.

It appears that Hickcox applied for listing of an area of unsurveyed lands in the Tonto National Forest, and the tract was listed upon his application and opened to homestead entry under the act of June 11, 1906 (34 Stat., 233). The area thus listed and opened amounted to 150.25 acres, while the present survey, which was made for the purpose of final proof and patent, embraces only 61.40 acres.

One of the objections raised by the Commissioner was with reference to the form of the entry as surveyed, which retains the central body of the tract listed and leaves an irregular area on three sides of the claim. The Department knows of no authority for compelling an entryman to retain all of the land embraced in an entry. If this entryman was qualified to take the entire body in question, it would appear that he could take any portion thereof in compact form.

This survey does not include any land not listed and opened to entry, but is wholly within the area opened. The claimant says that

the survey was made in accordance with his directions, and that it includes all of the area that is useful or desired by him. In view of these considerations, no objection is seen to the form of the survey.

The Commissioner also objected to the claim for the reason that it extends over and takes in about $2\frac{1}{2}$ acres in a township adjoining the main body of the claim, thus necessitating the drafting of two plats. This is merely an administrative matter which must be met, and affords no substantial objection.

The Commissioner also required that Tonto Creek, which crosses this claim, be meandered. However, the Surveyor-General finds that the stream is within the provisions of Paragraph 158 of the Manual of Surveying, and does not require meandering. He states that in surveys heretofore made in this region Tonto Creek was not deemed meanderable; that the stream was reported as being from 35 to 100 links in width. The plat indicates the stream to be about seven chains wide where it crosses this claim, but this probably had reference to the full width from bank to bank, without reference to the width of the water usually running therein, and also without consideration of the nature of the stream, which appears to be a wide, shallow water course, where the water spreads out in times of excessive runoff, but usually is confined to a narrow channel. The rule in the manual, referred to by the Surveyor-General, provides:

Shallow streams, without any well defined channel or permanent banks, will not be meandered.

In his communication transmitting the appeal the Commissioner asks for a ruling as to the status of the area listed and not included in the present survey. This question does not properly arise in the case, and no adjudication as to that question is deemed necessary, except to say that the entry should be adjusted to the present survey, thus leaving the remainder of the listed land free from the entry of Hickcox.

The decision appealed from is reversed, and if no other objection appears, the survey will be accepted.

EHALAINEN v. SANTA FE PACIFIC R. R. CO.

Decided December 17, 1913.

FOREST LIEU SELECTION—INNOCENT PURCHASER—RELINQUISHMENT—RESELECTION.

An innocent purchaser for value of a forest lieu selection under the act of June 4, 1897, prior to patent, does not by such purchase acquire any indefeasible interest in or legal or equitable title to the land involved, nor any such right as upon relinquishment of said selection by such purchaser and reselection of the land in the name of the Santa Fe Pacific Railroad Company is mergeable under the act of March 3, 1905, in the face of an adverse proceeding pending against the selection at the date of the relinquishment, into the contract right of selection saved to

the railroad company by said act, or into any right of reselection by the purchaser himself upon other base lands, to the prejudice of the right of a *bona fide* homestead settler on the selected lands at the time the relinquishment of the original selection and application for reselection were filed.

FOREST LIEU SELECTION—ADVERSE PROCEEDINGS—RELINQUISHMENT.

Neither an applicant to make forest lieu selection nor his transferee before patent can avoid the issue in adverse proceedings against the selection by relinquishing the same after service of notice of such proceedings and acquire against an intervening settler any better right to the selected lands by an attempted reselection thereof than he would have were such selection held to be invalid and canceled on such proceedings.

FOREST LIEU SELECTION—SETTLEMENT—RELINQUISHMENT—RESELECTION.

Public lands which are vacant and unappropriated except for a pending unapproved forest lieu selection embracing the same are not by reason alone of such selection withdrawn from homestead settlement; and a homestead settler in good faith on such lands, otherwise subject to settlement, acquires under the act of May 14, 1880, a right of entry therefor, subject to such selection, which attaches immediately upon relinquishment of the selection and will prevent the substitution by the selector or his transferee of other lands as base for the selection.

JONES, First Assistant Secretary:

Appeal is filed by Joseph Ehalainen from decision of December 5, 1912, of the Commissioner of the General Land Office dismissing his contest and protest affidavits filed March 28, 1912, against the application filed by the Santa Fe Pacific Railroad Company, Charles Hill, attorney in fact, to select the S. $\frac{1}{2}$, Sec. 8, T. 11 N., R. 5 E., Vancouver, Washington, land district, in lieu of certain lands owned by said company lying within the San Francisco Mountains Forest Reserve, Arizona.

This appeal is filed out of time, and might for that reason be dismissed, but in view of the fact that the case is, in its present form, *ex parte* and the question involved important, the case will be considered on its merits.

Said described lands were formerly embraced in lieu selection No. 3423 made November 20, 1900, on application filed August 8, 1900, under the act of June 4, 1897 (30 Stat., 11, 36), by Walter N. Bush, Angus McDougall, attorney in fact, as patentee of certain State school lands lying within the Stanislaus Forest Reserve, California, and which was approved April 9, 1903, as for unsurveyed lands, after conveyance of said lands by deed dated June 4 and filed June 21, 1901, to Alfred C. Tuxbury and William H. Sawyer for the consideration of \$1440.

Approved survey plat of said selected lands was accepted by the Commissioner July 31, 1908, but no adjustment of said selection thereto appears from the record.

Adverse proceedings against said selection were directed November 5, 1909, amended January 10, 1911, on the charge said base lands were fraudulently procured from the State for the purpose of making

said selection. Service was made and answer filed. Bush thereafter died. Tuxbury and Sawyer asked November 6, 1911, to be permitted, in accordance with a certain letter "P" of March 24, 1911, to substitute valid in lieu of the alleged invalid base, with relinquishment of said selection by themselves as the real parties in interest instead of by said Bush as required by said letter "P". Such permission was granted, and on January 6, 1912, Tuxbury and Sawyer filed their relinquishment both of said selected lands and also of the original base lands, together with said application by the Santa Fe Pacific Railroad Company to select said former lands upon other base, as above stated; also with affidavit of nonoccupancy executed June 19, 1911. There is nothing in the record to show said railroad company filed in the interest and on behalf of said Tuxbury and Sawyer.

The Commissioner, February 6, 1912, accepted said relinquishment and said application to select as a reselection to take effect *eo instanti*, and said application was filed accordingly in the local office February 14, 1912.

Within the time accorded by the published notice of such reselection, Ehalainen filed his corroborated contest affidavit, stating he had filed homestead application for a portion of said selected lands March 8, 1912, and charging that said reselection was "at the instance and request of the transferees of forest lieu selection 3423 made August 8, 1900, by F. A. Hyde," and formed a part of said Hyde's fraudulent operations against the Government. Ehalainen filed also with said contest affidavit his own uncorroborated protest affidavit stating he was an actual settler, when said reselection was filed, on the portion of said selected lands applied for by him. His alleged homestead application is not in the record.

The decision appealed from disposes of said contest affidavit solely as one based upon a corroborated allegation of prior settlement and makes no disposition of the only charge, that of fraud, contained therein. In view of the action hereinafter taken with reference to the question of settlement, remanding the case for further consideration and adjudication, the Commissioner will also consider and dispose of said contest affidavit upon said charge.

The decision appealed from, after reciting that the parties in interest were permitted by said letter "P" of March 24, 1911, to make reselection, states as to the question of prior settlement:

If, as is alleged, the contestant was a settler on the land at the said date of filing the application to reselect he was attempting to appropriate land that was for many years embraced in the original forest lieu selection, through which selection the parties in interest in the present selection claim their equities, for it has been shown that the parties in interest in the present selection are innocent purchasers, for value, of the rights to the land under the original selection. It would, therefore, appear

that a settler could not, by a mere intrusion upon the land, acquire a right thereto superior to the equities held by the said purchasers for value, and inasmuch as the original selection of the land was not canceled until February 6, 1912, whereupon the application to reselect the land was *eo instanti* allowed, there could have attached no intervening adverse right, under the circumstances in this case.

Both the Commissioner's decision and the relinquishment filed by Tuxbury and Sawyer of the original selection as to the lands involved are erroneous in stating reselection was permitted in this case by said letter "P" of March 24, 1911. Said letter had no reference to this case but related to a number of other Vancouver serials, 03339 *et al.*, and only authorized reselection to be made in any case in accordance with existing regulations and with the Department's decision in the case of John K. McCornack (32 L. D., 578), which held that selection could be made only by the owner and not by the assignee of the owner of the base lands, and that a reselection is effective only from the date it is filed with the required proof.

In view of the repeal by the act of March 3, 1905 (33 Stat., 1264), of the forest lieu selection law, no right of selection or of reselection existed at the time this application for selection or reselection was accepted as in effect, except as saved by said repealing act, which provided further that—

the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired: *Provided*, That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

Tuxbury and Sawyer are not shown to possess any contract right within the saving provision of said act, as is possessed, however, by the Santa Fe Pacific Railroad Company. (Circular of May 16, 1905, 33 L. D., 558; Santa Fe Pacific Railroad Company, 40 L. D., 360.)

Nor did the conveyance of said selected lands by Bush to Tuxbury and Sawyer, prior to patent on the selection, invest the latter parties, even though purchasers for value and with no knowledge of Bush's alleged fraud, with any indefeasible interest in or legal or equitable title to said lands or any such right in that selection as was mergeable, under said act of March 3, 1905, and in the face of said adverse proceedings pending against said selection when said Tuxbury and Sawyer relinquished same, into the contract right of selection, saved by said act, possessed by said railroad company, or into any right of reselection by said Tuxbury and Sawyer themselves upon other base lands, over the right of a *bona fide* homestead settler on the selected lands when the relinquishment of the original selection and the application for reselection or new selection was filed.

The matter of substitution of new for old base, in cases of forest lieu selection applications, is similar to and governed by the same principles of law as in cases of soldiers' additional right applications, as to which the Supreme Court of the United States stated in the case of *Robinson v. Lundrigan* (227 U. S., 173):

Each application must depend upon its particular basis. And it cannot be kept open for the substitution of another right than that upon which it was made. If one substitution can be permitted, successive substitutions can be permitted, and there might arise the condition of things condemned in *Moss v. Dowman*, 176 U. S., 413. In that case successive formal entries under the homestead law and successive relinquishments of the entries of a tract of land were made. Dowman, who was not a party to the manipulating process, about one month prior to the last relinquishment settled upon the land. It was held that his right attached immediately upon the filing of the last relinquishment and before the last entry, though the latter was made on the same day the relinquishment was filed. It was recognized that the entry which was given up had segregated the land and that no right could be initiated while it stood of record, but it was decided that the instant its relinquishment was filed in the local office the right of Dowman, the settler on the land, attached and the Moss entry could not defeat it. And so in the case at bar, the instant that Robinson's application was rejected as having no legal foundation the land became subject to appropriation by another. No right, therefore, of Robinson was divested by the ruling of the Department, as contended by complainants, for no right had attached. His application, based on the right of Carroll, was not an entry of the land and is not within the ruling of *McMichael v. Murphy*, 197 U. S., 304, that an entry valid on its face segregates the lands from the public domain and precludes their appropriation by another so long as it remains undisturbed.

In this case the original selection as made has not been held to be invalid, but neither a selector nor his transferee before patent can avoid the issue in adverse proceedings against the selection by relinquishing the same after service of such proceedings and acquire against an intervening settler any better right to the selected lands by an attempted reselection thereof than he would have were such selection held to be invalid and canceled on such proceedings.

Public lands which are vacant and unappropriated except for a pending unapproved forest lieu selection embracing the same are not by reason alone of such selection application withdrawn from homestead settlement, and a homestead settler in good faith on such lands otherwise subject to settlement acquires under the act of May 14, 1880 (21 Stat., 140), a right of entry for said lands, notwithstanding such filing, but which is subject thereto. So long as such selection application remains of record, such settler's right is in abeyance and of no effect as against such applicant, but upon failure of such application or relinquishment by the applicant of the lands embraced therein the right of a *bona fide* settler then on the land will attach as against such applicant and prevent any substitution by him of other base lands for the base lands proffered with such application.

In this case, however, Ehalainen is not entitled on his uncorroborated protest of settlement to a hearing; and in view of the

stated fact said Tuxbury and Sawyer were innocent purchasers for value under the original selection, and of the fact they apparently relinquished their interest under that selection and attempted to make a new selection of the same lands by permission of the land department and in misapprehension of their status in the premises, the case is remanded with direction that copies of this decision be forwarded to all interested parties, and that said Tuxbury and Sawyer be allowed a reasonable time to be fixed by the Commissioner after receipt thereof to elect whether they will abide by said application to select, filed in their stated interest by the Santa Fe Pacific Railroad Company, or desire to reinstate the original selection and defend the adverse proceedings pending against it at the time they relinquished their interest under it. In the event they desire to abide by said application of the Santa Fe Pacific Railroad Company, they will serve Ehalainen with notice thereof within said time to be fixed by the Commissioner and Ehalainen will have thirty days after receipt of such notice within which to file his duly corroborated protest affidavit as to his alleged prior settlement. In the event of Tuxbury and Sawyer electing to reinstate said original selection, the same will be reinstated subject to said adverse proceedings.

The case is remanded for action in accordance with the foregoing views.

INSTRUCTIONS.

FINAL PROOF—ACT JUNE 6, 1912—EQUITABLE ADJUDICATION.

Proof upon homestead entries made prior to the act of June 6, 1912, submitted under that act within seven years from the date of the entry and within five years from the date of the act, may be accepted, if otherwise satisfactory, without submission to the Board of Equitable Adjudication.

FINAL PROOF—ACT JUNE 6, 1912—EQUITABLE ADJUDICATION.

In instances where notice was published for five-year proof upon a homestead entry and the proof submitted is found to be acceptable as three-year proof under the act of June 6, 1912, but not good as five-year proof, or where notice was for three-year proof but the proof is found to be acceptable only as five-year proof, action may be taken thereon accordingly, where that is the sole defect, without submission of the case to the Board of Equitable Adjudication.

DEPARTMENTAL INSTRUCTIONS VACATED.

Departmental instructions of December 18, 1912, not reported, recalled and vacated, and paragraph 19 of instructions of February 13, 1913, 41 L. D., 479, modified.

First Assistant Secretary Jones to the Commissioner of the General Land Office, December 23, 1913.

The act of June 6, 1912 (37 Stat., 123), requires that, upon entries made thereunder, final proof must be made within five years from date of entry. The act also provides that persons who at that date had existing entries may avail themselves of the benefits of that act

and submit proof upon showing three years' residence and cultivation, as required.

Paragraph 19 of instructions under said act (41 L. D., 479, 486) reads as follows:

The new law also requires that the proof shall be made within five years from date of entry and if the entry is to be administered under that law the department is not authorized to extend the period within which proof may be made, but when submitted after that time, in the absence of adverse claims, the entry may be submitted to the Board of Equitable Adjudication for confirmation.

Under these instructions a large number of cases are being submitted to the Board of Equitable Adjudication. It is learned that there are more than 300,000 homestead entries in the files of your office which were made prior to the date of said act of June 6, 1912. A large proportion of these were five years old at the date of the act and of course final proof could not be submitted on such cases under the new law within five years from the dates of the respective entries. It thus results that, under the above instructions, vast numbers of these cases, where proofs were made after the expiration of the five-year period, are being submitted to the board. This involves much labor, and the board has heretofore approved hundreds of cases submitted solely upon this point.

Congress apparently intended that prior entrymen should have the benefit of the later act, and a liberal construction of that law justifies acceptance of proof on entries made prior thereto submitted under said act within seven years from date of entry, the statutory period under the old law, if also within five years from date of the new law of June 6, 1912, *supra*, and if otherwise proper. It seems unnecessary to burden the service with the further submission of such cases to the board. The instructions referred to are modified accordingly.

Furthermore, under date of December 18, 1912, in response to your inquiry, the Department instructed that cases should be submitted to the board, where the published notice was for five-year proof and the proof is found to be acceptable as three-year proof but not good as five-year proof; also where the notice was for three-year proof but acceptable only as five-year proof. Many cases of this kind have been submitted to the board. This seems a matter of small technicality, and you are hereby instructed that such cases need not be submitted solely because of such defect. The instructions of December 18, 1912, are recalled and vacated.

ALASKAN LANDS—APPLICATIONS FOR PATENT—NOTICE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, December 23, 1913.

REGISTERS AND RECEIVERS,
AND THE U. S. SURVEYOR-GENERAL,
District of Alaska.

SIRS: The notices of applications for patent for lands in Alaska are, in many cases, not sufficient to apprise adverse claimants and the public generally of the location of the land applied for, and, therefore, do not serve the purpose for which such notices are required; nor can the location of the land be ascertained from the application papers themselves and without obtaining information from other sources. This is due principally to the large area of unsurveyed land in the district, and remoteness from centers of population of much of the country. In order to give a more definite description of the land applied for, the following special instructions with reference to the District of Alaska are issued, which are supplemental to, but do not change or modify existing regulations:

1. The field notes of survey of all claims within the District of Alaska, where the survey is not tied to a corner of the public survey, shall contain a description of the location or mineral monument to which the survey is tied, by giving its latitude and longitude, and its position with reference to rivers, creeks, mountains or mountain peaks, towns or other prominent topographical points or natural objects or monuments, giving the distances and directions as nearly accurate as possible, especially with reference to any well known trail to a town or mining camp, or to a river or mountain appearing on the map of Alaska, which description shall appear in the field notes regardless of whether or not the survey be tied to an existing monument, or to a monument established by the surveyor, when making the survey, in accordance with existing regulations with reference to the establishment of such monuments. The description of such monument shall appear in a paragraph separate from the description of the courses and distances of the survey.

2. All notices of applications for patent for lands in the District of Alaska, where the survey on which the application is based is not tied to a corner of the public survey, shall, in addition to the description required to be given by existing regulations, describe the monument to which the claim is tied, by giving its latitude and longitude and a reference by approximate course and distance to a town, mining camp, river, creek, mountain, mountain peak, or other

natural object appearing on the map of Alaska, and any other facts shown by the field notes of survey which shall aid in determining the exact location of such claim, without an examination of the record or a reference to other sources. The registers and receivers will exercise discretion in the matter of such descriptions in the published notices, bearing in mind the object to be attained, of so describing the land embraced in the claim as to enable its location to be ascertained from the notice of application.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved, December 23, 1913.

A. A. JONES,
First Assistant Secretary.

JOHN GASSMAN.

Decided December 24, 1913.

SIoux INDIAN ALLOTMENT—RIGHTS OF HEIRS.

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

SELECTION OF LAND WITH VIEW TO ALLOTMENT—RIGHT OF HEIRS.

No such right is acquired by the mere inspection of a tract of land and decision to take it as an allotment, without application therefor or selection thereof during the lifetime of the proposed allottee, as will entitle his heirs, after his death, to an allotment of the land.

JONES, *First Assistant Secretary:*

Appeal has been filed by John Gassman from your [Commissioner of Indian Affairs] decision of November 11, 1913, denying his application for an allotment on the Rosebud Reservation under an agreement with the Indians of the latter reservation entered into March 10, 1898, and ratified by the act of March 3, 1899 (30 Stat., 1362). Under such agreement, the Indians of the Rosebud Reservation gave their permission and consent for the Indians of the Lower Brule Reservation, who left the same and settled upon the Rosebud Reservation, to remain thereon and take allotments of land in severalty as provided in section 8 of the act of March 2, 1889 (25 Stat., 888). It was further provided in said agreement that allotments in severalty should be made to all children born prior to the date of the ratification of the agreement *then living* in manner and quantity as provided in said section 8 of the act of March 2, 1889.

It appears that Emma Gassman was born May 9, 1897, and died March 19, 1899. She was, therefore, alive at date of the ratification of the agreement. In an affidavit September 14, 1910, her father,

John Gassman, stated that in the fall of 1898, he, in company with his wife and others, at the request of the Rosebud Indian Agent, selected a quarter section of land for his daughter; that said agent told him the Allotting Agent would be out and he would then see that the daughter got the land. The Indian Agent referred to reported that he was in charge of the Rosebud Agency in 1898; but at that time John Gassman was not enrolled at Rosebud, but at Lower Brule, and "so no such conversation as he states could have occurred with me."

In another affidavit dated November 17, 1913, John Gassman reiterates his statement as to the selection of land he claims to have made for his daughter and describes the time and place where his alleged conversation with the Indian Agent occurred. In this affidavit he states that his daughter died before the Allotting Agent came; that the selection was made for her in the summer of 1898, "a short time before" the talk made to him and others by the then agent at Rosebud.

The act of March 2, 1889, *supra*, which authorized individual allotments on the various Sioux Indian Reservations, including the Rosebud, provided that they should be made by special agents appointed for the purpose and by the agents in charge of the reservations under such rules and regulations as the Secretary may from time to time prescribe. Instructions were given to the special Allotting Agent on the Rosebud Reservation as late as 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.

It is well settled that allotments are only authorized to children in being; that is, application or selection can only be made for or on behalf of living persons. Furthermore, in order to initiate such right to allotment as can be confirmed to the heirs after death, application must have been made or a selection filed with some officer of the Indian Service authorized or directed to make allotments. If selection has thus regularly been made by or for a person in being, so that nothing remains but the scheduling and approval of the described selection, then a right is initiated and secured which can be confirmed for the benefit of the heirs.

In this case no such application or selection was made by John Gassman during the lifetime of his daughter. He may have viewed a certain tract of land and concluded that he would have the same allotted to his daughter but no further action was taken looking to the consummation of such selection prior to her death. The allowance of an allotment under such circumstances would be tantamount to making or allowing an allotment to or on behalf of a deceased person which was clearly not contemplated by law. See cases of Charles Tackett, 40 L. D., 4; Dallas Shaw, 40 L. D., 9, and Instructions, October 1, 1913 (42 L. D., 446).

In further support of the conclusion reached herein is a provision in Article IV of the agreement ratified by the act of March 3, 1899, with the Indians of the Rosebud Reservation, which reads:

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 eleven of said act last above mentioned. [Act of March 2, 1899.]

This provision clearly indicates that in order to insure to the heirs the right of succession to an Indian allotment of a deceased Indian, such allotment must have been "made in the field" during the lifetime of the decedent.

It follows that your decision, denying the application of John Gassman for allotment as father of Emma Gassman, was proper and is hereby affirmed.

ROUGH RIDER AND OTHER LODE MINING CLAIMS.

Decided December 26, 1913.

MINING CLAIMS—DISCOVERY.

The land department having for many years permitted mining locations and entries upon lands in the same region and upon the same character of deposit as the claims here involved, and issued patents upon like showing as to discovery as made in this case, and such practice having become a rule of property in that vicinity, and many locations having been made and claims purchased for valuable considerations in reliance upon such practice, at the dates of the locations and entries of the claims here involved, the stricter rule laid down in the decisions in this case

of January 31, 1911, and September 5, 1912, 41 L. D., 242, 255, holding the showing in this case insufficient to constitute a valid discovery, will not be given a retroactive effect, and said decisions are vacated and the entries here in question reinstated with a view to patent.

JONES, First Assistant Secretary:

This case is before the Department on a petition filed by J. A. Sherwood to recall and vacate departmental decision of January 31, 1911 (41 L. D., 242), adhered to on petition for exercise of supervisory authority, September 5, 1912 (41 L. D., 255), directing cancellation of mineral entries 04665, 04675 to 04683, inclusive, for the Rough Rider, White Horse, Red Jacket, Cousin Jack, Black Joe, Last Chance, Roosevelt, Jennie Gibson, Michigan, Bright Hope, Osceola, and Hard Time lode mining claims, situate in the Warren mining district, Phoenix land district, Arizona.

These entries were allowed December 13, 1906. February 28, 1907, a protest was filed against the same by a chief of field division, charging, in substance and effect, that the land embraced in the locations is nonmineral in character; that no mineral had been discovered on any of the claims; that the entries were fraudulently made with a view of obtaining the land for agricultural and townsite purposes; and that prior to making application the claims were conveyed by the applicant to one Hoval A. Smith. As a result of a hearing had on said charges in November, 1908, and April, 1909, the local officers found that none of the charges had been sustained and recommended that the proceedings be dismissed. Upon review of the record the Commissioner by decision of April 11, 1910, found and held that no such discovery had been made within the limits of any claims as would support an application for patent or mining location, and accordingly held the entries for cancellation. On appeal by the entrymen this finding was sustained by said departmental decisions of January 31, 1911, and September 5, 1912. Pursuant to said decisions the entries were canceled.

The present petition is predicated in part on the ground that the departmental decision of January 31, 1911, established and gave effect retroactively to a rule respecting discoveries in the area known as the Copper Queen block wherein the claims in question are situated, that did not obtain at the dates of the locations and entries; that at those times, and for many years prior thereto, it had been the practice of the land department to allow entries and issue patents for locations in said area, based on the same showing as to discovery as was relied upon to support these locations and entries; that the former practice had become a rule of property in that vicinity; and that in reliance thereon these locations had been purchased prior to entry for valuable consideration.

In connection with the petition there is filed an affidavit of Hoyal A. Smith, wherein he avers that about the year 1905 he acquired an interest in the claims in question, representing an actual cash outlay of approximately \$40,000—

that he acquired the title to said mining claims, in so far as he is interested therein, and he is informed and verily believes that the other claimants acquired their interests, in so far as they are interested therein, in reliance upon, and only because of the rule of construction then prevailing and applied in the Land Department of the United States as to what constitutes a valid discovery in the particular locality in which said mining claims are situated and that the discovery upon said several claims was no less than that held sufficient in many other cases both prior and subsequent to the acquisition of title to said claims by this affiant and by the other claimants herein. And this affiant says that he would not, for himself, and he is informed and believes that the other claimants herein would not, for themselves, have acquired their interests and titles therein and would not have expended their money or time or effort therein had they not relied upon the application to the adjudication of their claims to patent upon the above named mining claims of the same rule of construction that was enforced and applied by the Land Department at the time he and they acquired their several titles and made their several investments therein.

Upon a reconsideration of the matter on the present petition, the Department finds that the discoveries alleged respecting these claims were such as for many years prior to the date of the entries had been held and regarded by the land department as appropriate bases for locations, entries, and patents in the above mentioned area. This conclusion finds ample support in an opinion rendered August 23, 1911, by the Assistant Attorney General for this Department, in the matter of certain suits instituted with a view to the cancellation of various patents issued for mining claims in said area. In that opinion it was said:

The lands involved lie within one of the richest copper mining districts of the United States and some of these claims are within less than one mile of paying copper properties. The actual discoveries of mineral upon which these patents issued were inconsequential, studied apart from the geological conditions surrounding these lands, but they are shown to have the same geologic formation and therefore the same inviting prospect as that which theretofore had tempted the investment of enormous sums of money which, it appears, have not been ill spent. The consensus of opinion of practical miners, geological experts, and men of means has been and is that these properties warrant the expenditure of a large sum of money in their development, on account of the large deposits of copper which it is thought would be thereby uncovered. * * * The question of the pertinency and weight of evidence founded on geologic conditions offered in support of an application for patent upon a mining claim is at the present time under investigation by this Department, and it may be that the result reached will differ from that heretofore adjudged in some cases; possibly from that in this very case under present consideration. It will be enough to say, for the purposes of this opinion, that proof of the discovery upon these claims was no less than that held sufficient in many other cases both prior and subsequent thereto. Surface indications taken in connection with geological formation, together with the known history of the development of the mineral resources of this region were ample to justify the expenditure of labor and money in the development of these claims.

Not only so, but it is said that large sums of money have been expended by Smith and his associates in the location, purchasing of locations, and development work upon these properties, and it is probable that more would have been ere this expended thereon except for the agitation preceding, and the effect of the filing of, these suits. So, whether or not these lands should have been patented under the mining laws, the fact remains that they were patented by the Land Department upon a full consideration of the character of the lands, and of the evidence of discovery, improvements, expenditures, etc.; evidence fully as competent and weighty as that upon which many similar patents had theretofore been issued.

Upon the same day this opinion was rendered a copy thereof was transmitted to the Department of Justice and that Department in accordance with the views and reasoning therein expressed proceeded to forthwith dismiss said suits.

Without undertaking to discuss in detail or review the arguments pro and con with regard to the formation in the particular area under immediate consideration, the following excerpt from the former opinion of this Department will indicate the conditions on the ground, as disclosed by the record:

The surface formations of those claims consist, according to the testimony of several of claimant's witnesses, of limestone, conglomerate, or limestone and conglomerate, and containing within the limits of some of the claims, intrusions of porphyry with iron-stained or iron-impregnated contacts; on others, what is termed by the witnesses iron "blowouts"; and on still others, so-called stringers, feeders, ledges, or blowouts of quartz, stained more or less with iron oxide, or impregnated with iron sulphide, and varying in thickness from two to three inches to a number of feet.

It appears to be the belief of mining men in that region that these porphyritic intrusions and contacts have a direct connection with or relation to underlying and deep-seated copper deposits. Many witnesses whose long experience and thorough acquaintance with the subject-matter in general, and with this particular district as well, make their testimony of special value, were of opinion that the exposures on the surface of these claims were sufficient to warrant the expenditure of time and money with reasonable prospect of success in the development of a paying mine.

It will thus be seen that the question of such relation between the surface indications and the valuable minerals below is the subject of varying and somewhat conflicting opinions.

It was upon showings such as this that entries and patents were allowed for mining claims in this region at the dates of the locations and entries of the claims here involved. There can be no question therefore that at those times a more liberal rule with reference to mining locations situated in this region prevailed in the land department than that applied by the Department with respect to the claims here in question in its decision of January 31, 1911, and that had said earlier rule been followed with regard to these locations they would

in the absence of other objections have been passed to patent. This being true, and it appearing that these locations and others in that vicinity, based on the same character of discovery, had been, in reliance on such rule, purchased and dealt with as property, the Department is now of opinion that the rule under which the entries were canceled should not have been given retroactive application to the prejudice of the owners of the claims, but, on the other hand, that the said previous and long-continued practice of the land department established a rule of property with respect to such claims which should have been adhered to and followed in the determination of this case. *Germania Iron Company v. James et al.*, 89 Fed., 811; *James et al. v. Germania Iron Company*, *Belden v. Midway Company*, 107 Fed., 597; *Howe et al. v. Parker*, 190 Fed., 738; *Henry W. Fuss*, 5 L. D., 167; *William Thompson*, 8 L. D., 104; *William Drew*, 8 L. D., 399; *French Lode*, 22 L. D., 675; *Gowdy et al. v. Kismet Gold Mining Company*, 24 L. D., 191; *Brick Pomeroy Mill Site*, 34 L. D., 320; *Hidden Treasure Consolidated Quartz Mine*, 35 L. D., 485.

The testimony adduced at the hearing had herein fails to sustain the charge that the ground is nonmineral in character, or that the entries were fraudulently made for the purpose of obtaining the lands for agricultural and townsite purposes. The evidence on the other hand shows that it is not susceptible of cultivation and has no value as a townsite, and it is now conceded that it was located and entered for no other than mining purposes. As to the charge that prior to the filing of applications for patent the claims were conveyed to Hoval A. Smith, it is sufficient to say that this was a matter between Smith and the applicant, J. A. Sherwood, and one which in nowise affected the validity of the entry. The record title to the claims was shown by the abstracts filed in connection with the applications for patent to have been at that time in Sherwood, and this fully satisfies the requirements of the mining laws and regulations. Under such circumstances, and in the absence of a protest by one claiming title, the question as to the real ownership of a claim is one not ordinarily inquired into by the land department.

Accompanying the petition, praying a vacation of said departmental decisions, is one for the reinstatement of the entries. In view of the foregoing, the decisions of the Department of January 31, 1911, and September 5, 1912, are vacated, the Commissioner's decision of April 11, 1910, reversed, and the entries will be reinstated, and, if the proceedings upon which the entries were allowed be found to be in all other respects regular, the entries upon reinstatement will be passed to patent.

DONNER v. CENTRAL PACIFIC R. R. CO.

Decided July 3, 1913.

RAILROAD GRANT—SETTLEMENT CLAIM—UNSURVEYED LAND.

The provision in the act of July 2, 1864, amending the act of July 1, 1862, making a grant to the Central Pacific Railroad Company, that said grant "shall not defeat or impair any . . . homestead . . . or other lawful claim," excepts from the grant a tract of unsurveyed land which at the date of the definite location of the line of road, and down to the date of the filing of the township plat of survey, was successively occupied by qualified homestead settlers intending to make entry; and failure of the settler then occupying the land to assert his claim within three months after the filing of the township plat, does not inure to the benefit of the company, but he may assert his claim at any time prior to intervention of an adverse settlement right.

JONES, *First Assistant Secretary:*

The Central Pacific Railroad Company appealed from decision of the Commissioner of the General Land Office of January 8, 1912, denying its claim to E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 25, T. 1 N., R. 1 W., M. D. M., San Francisco, California, and allowing John Donner's homestead entry to remain intact.

The land is within primary limits of grant by acts of July 1, 1862 (12 Stat., 489, 492), and July 2, 1864 (13 Stat., 356, 358), to the Central Pacific Railroad Company. The railroad company's right attached by filing of its map of definite location, October 27, 1869. The road has been constructed opposite the land, which is within that portion of the grant assigned to the Western Pacific Railroad Company and subsequently again merged in the Central Pacific Company by consolidation. The land has never been listed by either company for purposes of obtaining a patent.

April 20, 1911, Donner applied for homestead entry, which was allowed on affidavit of himself and three others that the land had been occupied successively since 1861 by settlers qualified to make, and intending to make, homestead entry, to the last of which prior settlers Donner succeeded by purchase, and has occupied the land as the home of himself and family since some time in the year 1868, and that he has valuable improvements thereon, consisting of house, well, barn, vineyard, and fruit trees. The land was surveyed and opened to entry March 23, 1875.

September 29, 1911, the Commissioner directed the local office to cite the parties in interest to a hearing to determine whether such homestead claim had attached to the land at date of the grant, or at the time the line of road was definitely fixed, as would except the land from operation of the grant. Notice issued for hearing before the local office November 22, 1911, which was duly served on the parties, and at the date fixed for hearing Donner appeared, aided by counsel, and adduced evidence. The railroad company made no

appearance. November 27, 1911, the register found for Donner and recommended his entry remain intact. The receiver made no finding. January 8, 1912, the Commissioner affirmed the action of the register and the railway company appealed.

It is argued that the claim of a homestead settler on unsurveyed land did not except the land from operation of the grant, and that there is a distinction between the act making the grant to the Central Pacific Railway Company from that considered by the Department in *Perry v. Central Pacific Railway Company* (39 L. D., 5). The railway company insists that under the grant here considered there must be record evidence in the local land office to except the land from the grant, citing *Tarpey v. Madsen* (178 U. S., 215, 228), that:

A proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and on the other the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation.

The granting act of July 25, 1866, to the California and Oregon Railroad Company, construed in *Perry v. Central Pacific Railroad Company*, *supra*, excepted from the grant lands which had been—granted, sold, reserved, occupied by homestead settlers, preempted or otherwise disposed of.

The acts now under consideration were verbally different. That of July 1, 1862, granted the lands—

not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of road is definitely fixed.

The act of July 2, 1864, *supra*, amended that of 1862 and made it read:

and any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any preemption, homestead, swamp land, or other lawful claim.

The amendment thus made in 1864, before the railroad company had filed its map of definite location, was made to read so that the grant should not defeat or impair any homestead or other lawful claim.

In view of the Department this language is not narrower in its exception than that construed in *Perry v. Central Pacific R. R. Co.*,

supra. Any lawful claim would except any claim to public lands that is lawfully made.

In *Tarpey v. Madsen* (178 U. S., 215, 219) the court expressly held that where the accident or omission, to make a claim of record in the local land office to public lands was the fault of the Government, the failure to make a homestead entry did not affect the settler's right, which could not be defeated by the mere lack of a place in which to make a record of the entry. The particular land which was involved in the case of *Tarpey v. Madsen* was surveyed and opened to entry, and the original settler (Olney) filed a preemption declaratory statement on May 29, 1869. He did not convey to Madsen, but abandoned the land, nothing was heard from him, and in 1896, twenty-seven years after, Andrew Madsen made a settlement and claimed the land. It was with view to such facts that the court spoke in holding a record claim in the land office was necessary to except the land from the grant.

In the present case it was impossible to make a record claim at or before the time the grant attached. The land was not surveyed until 1875. The quotation made by counsel from the decision in *Tarpey v. Madsen*, *supra*, was therefore absolutely inapplicable, for, in language of the same decision, the homestead settler could not be defeated of his right by failure of the Government to give him opportunity to assert it.

Nor did Donner forfeit his right by failing to make entry within three months from the time the land was surveyed and opened. The forfeiture imposed by act of March 3, 1843 (5 Stat., 620), provides only for forfeiture of a settler's right "to the next settler in order of time on the same tract of land who shall have given such notice, and otherwise complied with the conditions of the law." This was construed by the court in *Johnson v. Towsley* (13 Wall., 72, 90), which held that:

If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this done before any one else has initiated a right of preemption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right.

The railroad company therefore gained nothing by Donner's extraordinary delay in failing to assert his right to entry.

In view of the Department, the case is essentially like that of *Perry v. Central Pacific Railroad Company* (39 L. D., 5), differing

only in the respect that Donner's delay was about thirty-five years longer than that of Perry in asserting his right of entry after having opportunity to do so. This delay might have caused loss of his entry to another settler, but did not inure to benefit of the railway company; grantee.

The question as to the effect of the delay on the part of the settler in asserting his claim to the land before the land department, where such land fell within the limits of a railroad land grant, is fully considered in the recent decision of the Supreme Court, in the case of Northern Pacific Railroad Company *v.* Trodick (221 U. S., 208), wherein it is held that such delay does not forfeit his claim in favor of the railroad grant.

The decision is affirmed.

DONNER *v.* CENTRAL PACIFIC R. R. CO.

Motion for rehearing of departmental decision of July 3, 1913, 42 L. D., 589, denied by First Assistant Secretary Jones, January 17, 1914.

HART *v.* COX.

Decided August 5, 1913.

IMPERIAL VALLEY LANDS—DESERT ENTRY—ACT OF MARCH 28, 1908.

The act of March 28, 1908, according a preference right to make desert land entry, after survey, to one who has taken possession of and reclaimed or commenced to reclaim a tract of unsurveyed desert land, has no application whatever to lands in the Imperial Valley, authorized to be resurveyed by the act of July 1, 1902, inasmuch as such lands were surveyed in 1856, although given by the land department for administrative purposes the status of unsurveyed lands pending their resurvey under said act of 1902.

DEPARTMENTAL DECISION DISTINGUISHED.

Departmental decision in Virgil Patterson, 40 L. D., 264, distinguished.

JONES, *First Assistant Secretary:*

Appeal is filed by Joseph W. Cox from decision of December 7, 1912, of the Commissioner of the General Land Office reversing the action of the local officers and rejecting his application filed March 1, 1909, to make desert land entry for resurveyed tract 113, township 14 S., R. 15 E., Los Angeles, California, land district, for the stated reason that Ethel Hart, who filed May 15, 1909, application to make desert land entry of said tract together with resurveyed tract 114, and the S. $\frac{1}{2}$ of resurveyed tract 115, same township and range, said application by her being filed within ninety days after filing plat of resurvey of said lands under the act of July 1, 1902 (32 Stat., 728),

has preference right, under the act of March 28, 1908 (35 Stat., 52), to make desert land entry for said resurveyed tract 113.

Since April 1, 1906, these lands have been recognized and considered by virtue of office telegram "G" of March 31, 1906, as having the status of unsurveyed lands pending the filing of plat of resurvey, which was filed February 23, 1909.

Hearing was duly had herein, at which both parties appeared with counsel, and a large amount of testimony was presented by both sides. The local officers and the Commissioner have concurred in finding that there is practically no dispute as to the facts in the case. They found that Hart first went upon the lands in conflict, and upon those applied for by her and not in conflict, shortly before or shortly after, which is immaterial, she became 21 years of age, February 1, 1906, and enclosed the lands now applied for by her, approximately 320 acres, with a plowed ditch or furrow and placed notice of her claim to such lands, and thereafter in the same year did considerable reclamation work on said other lands not now in conflict, and on November 3, 1906, staked out on the lands now in conflict a head ditch and borders and had furrows plowed along the east line between said lands now in conflict and said tracts 114 and 115 and along the south line of said lands in conflict. She does not appear to have done anything further on the latter lands since then until after March, 1909.

On November 8, 1906, Cox moved a tent house upon said lands in conflict, established residence therein, claiming those lands, and resided there and prosecuted further improvements and reclamation work thereon until ejected therefrom March 15, 1909, at Hart's suit in the Superior Court of Imperial County, California, his appeal from the adverse judgment in which is yet pending.

On July 17, 1907, Cox filed desert land application for said lands now in conflict, describing same by metes and bounds, and on July 30, 1907, Hart filed her desert land application intended to be for said lands but containing a description in terms of the old survey thereof, made in 1856, the lines of which had been obliterated, which description as given related to the lines of a private survey erroneously supposed to be a retracement of said old survey but was in fact descriptive of other lands which had already been entered, under such description, by other parties.

In accordance with the practice then in force, requiring that applications for entry in this locality should be by the lines of the old survey, Cox's application was rejected, and said rejection affirmed on appeal, and on the filing of his present application his former application was held to be abandoned, as was Hart's first application held to be by the filing of her present application.

The local officers held that Cox had, by actual settlement and occupation and by his first application filed after the filing of the resurvey plat, both legal and equitable title to the said land in conflict, and that Hart had no sufficient acts on said land in conflict to bring her within the benefit of said act of March 28, 1908, allowing a preference right, after survey, to make desert land entry to persons who had prior to survey taken possession of and reclaimed or in good faith commenced reclaiming unsurveyed desert lands. The Commissioner on appeal held that Hart is entitled on the facts to such preference right under said act.

These lands, although given by the land department the status of unsurveyed lands pending their resurvey under said act of July 1, 1902, were in fact surveyed lands, under the stated old survey of 1856, and said act of March 28, 1908, had no application whatever to said lands. Henderson T. Dizney *et al.* (41 L. D., 257).

The present case is distinguishable in several respects from that of Virgil Patterson (40 L. D., 264), relied upon in the decision appealed from as authority for holding that said act of March 28, 1908, confers a preference right in this case. The acts of performance on the land in that case were subsequent to the passage of said act and there was no adverse private interest involved, the conflict therein being with a subsequent withdrawal of the land for Government use. Under such circumstances equitable considerations existed why the Government should not allow its own withdrawal to prejudice perfection of Patterson's claim and why he should be considered as having a preference right under said act and the rule of the land department that said lands occupied the status of unsurveyed lands. No such conditions exist in this case, which is one of conflicting private interests only and determinable under the law in force when such conflict arose.

Prior to the passage of said act of March 28, 1908, no desert land right could be initiated, upon lands surveyed or unsurveyed, except by the filing of an application. The complicated and confused situation existing in this locality with reference to what is called the "excess strip" within which these lands are located, is fully set forth in the Department's decision in the case of Stephenson *v.* Pashgian (42 L. D., 113). As shown therein, the required description, in an application, of land by the old survey was an impossible condition, and a description by metes and bounds the only feasible one. Cox's application, made by metes and bounds, was in fact a proper application and but for such mistaken requirement by the land department should have been allowed. His claim was substantially good and valid, and, as in the case last above referred to, the Department is not disposed to hold that he is now prejudiced in the consideration of his case by failing then to appeal further to the

Department. He is first in right by reason of being first in the filing of a proper application, both pending the resurvey of said lands and after the filing of the resurvey plat. His application should, therefore, be allowed and that of Hart rejected as to the land in conflict.

The decision appealed from is accordingly reversed.

HART v. COX.

Petition for exercise of supervisory authority to review departmental decision of August 5, 1913, 42 L. D., 592, denied by First Assistant Secretary Jones, January 29, 1914.

BOUGHNER v. MAGENHEIMER ET AL.

Decided August 29, 1913.

RIGHT OF WAY—IRRIGATION PURPOSES—APPLICATION FOR PART OF SYSTEM.

It is not essential that an application for right of way under the act of March 3, 1891, shall cover the entire system necessary to ultimately irrigate the lands proposed to be irrigated; it being sufficient if it cover a substantial and requisite portion of the necessary system.

RIGHT OF WAY OVER LANDS WITHDRAWN UNDER THE RECLAMATION ACT.

A withdrawal under the reclamation act will not bar the allowance of an application for right of way under the act of March 3, 1891, over the withdrawn lands, where the allowance of the application will not interfere with the use of the lands by the United States in connection with the administration of the reclamation act and where the water proposed to be conveyed over such right of way has not been appropriated and is not claimed by the United States.

JONES, First Assistant Secretary:

In connection with the possible undertaking of the so-called White River reclamation project, under the Reclamation Act of June 17, 1902 (32 Stat., 388), a large area of lands in Rio Blanco and Routt counties, Colorado, in the White and Yampa River valleys was withdrawn under the first and second forms of said act and reserved during certain preliminary investigations and surveys of the proposed project. It was finally determined that the project would not be constructed by the United States and on June 18, 1909, the withdrawals were revoked and all the lands affected thereby restored to disposition under the applicable land laws.

August 29, 1909, C. J. Magenheimer filed in the local land office at Glenwood Springs application for right of way under the act of March 3, 1891 (26 Stat., 1095), for the Rio Blanco canal running from a point in Sec. 21, T. 1 N., R. 90 W., to a point in Sec. 8, T. 2 N., R. 92 W. According to the engineer's affidavit on the map and state-

ment accompanying the field notes, the survey for this canal was commenced May 31, 1909, and concluded July 24, 1909. The water right presented in connection with the application was accepted for filing July 30, 1909.

October 1, 1909, E. S. Smith and W. R. Wilson filed in the local land office their application, under the act of 1891, *supra*, for right of way for the Yellow Jacket Ditch No. 1, Yellow Jacket Ditch No. 2, Feeder Ditch No. 1, Feeder Ditch No. 2, Feeder Ditch No. 3, Feeder Ditch No. 4, and the Milk Creek Reservoir. According to the evidence filed with the application this survey was commenced May 25, 1909, and concluded September 29, 1909. The water right showing filed consists of certificate by the State engineer showing map and statement to have been approved and accepted September 28, 1909. Smith, Wilson and their associates have incorporated under the name of the White River, Trappers Lake & Routt County Irrigation Company.

October 29, 1909, H. D. Boughner filed in the local land office his application for right of way, under the act of 1891, *supra*, for the Northwestern Canal, practically paralleling the Magenheimer survey. The evidence submitted with Boughner's application is to the effect that the survey was begun June 27, and concluded September 4, 1909. Evidence of water right filed in connection therewith shows that the map and statement of a portion of the Northwestern and Reservoir system was accepted for filing and approved September 27, 1909, and a preliminary map and statement showing work to have been initiated June 27, 1909, were accepted for filing and approved July 21, 1909. December 29, 1909, the same applicant filed his application for the Milk River Reservoir, the survey of which was commenced August 24, 1909, and concluded October 16, 1909. This map and statement were approved and accepted for filing by the State engineer November 20, 1909. Boughner and associates have incorporated under the name of the Northwestern Irrigation Company.

Protests against the allowance of the application for right of way for the Rio Blanco and Yellow Jacket systems were filed by the Northwestern applicant, it being charged, in substance, as to both applications, that there was no valid appropriation of water; that surveys and other work were not commenced at the dates certified or alleged by the respective applicants; that the date of the initiation of rights fixed in the applications can not be recognized as vesting any rights because the lands were then in a state of reservation; that the surveys are mere paper ones, based upon plats and field notes made by the Reclamation Service of the United States; and as to the Rio Blanco system it is alleged that these plats and field notes were irregularly obtained by the Rio Blanco claimant through his engineer, A. L. Fellows, formerly in the service of the United States, in

connection with the so-called White River reclamation project. Protestees denied *in toto* the allegations and hearing was finally ordered by the Commissioner of the General Land Office, August 9, 1911, to determine the facts. Hearing was had, and the Commissioner of the General Land Office, on December 27, 1912, affirmed the decision of the register and receiver, stating that the Rio Blanco application was prior in time and right and that protestants had failed to establish the truth of the allegations contained in their protest.

Appeals from said decision were taken by both the contestant and by the Yellow Jacket claimants, it being alleged, in substance, by the Northwestern company that it was error to hold that the Rio Blanco applicant initiated a lawful right while the lands were covered by the reclamation withdrawal; that it was error to consider the Rio Blanco application as a valid one when the survey filed covers only a part of the canal and system ultimately necessary; that it was error to hold that protestants had failed to sustain their charges, hereinbefore outlined; that it was error to hold that there is nothing in the record to indicate that A. L. Fellows took improper advantage of knowledge gained while employed by the United States or made improper use of reclamation records; and that it was error not to hold it incumbent upon the Rio Blanco applicant to submit evidence at the hearing as to the *bona fides* of its alleged surveys.

The allegations of error in the appeal submitted by the Yellow Jacket claimants are, in substance, that the Commissioner erred in refusing to hold said applicants prior in time; that it was error to hold that the Rio Blanco applicant did any work or surveying prior to July 8, 1909; that it was error to hold that Alexander Walker, who signed the maps of applicants, Smith and Wilson, as engineers, was not a qualified person to execute such papers, and that applicants are not entitled to the benefit of reconnaissance surveys made by said Walker, beginning May 25, 1909.

The statement of facts contained in the first six pages of the Commissioner's decision is substantially correct, and is so conceded by the attorneys for the Northwestern company. The burden of establishing the truth of the allegations made in the protest rests upon the protestants, Boughner *et al.*, and the fact that the Rio Blanco applicants did not personally appear at the hearing and submit further evidence with respect to their surveys did not relieve protestants from that duty. The evidence fails absolutely to disprove the truth of the allegations made in the Rio Blanco application, that preliminary survey of the system was initiated May 31, 1909, and concluded July 24, 1909; nor is any attempt made to dispute the record facts that the preliminary map and statement were approved and accepted by the State engineer July 30, and application for right of way filed in the local land office August 29, 1909. All of

the foregoing acts and dates were prior in time to the initiation of surveys, the filing of maps and statements and applications by the protestants, the Northwestern company, and by the Yellow Jacket applicants, except it is alleged by the Yellow Jacket applicants that their initial surveys and investigations were begun May 25, 1909.

It is shown by the evidence at the hearing that this preliminary investigation or survey was made by Alexander Walker, a cattleman, without engineering knowledge or experience, and consisted merely of riding through the higher passes of the vicinity, on horseback, and the taking of certain observations with a hand level to determine whether a canal through which water would run could be conducted through the passes. No actual surveys were made by Mr. Walker. No field notes or maps were prepared by him, and the observations made were of such a character as, in the opinion of this Department, can not be denominated as a preliminary or reconnaissance survey, within the meaning of the terms as used in the consideration and adjudication of applications under the act of 1891, *supra*.

The matter of the water rights of the respective applicants is one which the Department will not undertake to determine, each applicant having apparently complied with the laws of the State in the filing of the necessary preliminary showing.

With respect to the allegation that the Rio Blanco application is not entitled to approval because it does not cover the entire system necessary to ultimately irrigate the lands proposed to be irrigated, it is sufficient to state that it is a substantial, requisite, and relatively large portion of the necessary system. By the portion of the canal surveyed water will be diverted from White River and, as stated by the Commissioner, priority of claim to the water diverted carries priority to the entire system contemplated. The act of 1891 does not require the entire system to be surveyed, mapped, and applied for at the same time. Section 19 thereof specifically authorizes the filing in sections of 10 miles each, within 12 months after the date of completing survey of each section. Section 20 also divides such a proposed system of irrigation into sections, providing for the forfeiture of such sections as shall not be completed within five years after location. The State engineer of Colorado approved and accepted for filing the Rio Blanco survey and has determined, *prima facie* at least, the sufficiency thereof for the purposes for which filed.

The record has been carefully examined to determine whether or not any evidence is therein contained showing that A. L. Fellows, former engineer in the United States Reclamation Service, and who subsequently appeared as engineer for the Rio Blanco applicant had or took any undue advantage because of his prior employment. The evidence submitted fails wholly to establish any such impropriety.

Reports submitted to the Department by the Reclamation Service indicate that Mr. Fellows was given no advantage over others after his resignation from the Reclamation Service and after the initiation of the claims here under consideration. Mention was made of the fact that the field notes made in connection with the proposed government project were not on file in the Denver office, but it appears that they were not in possession of Mr. Fellows but had been transmitted to the files of the project office at Montrose, Colorado. It is very probable that the work performed and data secured by Mr. Fellows while in the employment of the United States in the investigation of the proposed White River project were such as to give him an advantage over other engineers in the execution of the subsequent survey of the Rio Blanco canal; but the use of this knowledge, gained by experience, constitutes, so far as shown in this record, no impropriety, being simply the advantage possessed by one familiar with all the facts by reason of prior experience over those not familiar with such facts and unfamiliar with the country to be traversed and surveyed.

There is no evidence in the record to discredit the sworn statement of the engineer for the Rio Blanco applicant that the preliminary survey was initiated May 31, 1909, and regularly conducted to conclusion, as evidenced by the field notes and plat of survey, and, consequently, this Department would not be warranted in holding that it was "a mere paper survey" and not based upon actual field notes.

But it is contended that even if the priority of the Rio Blanco applicant be admitted, no lawful claim could have been initiated upon lands withdrawn under the first or second forms of the reclamation act, and in this connection it is argued that reclamation withdrawals occupy a different status from other reservations of the United States, in that they are withdrawals under special legislation for specific purposes. In practice since the enactment of the reclamation law and the making of preliminary withdrawals thereunder, the Department has not refused to allow applications for rights of way over withdrawn lands except in those cases where the allowance of applications would interfere with the use of the lands by the United States in connection with the administration of the reclamation act, or where the water proposed to be conveyed over such rights of way had theretofore been appropriated or claimed by the United States and was so claimed at time the application for right of way was filed in and considered by the land department.

Manifestly, it was not the purpose of Congress to withdraw vast areas of the public land from the operation of the various laws authorizing the granting of easements or rights of way thereover for canals, railways, electric, telephone or telegraph lines, if such use

could be had without interference with the attainment of the purpose of the governmental withdrawal. Even where reclamation projects have actually been undertaken or constructed by the United States under the reclamation law, there may be instances where rights of way for ditches and canals for private irrigation systems may and should be granted over withdrawn lands, to the end that other arid lands may be reclaimed through private enterprise. The purposes of the withdrawals authorized by the reclamation act are (1) to retain from other disposition such lands as may be needed for construction or operation of government reclamation works and (2) to retain for future disposition under the homestead laws such lands as are irrigable under the government canals. The allowance of right-of-way applications which do not defeat these purposes is not inconsistent with or prohibited by such withdrawals.

A similar contention arose in an application under the act of 1891, *supra*, through an Indian reservation. Such reservations are created and set apart for a specific purpose or use, and the Department held (27 L. D., 422) :

As the words "reservations of the United States" is a general term or expression, including all reservations made by the United States for any purpose whatever, it must be accorded that significance, unless restrained by the words of the statute, or unless it is apparent from the general scope and purpose of the act that it was to be used in a more limited sense.

The act of 1891 recognizes this practice but provides that where locating any reservations such rights of way must be so placed as to not interfere with the proper occupation of the reservation. Applying the principle laid down by the Department in the above-entitled case to the present case, it seems clear that the initiation of surveys and claims by the Rio Blanco and Yellow Jacket applicants before the restoration of the lands from reclamation withdrawal was not a trespass, was not in violation of the purposes of the withdrawal, and, consequently, may properly be held as initiating valid rights, in the absence of other objection. As already intimated, the Rio Blanco applicant was prior in time in all respects. With reference to the so-called Walker preliminary survey of the Yellow Jacket claimants, the Department holds it not to have been such a survey as to initiate a right, and the Commissioner's decision is, therefore, hereby affirmed. Should this decision become final the application of the Rio Blanco applicant will receive approval, in the absence of other objection.

BOUGHNER v. MAGENHEIMER ET AL.

Motion for rehearing of departmental decision of August 29, 1913, 42 L. D., 595, denied by First Assistant Secretary Jones, February 18, 1914.

VINCENT C. McCLEARY.

Decided September 18, 1913.

COAL LANDS—WITHDRAWAL—CLAIM OR REPORT OF COAL VALUE.

A mere withdrawal of lands for coal classification constitutes a claim or report of coal value within the meaning of the act of March 3, 1909.

COAL LANDS—ACT OF JUNE 22, 1910.

The act of June 22, 1910, applies to timber and stone entries of lands withdrawn or classified as coal upon which final proof had been submitted and entry allowed prior to the date of the act, as well as to entries of such lands upon which proof had not at that date been submitted.

JONES, *First Assistant Secretary*:

Vincent C. McCleary has appealed from the decision of the Commissioner of the General Land Office of June 5, 1912, holding intact his timber and stone entry, No. 01805, made at Lewistown, Montana, for lots 6 and 7 and the E. $\frac{1}{2}$ SW. $\frac{1}{4}$; Sec. 6, T. 7 N., R. 26 E., M. P. M., but requiring him to take a limited patent thereto, under the proviso to section 1 of the act of June 22, 1910 (36 Stat., 583).

The land described was, by departmental order of October 15, 1906, as later modified, withdrawn from coal entry for examination and classification with respect to coal values, and by the Commissioner's letter of May 8, 1909, was classified as coal land and appraised at \$35 and \$40 per acre.

The entry in question was allowed October 30, 1907, upon an application presented August 17, 1907, and proof was submitted on the date of entry. By letter of November 13, 1908, the Commissioner directed the local officers to proceed against the entry according to the circular of November 25, 1907 (36 L. D., 178), on the charge "that the land embraced in this entry is coal in character." Notice of the charge having been served on the entryman, and the same having been denied, hearing was had thereon November 25 and December 8, 1910, which resulted in a finding by the local officers in favor of the claimant, and a recommendation that the proceedings be dismissed. The Commissioner, however, in the decision here appealed from found the land to be coal in character. He further found, however, that the land possessed some value for timber and stone, and for that reason, and the fact that the filing of the application succeeded the withdrawal of October 15, 1906, permitted the entry to remain intact and held that the claimant would be entitled, under the proviso to section 1 of the act of June 22, 1910, *supra*, only to the limited patent prescribed by the act.

It is urged in the appeal that inasmuch as final certificate and entry had been allowed prior to the passage of the act of June 22, 1910, the provisions of that act were inapplicable to the case, but that, on the other hand, the claimant is entitled, under the circum-

stances disclosed by the record, to an unrestricted patent, under the second proviso to the act of March 3, 1909 (36 Stat., 844).

By the act of March 3, 1909, it is 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—

but that—

such locator, selector, or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation, unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal.

It is argued by the appellant that the case falls within this act, for the reason that there had been no formal classification of this land as coal, or claim or report that the land was coal in character until after the entry was allowed, and that as the record fails to show the known character of the land at the date of final proof and entry, the claimant is entitled to an unrestricted patent. It was held by the Department, however, in the case of Leroy Moore (40 L. D., 461) that a mere withdrawal of a tract for coal classification purposes constitutes, within the meaning of the act, a claim or report that such land is valuable for coal. Inasmuch, therefore, as said withdrawal preceded the filing of the application it must be held that the case does not fall within the purview of the act of 1909.

The act of June 22, 1910, relates to entries of lands withdrawn or classified as coal lands or valuable for coal, the proviso to section 1 of which reads as follows:

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 is argued by appellant that by the use of the term "may perfect the same" as applied to claims initiated prior to the date of the act upon withdrawn or classified lands, Congress must be understood as intending that the above-quoted provisions should be applied only to such of said lands as had not proceeded as far as a final proof stage. Such a construction, however, would preclude the issuance of patent upon any claims, save those of the characters specifically mentioned in the act, which had been initiated upon lands previously claimed, classified, or reported as being valuable for coal, where, prior to the act final proof had been submitted and final certificate issued.

This result would be clearly repugnant to the purpose of the proviso to said section 1, which was manifestly to permit the issuance of a limited patent in those cases which were left unprotected by the act of March 3, 1909. As was said by the Department in the case of *Clarke v. Hurley* (unreported), decided June 6, 1912, in answer to the same contention:

A literal interpretation of the proviso might restrict it to those cases in which final entry had not been allowed prior to the passage of the act, but it must be remembered that the proviso is remedial in character and should be liberally construed. Speaking broadly, an entry is not perfected until patent has issued, and accordingly the Department is of opinion that the proviso also applies to cases in which final entries had been allowed upon withdrawn lands prior to its enactment.

As before stated, this tract was classified by the Commissioner's letter of May 8, 1909, and this classification will be accepted as fixing a positive value for coal at the prices named.

The real situation here presented is as follows: Prior to the filing of the application to purchase this land under the timber and stone act by McCleary, the land department, upon the representation of the Geological Survey, had withdrawn the land with a view to fixing its value as coal land, and the local officers had been instructed to note upon their records with respect to lands so withdrawn, "coal lands." The orders of withdrawal, which made preliminary designations of the lands as coal, assumed that there might be some lands withdrawn which would prove to be noncoal in character, and, for that reason, nonmineral claims were accepted for lands so withdrawn, on the execution and filing of affidavits alleging the land to be in fact nonmineral. Under these circumstances, the nonmineral claimant voluntarily assumed the burden of establishing the noncoal character of the land entered. Such an entryman was not in the position of one who had made entry prior to the time when the lands had been withdrawn as coal land. The latter was protected by the act of March 3, 1909, *supra*, but this claimant was clearly not within the provisions of that act. Upon the ultimate establishment of the coal character of the land, claims like the present one must have been canceled, had it not been for the proviso to section 1 of the act of June 22, 1910, *supra*, but this act, while extending recognition to claims of the character here in question, exacted as a condition that the claimant accept a limited patent, reserving to the United States the coal deposits.

The evidence submitted at the hearing, as to the character of the land, has been carefully examined by the Department, and it entirely fails to disprove the classification heretofore made. The decision of the Commissioner of the General Land Office appealed from must be and is accordingly hereby affirmed.

SALE OF KIOWA, COMANCHE, APACHE AND WICHITA LANDS.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
Washington, November 3, 1913.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: You are directed to cause to be sold for cash, at not less than one dollar and twenty-five cents per acre, at public auction, under the supervision of James W. Witten, Superintendent of the Opening and Sale of Indian Reservations, at the City of Lawton, in the State of Oklahoma, beginning on Monday, December 8, 1913, the unused, unallotted, unreserved lands, and such portions of the school and agency lands as are no longer needed for administration purposes, in the Kiowa, Comanche, Apache and Wichita Tribes of Indians in the State of Oklahoma under the act of Congress approved June 30, 1913 (Public, No. 4).

2. *Lands occupied by Settlers*—All of such lands as were occupied in good faith on Jan. 1, 1913, by settlers still in possession thereof, shall be sold at the sale hereby ordered, subject to the preferred right conferred upon such settlers by said act, to purchase the lands so occupied by them at their appraised value for ninety days from and after notice, and in cases where lands are known at the time of the public sale to be so occupied, and are sold at the sale hereby ordered, no payments shall be required of the purchasers thereof at such sale before the 1st day of April, 1914, and not thereafter if the occupants purchase and pay for said tracts. All such occupants are hereby required to present their applications to purchase under said act, prior to the 1st day of March, 1914, accompanied by the proper payments and proof of their occupancy corroborated by the oaths of two persons, and if they fail to do so, they will not thereafter be permitted to purchase the lands occupied by them under said act.

All persons claiming a preference right to purchase the land settled upon by them under the act, and all persons claiming adversely any of the lands described in the schedule, are required to file their claims, supported by affidavits, with Mr. J. W. Witten, Superintendent of Openings, Lawton, Oklahoma, on or before December 8, 1913, otherwise their rights may be forfeited.

3. *Unsold lands subject to private sale*—All lands offered for sale and not sold at this sale shall thereafter be subject to purchase at private sale at one dollar and twenty-five cents per acre, at the United States Land Office for the land district in which they may then be located.

4. *Area in which lands will be offered*—All contiguous quarter-quarter sections or fractional lots situated in the same quarter section, or otherwise conveniently situated, will be listed as one tract and offered for sale at the same time; provided that in case of a reoffering of any tract under Rule 9, the Superintendent of the sale may, in his discretion, modify any grouping of tracts.

5. *Order in which tracts will be offered*—The tracts in the schedule will be numbered, and on December 8, 1913, there will be offered for sale if practicable, tracts numbered from 1 to 100 inclusive; on December 9, 1913, tracts numbered from 101 to 200 inclusive, and thereafter at the rate of 100 tracts per day until all the tracts have been offered, as set out in the schedule.

6. *Qualifications and restrictions*—Purchasers will not be required to show any qualifications as to age, citizenship, or otherwise, and no person will be required to reside upon, improve, or cultivate lands sold to him.

7. *Bids by Agents, etc.*—Bids and payments may be made either through agents or in person, but no bid of less than \$1.25 per acre will be received from the first bidder, or of less than ten cents per acre more than the last highest bid, after the first bid has been made, will be received or accepted; and no bids can be made through the mails or at any time or place other than the time and place at which said tracts are offered for sale.

8. *Payments and forfeitures*—All successful bidders to whom tracts are awarded must, on or before four-thirty o'clock p. m., on the day succeeding the date on which awards are made to them, Sundays excepted, pay to the Receiver of the United States Land Office at Guthrie, Oklahoma, who will be detailed to attend the sale, one-fourth of the total amount bid by them for such tracts, the balance to be paid in four equal annual instalments, interest at four per cent, on deferred payments. Any bidder who fails to make payment of one-fourth of the amount of his bid within the time required, except where the land is occupied by a bona fide settler, will not thereafter be permitted to pay for the tract, or bid on any other tracts. Any purchaser at the sale who fails to pay the annual instalments, with interest at four per cent, when due, will forfeit the amount already paid, and such failure will be a sufficient cause for cancellation of his entry.

9. *Lands re-offered*—All tracts awarded to persons who fail to make payments therefor, and all tracts which shall not be sold when first offered, will be re-offered for sale after all of said lands have been once offered, or at any other time during the sale when the Superintendent shall think best.

10. *Combinations in restraint of the sale* are forbidden by section 2375 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 lands 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.

11. *Suspension or postponement of sale*—If at any time it becomes evident to the Superintendent of the sale that there is a combination among bidders, or any other cause which effectually suppresses competition, or if for any other cause it shall seem best to the Superintendent to do so, he may suspend such sale temporarily or postpone it indefinitely; and, if in his judgment, the highest bid offered for any tract is below its reasonable cash value, the Superintendent may reject all bids then offered and re-offer the tract for sale as herein provided.

12. *Fees and Commissions*—All persons purchasing any of said lands will be required to pay a commission of two per cent on all payment made by them up to and including \$1.25 per acre, but no commission will be collected on moneys paid in excess of \$1.25 per acre.

Respectfully,

ANDRÉUS A. JONES,
First Assistant Secretary.

(Extract from Section 17, of the Indian Appropriation Act of June 30, 1913, Public No. 4.)

That the Secretary of the Interior, in his discretion, is authorized to sell upon such terms and under such rules and regulations as he may prescribe, the unused, unallotted, unreserved, and such portions of the school and agency lands that are no longer needed for administration purposes, in the Kiowa, Comanche, Apache, and Wichita Tribes of Indians in Oklahoma, the proceeds therefrom, less \$1.25 per acre, to be deposited to the credit of said Indians in the United States Treasury, to draw until further provided by Congress four per centum interest, and to be known as the Kiowa Agency Hospital fund, to be used only for maintenance of said hospital: *Provided*, That by and with the approval of the Secretary of the Interior the county commissioners of Comanche County for the benefit of said county shall, for ninety days from and after the passage and approval of this Act, have the preference right to buy at \$1.25 per acre a suitable one hundred and sixty-acre tract of land to be used for county poor-farm purposes: *Provided further*, That the Secretary of the Interior is hereby authorized in his discretion to grant to settlers a preference right to purchase for ninety days from and after notice, at the appraised price, exclusive of improvements, such lands as were occupied by such settlers in good faith on January first, nineteen hundred and thirteen.

EDWARD H. ALCOTT.

Decided November 5, 1913.

SOLDIERS' ADDITIONAL—SECOND HOMESTEAD ENTRY.

Where one entitled under section 2 of the act of March 2, 1889, to make a second homestead entry for 160 acres, and also entitled to make a soldiers' additional entry under section 2306, Revised Statutes, makes entry in exercise of the former right, which entry is subsequently abandoned and relinquished without consideration, his soldiers' additional right will not be held defeated or destroyed by such second entry never perfected.

JONES, *First Assistant Secretary:*

August 16, 1913, the Commissioner of the General Land Office rejected the above-described application, filed March 15, 1913, for the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 4, T. 11 S., R. 14 E., S. B. M., California, based upon the assignment of 40 acres of the alleged soldiers' additional homestead right of Marshall S. Phillips, who, it is alleged, served in Co. M, 1st Wisconsin Volunteer Cavalry from February 2, 1862, to October 14, 1862, and made homestead entry 3262, Greenleaf, Minnesota, May 23, 1868, for the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 34, T. 120 N., R. 29 W., 80 acres, canceled February 1, 1873, on relinquishment.

The rejection was based upon the fact that in addition to the original homestead entry above described, Phillips, on November 30, 1894, made homestead entry 747, Coeur d'Alene, Idaho, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 8, T. 56 N., R. 4 W., which he afterwards relinquished, stating that he received no consideration therefor but abandoned same because wounds received in the Civil War made it impossible for him to remain upon the homestead. The Commissioner cites as authority the case of W. A. Stafford (36 L. D., 231), statements in which are in accord with the action in this case. The *facts* were somewhat different, for in the Stafford case the second homestead entry made under the provisions of the act of March 2, 1889 (25 Stat., 854), was perfected prior to the time when entryman attempted to exercise his soldiers' additional right. The decision, however, states that it was "the making and not the perfection of his second entry that determined his right."

The case of Charles P. Colver (33 L. D., 329), also cited by the Commissioner, holds, in substance, that a person entitled to make a second homestead entry for 160 acres and also entitled to make a soldiers' additional entry can not exercise both rights so as to acquire title to more than 160 acres of land.

In the case at bar, Phillips has, so far as shown by the record, never acquired title to any land under the homestead law. By virtue of his original homestead entry made in 1868, for 80 acres, and thereafter canceled, there is conferred upon him by section 2306, Revised Statutes, the right to enter so much land as added "to the quantity previously entered shall not exceed 160 acres." This is

commonly known as a soldiers' additional homestead right, and while this right is stated by the Supreme Court to be in the nature of a gift or bounty and assignable in its nature, nevertheless it is based upon and is the complement of a homestead entry made prior to a certain date by a person who has rendered prescribed service in the Army or Navy of the United States during war and been honorably discharged. Therefore, in the opinion of this Department, it can not, as contended by attorney for appellant, be regarded as a right in nowise depending upon whether or not the entryman's homestead right had been exhausted prior to its attempted exercise. However, by virtue of said section 2306 and the act of March 2, 1889, *supra*, Phillips had at time of the making of his second homestead entry in 1894 the right to make a soldiers' additional homestead entry for not exceeding 80 acres, without the necessity of residence upon or cultivation of the land.

While it was the evident purpose of Congress to permit the acquisition of not exceeding 160 acres of land, which purpose is clearly apparent from the language of both section 2306, Revised Statutes, and the said act of March 2, 1889, Phillips has acquired, so far as shown by the record, no land under the homestead laws, but is entitled to the exercise of additional homestead right, based upon his original homestead entry made in 1868 and conferred upon him by section 2306, Revised Statutes. This right, as intimated, is a subsisting, outstanding, unsatisfied legal right which the Department does not believe was defeated or destroyed by his second homestead entry, never perfected.

The Department is, therefore, of the opinion that Phillips's soldiers' additional right for 80 acres, if otherwise unused and unexhausted, remains subject to exercise by him or a duly qualified assignee.

MITCHELL v. GRIMES.

Decided November 15, 1913.

PRACTICE—CONTEST HEARING—FAILURE OF CONTESTEE TO APPEAR.

In contemplation of Rule 39 of Practice testimony should be taken in support of a contest notwithstanding contestee fails to appear at the hearing; and upon failure of the local officers to require such testimony, the case should be returned, under Rule 96, for *ex parte* showing to support the charge.

PRACTICE—REINSTATEMENT OF CONTEST—SHOWING.

Where a contest proceeding is closed upon failure of contestee to appear, without any testimony being taken, he is not entitled as a matter of right, to reinstatement of the contest, for hearing on the merits, in the absence of a showing by him of a good defense to the charge made in the contest; but to prevent injustice the Secretary of the Interior may in his discretion direct a hearing in such case.

JONES, *First Assistant Secretary*:

Appeal is filed by Cressa Mitchell from decision of April 22, 1913, of the Commissioner of the General Land Office directing a hearing in her contest case initiated August 7, 1912, against the homestead entry made by Charles E. Grimes September 30, 1907, for the NE. $\frac{1}{4}$, Sec. 10, T. 11 S., R. 14 E., S. B. M., Los Angeles, California, land district, upon the charge that said Grimes had abandoned said entry for more than eighteen months last past.

Notice duly issued on said contest upon which, on proper showing, publication was made, to which Grimes filed, October 9, 1912, within time, his verified but uncorroborated answer, stating he had resided continuously on said entry since September 30, 1907, except for temporary unavoidable absences, said answer being duly served upon contestant. Order was duly issued and served for hearing December 26, 1912, at ten o'clock a. m., before the local officers. Default was made at said hearing by the contestee, and the record was transmitted to the Commissioner who on January 17, 1913, canceled Grimes's entry, closed the case, and allowed Mitchell preference right of entry, which she exercised February 1, 1913, by filing desert land application for said lands, which was allowed on that date.

January 30, 1913, said Grimes filed his protest against entry of any person for said lands pending decision upon his stated application to set aside his default in said contest case and reinstate his entry. On March 19, 1913, Grimes filed his petition for reinstatement of his entry, alleging that his default in appearance at the hearing was due to delay, by reason of a sand storm, of the train on which he was a passenger to Los Angeles where said hearing was to be held, so that he did not in fact arrive there until about 11.30 a. m., December 26, 1912, which being after the hour set for the hearing he supposed was too late and he made no effort then to appear before the local officers, but upon later being advised by his attorneys, he made this petition for reinstatement as soon as he was able to secure the necessary affidavits of witnesses, they being absent from the county. He asserted his belief that he would be able to show at a hearing that he had never abandoned his entry, but his petition is corroborated only by the affidavit of one witness as to the delay in his train reaching Los Angeles as above stated and is wholly uncorroborated by any showing as to his stated compliance with law under his entry at any time.

Mitchell in answer to this petition sets forth that she appeared at the time set for the hearing with her witnesses, and upon failure of Grimes to appear she procured a continuance until 2 o'clock p. m. of that day in order to afford him full opportunity to appear, and that when the latter hour arrived and there was still no appearance by Grimes his default was taken. Her attorney states in his affidavit

in detail the foregoing facts, also that he went to Grimes's attorney, who had prepared his answer to the contest charge, about 11.30 o'clock a. m., on the day of hearing, and that said attorney stated he had no further authority with reference to the contest case and refused to appear for Grimes at said hearing; that said protest of January 30, 1913, by Grimes was filed without verification or service upon Mitchell or himself as her attorney. It was stated also in Mitchell's affidavit that Grimes was in the office of his said attorney during the afternoon of the day of hearing; and that he was then intoxicated. It is also asserted by Mitchell that Grimes has never returned to or resided upon the land since initiation of her contest. No response has been made by Grimes to these statements.

The Commissioner holds that the showing by Grimes is "manifestly insufficient," but in view of his answer to the contest charge served and filed, and its sufficiency, "there is no authority under which his entry could be rightfully canceled in the absence of any testimony adduced on the part of the contestant on the hearing in support of such charges (see Rule 14 of Practice)"; and accordingly he revoked said decision of January 17, 1913, canceling Grimes's entry and closing the case, and reinstated said contest case, remanding same for hearing between the parties, Mitchell's entry being held for cancellation and Grimes's entry for reinstatement should she fail to respond, and her entry to remain intact should he fail to respond.

Grimes is clearly not entitled upon the showing made by him to reinstatement of Mitchell's contest for the purpose of a hearing on its merits. Beyond his uncorroborated answer in general denial of the contest charge, he has made no showing whatever as to his compliance with law under his entry. He was clearly negligent in failing to appear at the hearing and in filing application for reinstatement, without any showing of a good defense upon the merits as to said contest.

The closing of the contest case without the presentation by Mitchell of any testimony in support of her charge was improper and irregular. It is clearly within the contemplation of Rule 39 of Practice, if not expressly required thereby, that testimony in support of a contest charge shall be taken even when the contestee has failed to appear at the hearing. And the duty is incumbent on the local officers, by Rules 34 and 36 inclusive of Practice, to see that all pertinent facts with reference to the case are elicited at hearings had before them, particularly in a case like the present where the contestee has failed to appear. Rule 14 of Practice has no application herein.

Under Rule 96 of Practice, this contest case should have been returned by the Commissioner to the local officers for an *ex parte* showing by Mitchell in satisfactory proof of her charge, before a decision on the merits of her case and cancellation of Grimes's entry.

Grimes was not entitled to notice of such showing (Instructions, 31 L. D., 318), and being in default at the hearing he had no right of appeal under Rule 49 of Practice; and while the closing of the case without the required testimony by Mitchell in support of her charge was improper and unwarranted, Grimes is not in position to take any advantage of such irregularity, under his wholly insufficient showing on the merits either as to the contest charge or as to his default at the hearing.

However, in order that no injustice be done him, and in view of the fact his entry was canceled without presentation of any testimony showing his default in complying with law in the respect charged against same, hearing should be had upon the contest charge, as directed by the Commissioner, each party to pay his own costs, after which the case will be further adjudicated.

With this modification, the decision appealed from is affirmed.

MITCHELL v. GRIMES.

Motion for rehearing of departmental decision of November 15, 1913, 42 L. D., 608, denied by First Assistant Secretary Jones, January 29, 1914.

JACOB A. HARRIS.

Decided December 13, 1913.

EXECUTIVE DEPARTMENT—WITHOUT POWER TO LEGISLATE.

An executive department of the government has no legislative power, and must leave to Congress and the courts the rectification of any evils that may flow from its administration of the law.

CONFIRMATION—GOVERNMENT PROCEEDING—PROVISO TO SEC. 7, ACT MARCH 3, 1891.

Under the proviso to section 7 of the act of March 3, 1891, an entry is confirmed against any proceeding by the government, as well as against private contests and protests, unless such proceeding was pending at the expiration of two years from the date of the issuance of the receiver's receipt upon final entry.

CONFIRMATION—CONTEST, PROTEST, OR GOVERNMENT PROCEEDING.

A contest or protest to defeat the confirmatory effect of the proviso to section 7 of the act of March 3, 1891, must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and such proceeding will be considered as pending from the moment the affidavit is filed, in the case of a private contest or protest, or from the moment the Commissioner of the General Land Office, on behalf of the government, requires something to be done by the entryman or directs a hearing upon a specific charge.

PRACTICE—ABATEMENT OF CONTEST—GOVERNMENT PROCEEDING.

The Rules of Practice relative to the abatement of private contests not diligently prosecuted, will be applied to all proceedings against entries, whether on the part of the government or of a private individual.

CONTRARY DECISIONS OVERRULED.

Mertie C. Traganza, 40 L. D., 300, and all other cases in conflict, overruled.

JONES, First Assistant Secretary:

Jacob A. Harris has appealed from the decision of the Commissioner of the General Land Office, dated December 26, 1912, reversing the action of the local officers and holding for cancellation his homestead entry, made on April 30, 1902, for the NE. $\frac{1}{4}$, Sec. 22, T. 40, N., R. 6 E., M. D. M., Susanville, California, land district, upon which final proof was submitted, on August 22, 1908, and final certificate was issued, on August 31, 1908.

It appears from the record that, on March 29, 1911, the Commissioner directed proceedings against this entry upon the charges submitted by a forest officer, to the effect that the claimant had not established and maintained residence upon nor cultivated nor improved said land. Upon consideration of the testimony submitted at the hearing upon said charges, the local officers recommended the dismissal of the proceedings. Their action was reversed by the Commissioner who held that the Government had established said charges by a clear preponderance of the evidence.

The record has been carefully reviewed and the Department is convinced that the local officers reached a just conclusion upon the testimony. The claimant not only maintained a home upon the land during the period covered by his final proof, but placed valuable improvements thereon, inclosed the entire tract with a substantial fence, cultivated a garden sufficient for his use and pastured from eight to eighteen head of stock owned by himself. He was never absent from the land for a longer period than two months. When absent from his homestead, he worked at a sawmill and in the hay fields.

While the claimant is entitled to a decision upon the merits of the case, a judgment in his favor is demanded by a consideration wholly independent of the showing made of compliance with law. From what has been hereinbefore stated, it will be observed that this proceeding was instituted more than two years subsequent to the issuance to him of the receiver's final receipt. The proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), reads 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 preemption 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 issuing of a patent therefor.

The conflict in the decisions construing this proviso has rendered necessary a careful review of the circumstances leading to its enactment. The records of this Department disclose that, during several years preceding 1891, a very large number of entries were suspended by the General Land Office on vague and indefinite suggestions of fraud or noncompliance with law, to await investigation by special agents of that bureau. These suspensions were so numerous and the force available for investigation was so insufficient as to create a practical blockade in the issuance of patents to the serious prejudice of *bona fide* claimants under the public land laws. In many instances, the charge or suggestion upon which the suspension was ordered had no foundation of fact other than the proximity of the land to other tracts embraced in entries alleged to be fraudulent or otherwise illegal. The reports of this Department to the public land committees of the Senate and House of Representatives, concerning this legislation, and the debates of those bodies thereon, leave no doubt of the purpose of Congress that said proviso should correct the hardship of this situation and provide against a repetition thereof.

The construction placed by the Department upon the proviso to section 7, immediately after the passage of the act of March 3, 1891, *supra*, and which was long adhered to, was that the entry was confirmed against any proceeding by the Government, as well as against private contests and protests, unless such proceeding was pending at the expiration of two years from the date of the issuance of the receiver's receipt upon final entry and amounted to an "action, order or judgment had or made in your (Commissioner's) office cancelling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled." See instructions of July 1, 1891 (13 L. D., 1).

In the course of time many cases involving the proviso to section 7 of said act were brought to the attention of the Department in which the application of the principles announced in the earlier and, as the Department now holds, sound construction of the law, amounted to the passing of patent of fraudulent or otherwise illegal entries. Doubtless, with a desire to protect the public domain from spoliation, perhaps overlooking the history of the law, my predecessors have progressively modified the construction originally placed upon the

proviso until finally it was held, in the case of Mertie C. Traganza (40 L. D., 300), that:

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.

Passed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries, the proviso is robbed of its essential purpose and practically repealed by the decision in the Traganza case. It is unnecessary to consider so obvious and fundamental a proposition as that an executive Department of the Government has no legislative power and must leave to Congress and the courts the rectification of any evils that may flow from its administration of the law.

Upon mature consideration, the Department is convinced that a contest or protest, to defeat the confirmatory effect of the proviso, must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well established practice of the Department, such a proceeding will be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge. The date of the issuance and service of notice is immaterial, if without undue delay and pursuant to the orderly course of business under the regulations. The Rules of Practice, relative to the abatement of private contests not diligently prosecuted, will be applied to all proceedings against entries, whether on the part of the Government or of a private individual. The Commissioner of the General Land Office is directed to prepare and submit to the Department, for its approval, regulations in harmony herewith, applicable to all proceedings by the Government against entries.

The case of Mertie C. Traganza, *supra*, and all others in conflict herewith are overruled and the decision appealed from is reversed.

JACOB A. HARRIS.

Motion for rehearing of departmental decision of December 13, 1913, 42 L. D., 611, denied by First Assistant Secretary Jones, March 10, 1914.

EDWARD GARDNER.

Decided December 19, 1913.

THREE-YEAR HOMESTEAD—ACTUAL RESIDENCE—CONSTRUCTIVE RESIDENCE.

The act of June 6, 1912, contemplates and requires the maintenance by an entryman of *actual* residence upon the land entered for at least seven months each year for three years; and this statutory requirement precludes the land department from extending the privilege of constructive residence during such periods on account of absence due to election to office or for any other reason.

RESIDENCE—TEMPORARY ABSENCES.

The requirement in the act of June 6, 1912, that entryman shall actually reside upon his claim for seven months each year, does not preclude temporary absences during that period such as are ordinarily necessary and incident to the conduct of a farm.

RESIDENCE—ABSENCES EXCEEDING FIVE MONTHS.

The act of June 6, 1912, permits absences for a continuous period not exceeding five months in each year, which absences are credited to the entryman as constructive residence; and where the proof submitted by an entryman shows that he was absent more than five months in any one year, the land department is precluded from accepting such proof as sufficient, notwithstanding the aggregate of time actually spent on the premises for the three years is more than the total required by the act during that period.

JONES, *First Assistant Secretary:*

May 8, 1909, Edward Gardner made homestead entry 06312 for the NE. $\frac{1}{4}$, Sec. 18, T. 4 N., R. 28 E., N. M. P. M., Fort Sumner, New Mexico, land district, and on May 20, 1909, made additional entry 06469 under the enlarged homestead act for the NW. $\frac{1}{4}$ of Sec. 18.

November 1, 1912, he submitted three-year final proof on both entries, which proof was rejected by the local land officers on the ground that he had failed to reside upon the land for the period required by law and his absence therefrom while acting as constable could not be included within his period of residence because a "constable is not a county officer." Upon appeal the Commissioner of the General Land Office affirmed the rejection on the same ground, finding further that his term of service expired in February, 1912, and that, consequently, he should have reestablished residence upon the land after that date; also that the duties of a constable in a small district would apparently not necessitate the maintenance by entryman of a residence elsewhere than upon the claim.

With his appeal entryman furnishes supplemental evidence, consisting of the affidavits of himself and his proof witnesses, copy of certificate of election and certificate by the Chairman of the Board of County Commissioners to the effect that he was elected constable January 9, 1911, and served as such until the acceptance of his resignation November 16, 1912.

It further appears from the evidence submitted that he established residence upon the land May 15, 1909, and resided thereon with his family continuously until March, 1911, when he entered upon the performance of his duties as constable. Since that time he states that he has been absent from the claim for the greater part of the time but has continued his cultivation and improvement thereof. In 1910 he planted 15 acres of millet and 10 acres of maize; in 1911, 29 acres of maize; in 1912, 40 acres of maize; and at present has 70 acres broken and under cultivation. The improvements upon the land consist of a house and barn valued at \$340. Since resignation from the office of constable he has been appointed to the New Mexico Mounted Police and does not now reside upon the claim.

The departmental practice of permitting a homestead entryman who had established residence upon his claim and afterwards been elected to a Federal, State or county office, to be absent from his land, if required by official duty, and to consider such absence constructive residence upon the land, is not based upon any statutory right, but rests solely upon departmental rulings rendered prior to June 6, 1912. On that date Congress amended section 2291, R. S., which section required a homestead entryman, as a prerequisite to patent, to prove that he had resided upon the land for the term of five years immediately succeeding date of original entry, so as to provide for the issuance of patent upon proof by the entryman that he has a habitable house upon the claim and has "actually resided upon and cultivated the same for a term of three years succeeding the time of filing the affidavit." A proviso authorizes such entrymen to be absent from their land for a period not exceeding five months in each year after establishing residence, such absence to be considered as constructive residence.

It will be noted that this statute contemplates and requires the maintenance by entryman of *actual* residence upon the land entered for at least seven months a year for three years. This statutory requirement precludes the Department from extending in such cases the privilege of constructive residence during periods of absence due to election to office or otherwise, because one who is continuously absent from the land can not be said to have actually resided thereupon, no matter what occasioned the absence.

As already indicated, five months' continuous absence during each year is expressly authorized by the statute, and the Department has heretofore held that during the remaining seven months, the law, while contemplating maintenance of actual residence upon the land, does not preclude temporary absences such as may be necessary in the case of the ordinary farmer residing upon a tract of land.

In this case it appears from the proof that Mr. Gardner resided continuously upon his homestead for seven and one-half months during the year 1909; for twelve months during the year 1910, and for two months during the year 1911. The total period of residence was more than the total residence required under the act of June 6, 1912 (37 Stat., 123), during a three-year period of residence. He was not upon the land in 1911, however, for seven months, being in fact absent for approximately 10 months in performance of his duties as constable. Subsequent to his resignation from that office in November, 1912, he has been a member of the mounted police of the State of New Mexico and has not resided upon the claim.

It appears from the record, however, that during the year 1912 he put 40 acres in maize and now has a total of 70 acres broken and under cultivation. His improvements, consisting of house and barn, are of substantial character and like other acts performed in connection with the land indicate good faith. Notwithstanding this fact, however, the Department is precluded from accepting this proof as sufficient under the provisions of the act of June 6, 1912, *supra*, which requires actual residence upon the homestead for three years, excepting during "a period not exceeding five months in each year" during which latter time entrymen may absent themselves from their claims and have such periods of absence counted as constructive residence. Actual residence, as used in the statute, can only be construed as precluding the allowance of so-called constructive residence other than that specifically provided for in the statute; and applying the rule to the case at bar it is clear that Mr. Gardner did not maintain his actual residence upon his claim during the year 1911, within the meaning of the act.

However, in view of the fact that his entry was initiated and he was elected to office at a time when the law and the regulations of the Department did not specifically require actual residence upon the land for a defined period each year, and when absence after establishment of residence due to election to a Federal, State or county office was regarded as constructive residence, and that proceeding under this practice he improved his claim in good faith, the Department feels that he is entitled to equitable consideration, particularly in view of the fact that the amendment to the homestead law of June 6, 1912, was not made until after he had made all the expenditures and performed all of the cultivation hereinbefore described. Therefore, while the Commissioner's decision must be affirmed the case is returned with direction that it be submitted to the Board of Equitable Adjudication for consideration and patent, should the board find such disposition of the case proper.

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6. The fact that remunerative crops may be raised without irrigation upon land lying within a reclamation project is not sufficient ground for exclusion of such land from the project; and final certificate should not issue upon an entry embracing such land until all

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11. The provisions of the three-year homestead act of June 6, 1912, respecting cultivation, have no application to entries made under the reclamation act; but the reclamation laws require, as a prerequisite to the issuance of final certificate and patent, that the entryman shall have reclaimed, for agricultural purposes, at least one-half of the total irrigable area of his entry and paid all reclamation charges at that time due..... 534

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17. By virtue of the acts of June 25, 1910, and April 30, 1912, one who made entry of lands within a reclamation project prior to the act of June 25, 1910, and in good faith established residence, is not subject to contest for failure to maintain residence prior to the time water is available for irrigation of the land, provided residence is established and application for water right filed within ninety days after the issuance of public notice fixing the date when water will be available; and where an entrywoman marries after establishing residence, and removes to the unperfected homestead entry of her husband, she does not thereby forfeit the protection accorded by these acts, where after final proof upon her husband's claim she returns and reestablishes residence upon her own claim within the time fixed therefor..... 528

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fore been granted should be permitted to continue without interference, and in view of past departmental decisions applications by corporations pending at this date may be allowed. 250

20. The provision in forms for the water-right applications requiring payment by applicant of "betterment" or maintenance charges is a proper requirement under the reclamation laws, and the fact that at the time entry was made there was no specific mention of "betterment" charges in the water-right application forms then in use will not relieve the entryman from payment of betterment charges legally assessed against his land. 547

21. The provision in the form for water-right application by private landowner requiring him to bind himself not to convey the land voluntarily to any person not qualified under the reclamation law to purchase a water right, upon condition that the application and any "freehold interest" sought to be conveyed shall be subject to forfeiture, is a reasonable and proper requirement, and an application from which such provision has been eliminated will not be accepted. 547

22. The provision in the form of water-right application by private landowner requiring applicant to agree that the United States, or its successors, shall have full control over all ditches, gates, or other structures owned or controlled by applicant and which are necessary for the delivery of water, is in accordance with departmental regulations, and being a necessary incident to the proper management and operation of the project by the United States or its successors, is impliedly authorized by the reclamation act, and a water-right applicant will be required to conform thereto. 547

23. The provision in the form for water-right application by private landowner requiring applicant to agree to grant and convey to the United States, or its successors, all necessary rights of way for ditches, canals, etc., for or in connection with the project, is a proper requirement, warranted by the spirit and intent of the reclamation act, and an applicant for water right will be required to conform thereto as a condition to allowance of his application. 547

24. The terms "water-right certificate" and "certificate," as used in section 1 of the act of August 9, 1912, providing for patents on reclamation entries, relate to final water-right certificates issued in connection with water rights for lands held in private ownership. 207

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28. The limitation in the proviso to section 3 of the act of August 9, 1912, as to the area of lands for which water right may be acquired or owned by any one person, has reference to irrigable lands only. 542

29. Under the reclamation laws the same person or association of persons can, prior to the time all building and betterment charges have been paid, hold but one farm unit of public land and acquire a water right therof, unless the water rights for any additional lands, not to exceed 160 acres, have been paid for in full; or, if not owning or holding a farm unit of public land, may own, hold, and obtain water for not exceeding 160 acres of private land within the project, without first paying in full the installments contracted for with reference to the water rights; but can not at the same time hold and obtain water rights for both a farm unit of public land and a tract of privately owned land, unless the installments on water right, either for the farm unit or for the private lands, not exceeding 160 acres, have been paid in full. 543

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- 3. All applications for preliminary and final power permits presented under the act of February 15, 1901, and the regulations of March 1, 1913, on lands within Indian reservations or allotments, should be filed with the register and receiver of the proper local land office, and after notation thereof transmitted to the General Land Office, whereupon they will be referred to the Geological Survey and the Commissioner of Indian Affairs for report and recommendation. 419

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- 11. A survey and entry of lands in a national forest under the act of June 11, 1906, need not include the entire body of land applied for, listed, and opened to entry under that act, but the entryman may take any portion thereof in compact form. 573
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- 13. Any forest reserve homestead listed under the act of June 11, 1906, which does not exceed 160 acres in area and which may be contained in a square mile the sides of which extend in cardinal directions, will be regarded as within the provisions of said act limiting such homestead entries to "not exceeding 160 acres in area and not exceeding one mile in length" 20
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2. In case of refusal of a State, after notice from the Commissioner of the General Land Office, to accept surface title under the act of June 22, 1910, for a school indemnity selection of withdrawn land, subsequently classified as coal, or to relinquish the selected land, the selection should be rejected, with right of appeal..... 311

3. Under the express terms of the act of February 23, 1891, a selection of lands in lieu of sections 16 and 36 lost to the State's school grant by reason of being embraced in a reservation of the United States "may not be made within the boundaries of said reservation," notwithstanding the State may have applied for survey of the township within which the selected lands are located, under the act of August 18, 1894, prior to their inclusion in the reservation..... 118

4. The confirmation of indemnity school selections to the State of California by sections 1 and 2 of the act of March 1, 1877, is limited to selections certified to the State prior to the date of the act..... 296

5. Where the State of California made school indemnity selection in lieu of a tract supposed to be lost to its grant by reason of inclusion within the outboundaries of a Mexican grant, but which upon survey was excluded from such grant, the subsequent erroneous approval of the selection and certification of the land to the State, after sale of the base by the State to a bona fide purchaser, in no wise affected the right of such purchaser nor vested the United States with title to the base land; and a homestead entry allowed therefor is void, and upon protest by the purchaser from the State will be canceled..... 296

6. The legal title to a tract of school land relinquished as base for indemnity selection does not revert in the United States until the selection is approved, and prior to such approval the relinquished land is not subject to entry, selection, or other appropriation under the public land laws; but where settlement was made upon land so relinquished prior to approval of the selection based thereon, on the faith of statements by the State Land Commissioner that the State did not claim the land, and application to enter filed by the settler, such application should not be rejected outright but held and considered in connection with the selection, and if the selection be approved, the settlement right should be recognized and protected..... 538

7. Whatever doubt and uncertainty existed concerning departmental decisions in Thorpe et al. v. State of Idaho (35 L. D., 640; 36 L. D., 479) and Williams v. State of Idaho (36 L. D., 20, 481), respecting the right of the State of Idaho to select indemnity in lieu of school sections within the Coeur d'Alene Indian Reservation, because of the decision of the

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 supreme court of that State in *Balderston v. Brady et al.* (107 Pac. Rep., 493), holding that school sections falling within Indian and other reservations were not a valid basis for indemnity, having been removed by enactments of the State legislature of February 8, and March 4, 1911 (Laws of Idaho, 1911, pp. 16, 85), and the later decision of the supreme court of the State in *Rogers v. Hawley et al.* (115 Pac. Rep., 687, 692), said departmental decisions are relieved from suspension and will be carried into effect..... 15

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See *Alabama Lands*, 1; *Coal Lands*, 12; *Homestead*, 2, 11, 32, 34; *Reclamation*, 4, 13, 14; *Reservation*, 20, 25, 29-31; *School Land*, 6.

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2. A homestead entry made subsequent to the withdrawal or classification of the land for coal, but based upon settlement initiated prior to such withdrawal or classification, is subject to the provisions of the act of June 22, 1910, and the entryman is not, by reason of such prior settlement, entitled to an unrestricted patent under the provisions of the act of March 3, 1909..... 82

3. The provision in the act of July 2, 1864, amending the act of July 1, 1862, making a grant to the Central Pacific Railroad Co., that said grant "shall not defeat or impair any . . . homestead . . . or other lawful claim," excepts from the grant a tract of unsurveyed land which at the date of the definite location of the line of road, and down to the date of the filing of the township plat of survey, was successively occupied by qualified homestead settlers intending to make entry; and failure of the settler then occupying the land to assert his claim within three months after the filing of the township plat does not inure to the benefit of the company, but he may assert his claim at any time prior to intervention of an adverse settlement right..... 589

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2. Section 1 of the act of July 23, 1866, confirming to the State of California lands selected in satisfaction of its grants and disposed of to purchasers in good faith, is by its terms applicable only to lands theretofore selected and sold by the State..... 296

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2. An application by a State for the survey of a township under the act of August 18, 1894, has no effect as against other applications to appropriate lands within the township until it is received by the Commissioner of the General Land Office, and has no effect as against the United States until proper selection of the lands by the State..... 118

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2. Where by mistake patent issued to a State for a tract of land not claimed by it, instead of a tract claimed by it under its swamp-land grant, it is not entitled to receive patent for the tract claimed as swamp until reconveyance to the United States of title to the tract erroneously patented to it..... 69

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3. Collusive arrangements through which persons are induced to make timber-land entries with a view to sale of the body of lands so entered to another, the sole interest of the entrymen being an expectancy in the profits of the transaction to an amount agreed upon from the beginning, are in violation of the statute, and entries so made, being purely speculative, must be canceled..... 440

4. The filing of a timber and stone declaratory statement, not preceded by personal examination of the land by the applicant, does not constitute a "duly initiated" claim within the meaning of the excepting clause in the withdrawal of May 29, 1903, for the Heppner National Forest, and is not sufficient to except the land embraced therein from the effect of such withdrawal..... 437

5. A mere general knowledge, however intimate, of the locality in which a tract applied for under the timber and stone act is situated does not meet the requirement that an applicant under that act must have personal knowledge of the particular tract he seeks to acquire..... 437

6. That part of paragraph 29 of the regulations of November 30, 1908, as revised August 22, 1911, under the timber and stone act, which declares that all moneys paid by an applicant under the timber and stone act will be forfeited to the Government, and his rights under the act exhausted, "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," is without authority of law, and said paragraph is amended by eliminating therefrom the clause "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..... 429

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